

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 52692

JAMES ROBERT “JIM BOB” and SHARON)
INFANGER, husband and wife, individually,)
and as natural parents of CHELSEA)
BRITTNEY INFANGER, deceased; and)
JAMES ROBERT “JIM BOB” INFANGER,)
as Personal Representative of the ESTATE OF)
CHELSEA BRITTNEY INFANGER,)
deceased,)

Plaintiffs-Appellants,)

v.)

THE STATE OF IDAHO, IDAHO)
DEPARTMENT OF TRANSPORTATION,)
DIVISION OF AERONAUTICS,)

Defendants-Respondents.)

Boise, May 2026 Term

Opinion Filed: September 24, 2026

Melanie Gagnepain, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho,
Ada County. Jonathan Medema, District Judge.

The decision of the district court is affirmed.

Mossman Law Office, Boise, and Katzman Lampert & Stoll, Broomfield,
Colorado, for Appellants. Bruce A. Lampert argued.

Raúl R. Labrador, Idaho Attorney General, Boise, for Respondent. Michael E.
Kelly argued.

BRODY, Justice.

This wrongful death action against the Idaho Department of Transportation’s Division of Aeronautics arises from the fatal collision of Chelsea Brittney Infanger’s Cessna aircraft with a set of exhaust stacks owned by Gem State Processing and situated within the approach path to Runway 20 at the Burley Municipal Airport. We are asked to decide whether the government is subject to tort liability when it negligently regulates—or fails to regulate—a known risk to public safety. In

the present case, the answer to that question turns on whether the Division owed Ms. Infanger a duty of care based on negligence per se, special relationship, common law, or contractual theories.

As to the first theory, we hold that the first step under the Idaho Tort Claims Act in assessing whether a government defendant breached a statutory duty is to determine whether the statute recognizes a duty of care running from the government to a defined class of persons, such that the duty is properly understood as an individualized one, the breach of which is actionable in tort. Although we conclude that the district court's analysis of this first step was erroneous, our independent examination of the record leads us to conclude that the government owed Ms. Infanger no individualized duty of care actionable in tort based on the regulatory authority the legislature granted it under the Airport Zoning Act.

The Infangers' remaining theories of duty are either unpreserved for appellate review or contrary to this Court's well-established caselaw governing tort duties. The absence of the quintessential aspects of a special relationship, affirmative conduct, or a clear theory of liability premised on the Division's contract with the Federal Aviation Administration to conduct airport inspections undermines these theories. We therefore affirm the district court's grant of summary judgment in favor of the Division.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dedicated in 1930, the Burley Municipal Airport is located about a mile northeast of Burley, Idaho. In 2004, the City of Burley ("Burley") leased to Burley Park, L.C., real property neighboring the airport, which is technically within the city limits of Heyburn. The site is now home to Gem State Processing ("Gem State"), a potato dehydration plant. Since at least 2011, Burley has taken steps to either relocate or close the airport due to an insufficient "safety area off the runway." Burley eventually lost federal funding for the airport due to its inability to comply with Federal Aviation Administration ("FAA") safety standards.

In early 2015, the FAA learned that Gem State intended to increase the height of exhaust stacks at its plant from 70 to 100 feet above ground level to meet EPA emissions standards. Gem State had not formally notified the FAA of these plans; in fact, the FAA was unaware of the existing stacks because it had last surveyed the site before the plant's construction. Over a year later, the Division of Aeronautics sent a letter to Gem State complaining that it too had not been formally notified of Gem State's plans to increase the height of the stacks. The Division directed

Gem State to provide formal notice to the FAA so that both agencies could perform a technical review of the proposal.

The FAA later informed Gem State that its proposal to extend the stacks to 100 feet would intrude into the “glide path” of approaching aircraft. Indeed, the FAA went so far as to warn Gem State that the stacks “present[] . . . a risk of collision hazard to the flying public.” The FAA appears to have reevaluated Gem State’s proposal in February 2017. It determined that the elevated stacks “would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace” on the condition that Gem State mark and light the stacks in accordance with FAA advisories. Gem State reported to the FAA in October 2017 that it had installed red lights on the stacks. Burley, however, deactivated the visual approach slope indicator (“VASI”) lighting system on Runway 20 because “the stacks and silos penetrate the VASI obstacle clearance surface by as much as 28 feet,” meaning the system misled approaching aircraft as to the height of ground obstacles.

In 2020, the Division conducted a 5010 Airport Safety Data Inspection at the Burley airport, a periodic safety inspection made on behalf of the FAA. The inspection included a review of “obstructions at both approach [and] departure ends of the runways,” yet the inspector’s report did not discuss any of the concerns from prior years about Gem State’s exhaust stacks. The inspector appears to have noted Gem State’s stacks at the end of Runway 20, and he erroneously recorded the height of those stacks to be 70 feet when they are more likely over 100 feet.

Ms. Infanger obtained a private pilot’s certificate in 2012. At the time of the collision, she had over 1,300 hours of flying time and was a qualified multi-engine and commercial pilot. She was adept at using cockpit instruments, rather than visual cues, to land her Cessna aircraft, including the GPS-based navigation system Ms. Infanger was using to land on Runway 20 on the day of the collision. Light snow and overcast conditions were reported that day, reducing visibility to one mile. Using the GPS-based instrumentation to approach Runway 20, Ms. Infanger initially missed the first approach and attempted a second approach. On the second approach, a witness “observed the aircraft descend out of the clouds, then it immediately enter[ed] into a steam cloud, which was produced from a set of six smokestacks located on the roof of the Gem State Processing Plant.” “The witness heard the engine increase in sound and saw the nose of the aircraft lift shortly before the airplane struck the smokestack and crash[ed] to the rooftop.” Ms. Infanger did not survive the collision.

James Robert “Jim Bob” and Sharon Infanger, Ms. Infanger’s parents, brought this wrongful death action in Ada County district court against Burley, Heyburn, Minidoka County, Gem State, Burley Park, and the Division. The Infangers alleged that Burley, Heyburn, Gem State, Minidoka County, and Burley Park owed Ms. Infanger a duty to mitigate the risk posed by Gem State’s exhaust stacks. Prior to this appeal, the Infangers reached settlement agreements with Burley, Heyburn, Minidoka County, Gem State, and Burley Park. As to the Division, the Infangers alleged that it owed Ms. Infanger a comparable duty arising from its administration of the Airport Zoning Act (“Zoning Act”), which charges the Division with a range of oversight responsibilities and enforcement powers over the state’s airports and their environs. The Infangers also pointed to the Division’s contract with the FAA, under which it conducts 5010 Airport Safety Data Inspections, as imposing on the Division a duty to competently inspect public airport facilities and nearby flight hazards.

The Division moved for summary judgment, on grounds that it owed no affirmative duty of protection to Ms. Infanger under either the Zoning Act or its obligations under the 5010 inspection program. Moreover, the Division took the position that, even if it did owe Ms. Infanger a duty of care, the Infangers had failed to raise a triable issue of fact as to whether it acted with gross negligence in its inspection of the Burley Airport and therefore could not overcome the Idaho Tort Claims Act’s (“ITCA”) exceptions to its waiver of tort immunity. Alternatively, the Division argued that it is entitled to immunity under the ITCA because any inaction with respect to the exercise of inspection or other regulatory powers over the Burley Airport and/or Gem State fall within the ITCA’s discretionary function exception.

The district court granted summary judgment to the Division. At the first step of the ITCA immunity analysis, the court concluded that the Division owed no duty of care to Ms. Infanger under any of the Infangers’ theories: negligence per se, special relationship, or third-party beneficiary to a contract. On the negligence per se theory, the court ruled that none of the Zoning Act provisions cited by the Infangers “clearly defines the required standard of conduct.” The district court also rejected the special relationship theory because the Division did not have physical custody of Ms. Infanger or her aircraft. Without custody, it reasoned, she was not deprived of the ability to protect herself, so no duty to protect arose. The district court also declined to extend what it termed the “method of equitable analysis” this Court recognized in *Rees v. State, Department of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006), which it viewed as relevant

to the special relationship doctrine. It concluded that “*Rees* is limited to its unique factual circumstances”—namely, child protection—and therefore was inapposite here.

Finally, the district court struggled to discern the precise theory of liability the Infangers sought to advance based on the Division’s contract with the FAA to conduct 5010 safety inspections. Treating the theory as a contract-based, third-party-beneficiary claim, the court held that, even if the Division had been negligent in performing the 5010 safety inspection of Burley Airport in 2020, it was not apparent that “pilots were intended third-party beneficiaries to the agreement between the FAA and the [Division].” Finding no duty of care on the Division’s part, the district court granted summary judgment in favor of the Division and dismissed all the Infangers’ claims. The Infangers timely appealed.

II. STANDARD OF REVIEW

Summary judgment is a procedural device designed “to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.” *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896, 899 (1984) (citation omitted). To that end, Rule 56 of the Idaho Rules of Civil Procedure allows a litigant to move for summary judgment when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). “When considering whether the evidence shows a genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences in favor of the nonmoving party.” *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012) (citation omitted). To establish that a genuine dispute of material fact exists, a party must present evidence upon which a jury could reasonably rely; “a mere scintilla of evidence merely casting a slight doubt of the facts” will not suffice. *Id.* (citation omitted).

III. ANALYSIS

The State’s immunity from tort liability traces its roots to the English-law principle that “the King cannot be sued without his consent.” Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1 (1963). In the absence of a king, the Idaho Legislature provided for a limited waiver of the State’s sovereign immunity in the Idaho Tort Claims Act, Idaho Code sections 6-901 to -929.

This Court has construed the ITCA as providing a three-step analytical framework to determine whether its waiver is applicable in a particular action. *Harris v. State, Dep’t of Health & Welfare*, 123 Idaho 295, 298 n.1, 847 P.2d 1156, 1159 (1992). We have explained that courts

may apply the ITCA’s three-step framework in the order of its choosing, but we find the traditional sequential inquiry to be more appropriate in the present case. *GSN Cap., LLC v. Shoshone City & Rural Fire Dist.*, 173 Idaho 345, 352, 541 P.3d 703, 710 (2024).

At the first step of the ITCA analysis, the question is “whether tort recovery is allowed under the laws of Idaho.” *Harris*, 123 Idaho at 298 n.1, 847 P.2d at 1159 n.1; *see* I.C. § 6-903(1). That is to say, “if a private person would be liable for the misconduct alleged against the government, . . . so will be the government.” *Sterling v. Bloom*, 111 Idaho 211, 216, 723 P.2d 755, 760 (1986), *overruled on other grounds by Shubert v. Ada County*, 166 Idaho 458, 469, 461 P.3d 740, 751 (2020). Importantly, the ITCA instructs that immunity does not turn on whether the tortious conduct “aris[es] out of a governmental or proprietary function.” I.C. § 6-903(1). Rather, the analysis at step one asks whether the plaintiff’s theory corresponds to a type of tort for which a private person would be liable under like circumstances. *Sterling*, 111 Idaho at 216, 723 P.2d at 760. If the plaintiff’s theory asserts a category of liability unknown to tort law, the claim fails as a matter of law. *See id.* at 216, 223–24, 723 P.2d at 760, 767–68 (recognizing a tort action against a government entity for the negligent supervision of a dangerous third person).

Once the first step is satisfied, the second step considers “whether an exception to liability found in the [ITCA] shields the alleged misconduct from liability.” *Harris*, 123 Idaho at 298 n.1, 847 P.2d at 1159 n.1; *see generally* I.C. §§ 6-904 to -904B. Finally, at the third step of the analysis, the inquiry focuses on “whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal.” *Harris*, 123 Idaho at 298 n.1, 847 P.2d at 1159 n.1.

This appeal concerns the first step of the ITCA’s analytical framework and, more specifically, whether the Division owed Ms. Infanger a duty of care, the breach of which is actionable in tort. The Infangers raise four theories of duty. First, they attempt to establish a duty under a negligence per se theory premised on the Zoning Act, an “unusual circumstance[]” that justifies departure from the general rule against affirmative duties. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999) (citing Restatement (Second) of Torts § 314A (1965)). Second, they point to the common law’s mandate that “[e]very person has a general duty to use due or ordinary care not to injure others” in their foreseeably harmful affirmative conduct. *Whitt v. Jarnagin*, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966). Third, the Infangers invoke the special-relationship doctrine in an attempt to establish an affirmative duty of care.

Fourth, the Infangers rely on the Division's contract with the FAA to undertake 5010 safety inspections to advance several theories of liability under either tort or contract. We consider each theory in turn and conclude that none can support a duty on the Division's part.

A. The district court correctly concluded that the Infanger's "failure to regulate" or "negligent regulation" theory is unsupported by statutory or common law duties.

1. The Zoning Act does not give rise to a duty actionable in tort.

The Infangers first rely on the Zoning Act to advance a negligence per se theory. They argue that the Zoning Act requires the Division to: (1) evaluate structures near public use airports; (2) determine whether these structures may impact aircraft navigation; (3) identify structures that are hazardous to aircraft operation; (4) notify landowners when their structure poses a hazard; and (5) force the landowners to take action to mitigate the risk posed by the structure. From this, the Infangers conclude that "[t]he individual sections of the [Zoning] Act and the [Zoning] Act taken as a whole clearly define the required standard of conduct and additionally how to enforce that standard."

The district court disagreed. It concluded that no provision of the Zoning Act "clearly defines" a standard of conduct with respect to the Division's mitigation of ground hazards to aircraft. On appeal, the Infangers argue that the district court's analysis of the Zoning Act was erroneous. They contend that, by vesting the Division with discretionary regulatory authority over ground hazards, the Zoning Act imposes a duty of care the Division breaches when it fails to competently exercise that authority. The Infangers further contend that the duty created by the Zoning Act runs specifically from the Division to "aviators and their passengers," rather than to the public at large.

The Division largely adopts the district court's analysis. In its view, although the Zoning Act assigns numerous air-safety responsibilities to the Division, those duties lack the specificity—in both content and intended beneficiaries—necessary to support an affirmative duty actionable in tort under a negligence per se theory. What is more, the Division interprets the Zoning Act as vesting it with purely discretionary enforcement powers; thus, its choice not to exercise those powers cannot amount to a breach of any duty arising from the Zoning Act.

As we explain, however, the parties' arguments wrongly focus on the elements of a negligence per se theory. Our analysis begins with Idaho's public-duty rule. Applying that rule, we hold that the Zoning Act does not create a duty actionable in tort because the regulatory powers it bestows on the Division benefit the public at large rather than a particular class of persons.

The doctrine of negligence per se provides that a statute may displace the common law's conception of what a reasonable person would do under like circumstances, i.e., the standard of care. W. Page Keeton et al., *Prosser and Keeton on Torts* § 36, at 220 (5th ed. 1984). Statutory law may also abrogate the general rule against affirmative duties to aid or protect. *E.g.*, *Dreyer v. Idaho Dep't of Health & Welfare*, 558 F. Supp. 3d 917, 938 (D. Idaho 2021) (ruling that the complaint stated a negligence per se claim under Idaho Code section 16-1605(1) where a healthcare worker failed to report witnessed abuse because “[s]he was statutorily obligated to report that abuse”). To give a statute such effect, it must satisfy a four-part elemental test:

- (1) the statute or regulation must clearly define the required standard of conduct;
- (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury.

Nation v. State, Dep't of Corr., 144 Idaho 177, 190, 158 P.3d 953, 966 (2007) (citation omitted); *Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986). This test, which we first announced in *Sanchez*, traces its roots to the Second Restatement of Torts. *See* Restatement (Second) of Torts § 286 (1965).

The negligence per se analysis becomes more nuanced when the defendant in the underlying tort action is a government entity subject to the ITCA. In these cases, this Court will recognize a statutory duty on the part of the government entity only when the statute “require[s] a particular action by the agency to benefit a particular class of people.” *GSN Cap., LLC*, 173 Idaho at 352, 541 P.3d at 710 (quoting *Rees v. Dep't of Health & Welfare*, 143 Idaho 10, 16, 137 P.3d 397, 403 (2006)). This inquiry necessarily precedes the application of the four-part *Sanchez* test; that is, before we determine the standard of care as defined by the statute—the aim of the *Sanchez* inquiry—we must first determine whether the statutory duty benefits the plaintiff as a member of the “particular class of people” to whom the duty is owed.

The public duty rule provides that “the duty imposed on state agencies and public officials is one owed to the public generally, and breach of this duty does not provide an individual with a cause of action.” Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 Ind. L. Rev. 781, 807–08 (1990) (quoting *State v. Super. Ct. of Maricopa Cnty.*, 599 P.2d 777, 785 (Ariz. 1979) (en banc), *overruled by*, *Ryan v. State*, 656 P.2d 597 (Ariz. 1982)). In more pedestrian terms, the doctrine stands for the idea that, because the government “owe[s] a

duty to everybody, [it] owe[s] [the duty] to nobody.” *Riss v. City of New York*, 29 N.Y.2d 579, 585 (1968) (Keating, J., dissenting).

This Court first recognized the public duty doctrine in *Rees*, 143 Idaho 10, 137 P.3d 397. There, we observed that, as a general matter, sister-state courts have answered this public duty question by “look[ing] to their statutes to determine whether they require a particular action by an agency to benefit a particular class of people rather than a duty running to the general public.” *Id.* at 16, 137 P.3d at 403 (citations omitted). We settled on the Minnesota Supreme Court’s articulation of the public duty rule as the better of many options:

- (1) Whether the governmental unit had actual knowledge of the dangerous condition;
- (2) Whether there was reasonable reliance by persons on the governmental unit’s representations and conduct (such reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves);
- (3) Whether an ordinance or statute set forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and
- (4) Whether the governmental unit used due care to avoid increasing the risk of harm.

Id. (quoting *Radke v. County of Freeborn*, 694 N.W.2d, 788, 794 (Minn. 2005)). The *Rees/Radke* framework consists of three factual inquiries and one that is purely a matter of statutory construction. *See id.*; *Radke*, 694 N.W.2d at 796 (“[F]actor three—mandatory acts for the protection of a particular class—involves an analysis of the statute alone.”).

In *GSN Capital*, this Court considered whether the Fire Protection District Law, Idaho Code sections 31-1401 to -1438, could support a negligence per se theory in a case where the plaintiff argued its local fire district, a government entity subject to the ITCA, acted negligently by failing to protect the plaintiff’s property from wildfire. 173 Idaho at 350, 352, 541 P.3d at 708, 710. To establish the district’s negligence per se, the plaintiff relied on Idaho Code section 31-1401:

The protection of property against fire and the preservation of life, and enforcement of any of the fire codes and other rules that are adopted by the state fire marshal pursuant to chapter 2, title 41, Idaho Code, are hereby declared to be a public benefit, use and purpose. Any portion of a county not included in any other fire protection district may be organized into a fire protection district under the provisions of this chapter. All taxable property within any fire protection district created under the provisions of this chapter is and shall be benefited ratably in proportion to assessed valuation by the creation and maintenance of such district,

and all taxable property within any such district shall be assessed equally in proportion to its assessed valuation for the purpose of and in accordance with the provisions of this chapter.

Id. at 353, 541 P.3d at 711 (quoting I.C. § 31-1401). This Court held that the plaintiff could not rely on section 31-401 to establish negligence per se because it “does not ‘require a particular action by an agency to benefit a particular class of people[.]’” *Id.* (quoting *Rees*, 143 Idaho at 16, 137 P.3d at 403). Importantly, *GSN Capital* never reached the *Sanchez* inquiry because the plaintiff could not demonstrate, at the threshold, that the Fire Protection District Law created a particularized relationship between the plaintiff and the district. *See id.*

By contrast, in *Rees*, this Court held that the Idaho Child Protection Act (“CPA”) created an affirmative duty on the Idaho Department of Health and Welfare’s part to “competently investigate” each specific report of child abuse. 143 Idaho at 15, 137 P.3d at 402. In *Rees*, a father sued the Department after reporting his suspicion that his young son was being abused in the home of the child’s mother. *Id.* at 13–14, 137 P.3d at 400–01. The Department opened an investigation but ultimately deemed the report “invalid,” despite the child presenting with two black eyes and “bruises and other injuries on his head and face.” *Id.* at 14, 137 P.3d at 401. Less than two months after the Department closed its investigation, the child was murdered by his mother’s abusive boyfriend. *Id.*

In addition to the CPA’s mandate, the Department’s duty in *Rees* arose from the fact that it knew about the danger to the particular child, and that the plaintiff-father reasonably relied “on the investigator’s representations and conduct that caused [him] to forgo other alternatives to protecting [the child].” *Id.* at 18, 137 P.3d at 405. In this Court’s view, once the plaintiff-father reported the child abuse to the Department, initiating an investigation, a special relationship arose between the child and the Department. *See id.* at 18–19, 137 P.3d at 405–46. By the terms of the CPA, the Department owed the plaintiff’s child, in particular, a duty to “assess risks to the child” and “ensure the child victim’s safety including removal of the alleged offender.” I.C. § 16-1617(2).

Despite *Radke*’s sequencing of the factual analysis, *Rees* and *GSN Capital* demonstrate that the logical starting point in the *Rees/Radke* analysis is its third factor, the statutory construction inquiry. *GSN Cap.*, 173 Idaho at 352–53, 541 P.3d at 710–11 (treating the statutory construction factor as dispositive); *Rees*, 143 Idaho at 16–17, 137 P.3d at 403–04 (beginning the public duty analysis with the statutory construction factor). Moreover, in *GSN Capital*, we effectively treated the *Rees/Radke* factors as four necessary elements, leading us to reject the plaintiff’s negligence

per se theory once we determined that the Fire Protection District Law announced a duty to the public at large, rather than to specific individuals. *GSN Cap.*, 173 Idaho at 352–53, 541 P.3d at 710–11.

GSN Capital’s reliance on the plain language of the Fire Protection District Law is the sound approach to the public duty rule. After all, if a statute imposes on the government “a duty . . . to the general public” rather than “a particular action by an agency to benefit a particular class of people,” *Rees*, 143 Idaho at 16, 137 P.3d at 403, the issue is definitively resolved: the public duty rule bars a tort action against the government on a negligence per se theory premised on that duty. Thus, although *Rees* describes its inquiry as “fact-intensive,” the reality is that the public duty rule turns largely on statutory substance—a reality confirmed by *Rees* and *Radke*, both of which treat the statutory-construction “factor” as a threshold inquiry. *Id.* at 16–17, 137 P.3d at 403–04.

The district court opted for a novel—and decidedly less generous—reading of *Rees*. It understood *Rees* as adopting “a method of equitable analysis” that allows a court to “impose a duty to protect upon anyone whenever the court feels it just to do so.” But a careful reading of *Rees*—contrary to the district court’s critical view—reveals that it aims to define the contours of Idaho’s public duty rule. Nevertheless, the district court’s confusion in the present case regarding the proper starting point in evaluating the Infangers’ negligence per se theory against the Division leaves us persuaded that a simpler and more definite articulation of the public duty rule—one that will permit lower courts to apply the doctrine with greater ease in an already complex area of law and with consistent outcomes in factually similar cases—is appropriate.

Accordingly, we hold that a negligence per se theory asserted under the Idaho Tort Claims Act must be evaluated under the public duty rule at the threshold as part of determining “whether tort recovery is allowed under the laws of Idaho.” *Harris v. State, Dep’t of Health & Welfare*, 123 Idaho 295, 298 n.1, 847 P.2d 1156, 1159 n.1 (1992); see I.C. § 6-903(1). And only where a statute sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole is the governmental duty based on that statute actionable in tort. In the absence of a particularized duty, the government only owes the public at large a duty to competently perform its statutory obligations and its failure to do so is properly remedied through the political process, not a tort action. The effect of our holding today is to reduce the *Rees* factors to a single element: “Whether an ordinance or statute set forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole.” 143 Idaho at 16, 137 P.3d at 403

(quoting *Radke*, 694 N.W.2d at 794). To the extent *Rees* is inconsistent with this holding, it is overruled.

Here, the district court failed to recognize that the public duty rule is distinct from and antecedent to the *Sanchez* test for negligence per se theories. However, its analytical error is harmless because the Zoning Act “does not ‘require a particular action by an agency to benefit a particular class of people.’” *GSN Cap.*, 173 Idaho at 352, 541 P.3d at 710 (quoting *Rees*, 143 Idaho at 16, 137 P.3d at 403). Thus, even under the correct inquiry, the district court would have reached the same conclusion: the Zoning Act does not create a tort duty running from the Division to Ms. Infanger.

The Infangers allege that the Division breached duties to prevent Gem State from erecting noncompliant exhaust stacks and to compel their removal after the fact. They point to Idaho Code section 21-520 as the source of these duties:

Whenever any person refuses or neglects to illuminate, mark, paint, designate or light, as required by this act, a structure owned or operated by him after the same has been designated by the director to be an obstruction to air flight, he shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than \$100, nor more than \$300, for each offense, or the director may maintain an action in the name of the state of Idaho to compel compliance by mandatory injunction.

That after the first conviction and fine, every subsequent period of 30 days during which such person neglects to comply with the provisions of this section, shall constitute a separate offense and be punishable as provided herein.

I.C. § 21-520.

As an initial matter, we note that the plain language of section 21-520 does not confer on the Division the power to prevent ground hazards to air traffic or to compel their removal once erected. To be sure, the Division could have sought injunctive relief compelling Gem State to “illuminate, mark, paint, designate or light” the exhaust stacks in accordance with its regulations. But section 21-520 does not authorize the Division to prevent Gem State’s construction of the stacks in the first instance or to compel their removal after the fact. Even so, assuming *arguendo* that the Zoning Act encompasses the broader mitigation authority the Infangers envision, the relevant question under the public duty rule is whether section 21-520 sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole.

The statute fails the public duty inquiry on two bases. First, section 21-520’s injunctive authority is purely discretionary rather than mandatory—its text provides that the Division “may” seek an injunction to enforce its ground-hazard regulations. See *Scott Beckstead Real Est. Co. v.*

City of Preston, 147 Idaho 852, 854, 216 P.3d 141, 143 (2009) (“The word ‘may’ is permissive.”). Consequently, section 21-520 cannot support a duty of care.

Second, nothing in the statute indicates that section 21-520’s enforcement authority is intended to benefit a particular class of persons. That absence, coupled with the legislature’s stated aims in enacting the Zoning Act, suggests the opposite: mitigating ground hazards to air traffic benefits “users of the airport,” “occupants of land in its vicinity,” the aircraft themselves, and “public investment” in airports. I.C. § 21-502 (legislative declaration that air hazards are contrary to the public interest). Because the Zoning Act is intended to benefit a broad swath of the public, it is properly understood as directed to the “general welfare of the citizens of this state” I.C. § 21-513 (legislative declaration of policy). The Zoning Act stands in stark contrast to the CPA at issue in *Rees*, the provisions of which are expressly and specifically concerned with “the protection of any child whose life, health or welfare is endangered.” *Rees*, 143 Idaho at 17, 137 P.3d at 404 (quoting I.C. § 16-1601 (2003)). Instead, the Zoning Act more closely resembles the Fire Protection District Law, which provides for “the preservation of life and protection of property,” a generalized concern we held in *GSN Capital* to be insufficient to establish a particularized duty of care on the government’s part. 173 Idaho at 353, 541 P.3d at 711 (citing I.C. § 31-1401).

We conclude that section 21-520 does not “require ‘a particular action by an agency to benefit a particular class of people.’” *Id.* (quoting *Rees*, 143 Idaho at 16, 137 P.3d at 403). On the contrary, the Zoning Act is intended to secure the general public against the various risks associated with unidentifiable ground hazards to air traffic. For this reason, the Infangers have failed to overcome the public duty rule and, as a consequence, Idaho tort law will not recognize their negligent regulation theory against the Division. *See id.*; accord *Est. of McFarlin v. State*, 881 N.W.2d 51, 61–62 (Iowa 2016) (applying the public duty doctrine to hold that state had no duty to enforce statutory obligations of dredge operators who failed to properly mark submerged dredge pipe in lake that caused boat accident resulting in plaintiff’s death); *Hunt ex rel. Hasty v. N.C. Dep’t of Labor*, 499 S.E.2d 747, 198–99 (N.C. 1998) (applying the public duty doctrine to hold that state had no duty, under the North Carolina Amusement Device Safety Act, to competently inspect amusement park for safety violations that ultimately caused plaintiff’s injuries).

2. *The common law does not provide a basis for a duty on the Division’s part to competently regulate ground hazards to air traffic.*

We also reject the Infangers' second argument that their negligent-regulation claim is supported in the alternative by a common law duty. They contend that Ms. Infanger's "death was a foreseeable consequence of the [Division]'s negligence in allowing a 100-foot obstacle to be erected within 2,000 feet of the touchdown point on the Runway 20 approach." Given the foreseeability of harm, they reason, the Division had a duty to mitigate the risk Gem State's stacks posed to Ms. Infanger. The district court did not meaningfully address this argument in its order on the Division's summary judgment motion, but even if it had, the conclusion would be the same: the Division did not owe Ms. Infanger a duty of care.

The common law duty of care provides that "[e]very person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury." *Whitt v. Jarnagin*, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966). Critically, this "general duty to use due or ordinary care," *id.*, applies only when the actor risks "injur[ing] another by a positive affirmative act," Restatement (Second) of Torts § 314 cmt. c (1965) (discussing the difference between "misfeasance" and "non-feasance"). Liability in tort arises only where the tortfeasor has engaged in conduct that creates a foreseeable risk of harm to the plaintiff. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999).

Here, the Infangers charge the Division with nonfeasance—failing to take regulatory action to mitigate the risks posed by Gem State's stacks. But Idaho tort law does not recognize passive negligence in the absence of "unusual circumstances." *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001) (citing *Coghlan*, 133 Idaho at 399, 987 P.2d at 311). To impose a common law duty on the Division, the Infangers must identify some affirmative act by the Division that foreseeably created or increased the risk of harm to Ms. Infanger. Because they allege only that the Division was negligent in *failing* to act, the Infangers have not identified any cognizable tort duty under the common law. We affirm the district court's conclusion that the Infangers' negligent regulation theory against the Division is unsupported by either statutory or common law duties.

B. The district court correctly concluded that a special relationship did not give rise to a duty on the Division's part to protect Ms. Infanger from Gem State's exhaust stacks.

The Infangers next raise the special relationship doctrine as an exception to the general rule against affirmative duties of care. They posit that a special relationship existed between the Division and Ms. Infanger or, in the alternative, the Division and Gem State. In its ruling on the

Division's summary judgment motion, the district court concluded that the Infangers never argued at least one variety of special relationship (duty to control) and declined to consider it. Moreover, the district court ruled that the special relationship theory the Infangers did argue (duty to protect) failed on the merits.

1. The Infangers failed to preserve a duty to control theory.

Special relationship theories come in two forms: a duty to control or a duty to protect. Restatement (Second) of Torts § 315 (1965). A duty to control arises from the defendant's control over a third party whose conduct poses an "unreasonable risk of harm" to the plaintiff. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999). However, that risk must be foreseeable and the defendant must have "the right and ability to control" the third party's conduct. *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 686, 316 P.3d 92, 98 (2013). In this case, a duty to control theory would mean that the Division had a duty to control Gem State because it possessed the right and ability to mitigate the unreasonable risk Gem State's exhaust stacks posed to Ms. Infanger.

In the district court's view, the Second Amended Complaint could have supported a duty to control theory, but the Infangers never argued that this duty existed. In other words, they never contended that the Division was obligated to control Gem State by requiring it to mitigate the risks posed by the exhaust stacks. The court nevertheless found support in the pleadings and arguments for the view that the Division owed Ms. Infanger a duty of protection. For that reason, the district court confined its special-relationship analysis to a duty to protect theory and declined to consider the merits of a duty to control theory.

In their briefing on appeal, the Infangers disavow the duty to protect theory. They insist that they adopted a duty to control theory—a duty on the Division's part to competently exercise its regulatory authority over Gem State for Ms. Infanger's protection. By doing so, the Infangers adopt the very theory the district court concluded was forfeited and reject the very theory it determined was adequately supported by the pleadings and arguments. To complicate matters further, at oral argument, counsel for the Infangers took the position that this case implicates both special relationship theories. Yet at another point during argument, counsel dismissed the duty to protect theory as "ridiculous."

For its part, the Division insists, consistent with the district court, that the Infangers "never properly pleaded or argued" a duty to protect. The Division views the Infangers' duty to control

theory similarly, and it frames the Infanger's invocation of this theory on appeal as an "attempt to cure their deficient pleadings." We agree that the Infangers failed to preserve a duty to control theory and decline to address their arguments on that issue.

Idaho appellate courts do not consider arguments or theories raised for the first time on appeal. *Choice Feed, Inc. v. Montierth*, 168 Idaho 124, 140, 481 P.3d 78, 94 (2021) (citation omitted). Our review is "limited to the evidence, theories and arguments that were presented" to the district court. *Obenchain v. McAlvain Constr. Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) (citation omitted). And it goes without saying that whatever theory of liability is raised in the district court, it must be supported by the pleadings. *See Estes v. Barry*, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998).

Idaho is a notice pleading jurisdiction. *Cook v. Skyline Corp.*, 135 Idaho 26, 33, 13 P.3d 857, 864 (2000) (citing *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 921, 500 P.2d 218, 222 (1972)). That means a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (quoting I.R.C.P. 8(a)(2)). The complaint need not expressly name the particular theories of recovery the plaintiff will pursue; at a minimum, however, it must "offer[] allegations that, if true, would meet the elements of" those theories. *Id.* at 808, 229 P.3d at 1170. In the absence of an expressly named theory of recovery, the factual allegations of the complaint must support that theory so that an adverse party can reasonably anticipate defending against it. *See id.* The sufficiency of the allegations in the complaint is determined by asking "whether the adverse party is put on notice of the claims brought against it." *Id.* at 807, 229 P.3d at 1169 (citation omitted).

The Infangers contend that the pleadings and their arguments below demonstrate their embrace of a duty to control theory throughout this litigation. They first point to several paragraphs in the Second Amended Complaint, which generally allege that the Division "abdicated its duties and responsibilities" under the Zoning Act, "failed to evaluate the effects of superheated steam exhaust on aircraft," and "breached and violated its duty of care" to Ms. Infanger, all of which, they further allege, proximately caused her death. But the allegations in the Second Amended Complaint revolve entirely around the Division's statutory and regulatory duties. None of these allegations are sufficient to alert a reasonably diligent attorney that the Infangers might raise a duty to control theory. In other words, there is nothing in these allegations that even suggests that the

Division had a special relationship with Gem State which imposed a duty on the Division to control Gem State's conduct.

The Infangers also assert that their reply brief in opposition to the Division's summary judgment motion asserted a duty to control theory. We find the argument presented there on a special relationship theory to be largely incoherent; it appears to apply the factors from *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995), without offering any analysis, or even mention, of the special relationship elements of custody and control. *See GSN Cap.*, 173 Idaho at 356, 541 P.3d at 714 ("The *Rife* factors do not consider whether the quintessential aspects of a special relationship—custody and control—are present in a given circumstance."). More importantly, it is virtually impossible to determine which variety of special relationship the Infangers invoked, much less which elements of the Division's relationship with Gem State could give rise to a duty to control.

The Infangers next rely on the hearing before the district court on the Division's summary judgment motion. Their reply brief on appeal cites numerous portions of the hearing transcript, which they contend demonstrate that they raised a special relationship theory before the district court. To the contrary, while they repeatedly referenced a duty arising from "special circumstances," the only specific theory they articulated during the hearing under that umbrella was an assumed duty theory. Beyond invoking "special circumstances," their arguments at the hearing related almost entirely to the Division's statutory duties under the Zoning Act. Nothing in their presentation suggested—even obliquely—that the Division's potential liability rested on a special relationship theory.

Finally, the Infangers contend that the evidentiary exhibits they submitted raised the specter of a special relationship theory. Yet those exhibits addressed only the Division's duties under the Zoning Act and its 5010 Inspection Program contract with the FAA. Nothing in the exhibits suggested the Infangers were arguing that the Division had a special relationship with Gem State that gave rise to a duty to control the company's conduct. For these reasons, we hold the Infangers failed to preserve a duty to control theory for appeal and we therefore decline to address their arguments on that issue.

2. *The Infangers have not shown the elements of custody and control necessary to establish a duty on the Division's part to protect Ms. Infanger.*

A duty to protect, the second variety of special relationship, arises from the alleged tortfeasor's direct relationship with the plaintiff, which entitles the plaintiff to protection.

Restatement (Second) of Torts § 315(b) (1965). In these scenarios, the plaintiff forfeits her “normal power of self-protection” and relies on the defendant to “exercise reasonable care to protect [her] from harm.” *Merritt ex rel. Merritt v. State*, 108 Idaho 20, 24, 696 P.2d 871, 875 (1985) (citing Restatement (Second) of Torts §§ 314A, 320 (1965)). We recently pointed to an airline’s relationship to its flight attendants or a mine operator’s relationship to its miners as illustrative of circumstances in which a duty of protection arises because the reliant parties cannot provide for their own safety. *See Spears v. Antelope Mountain Resort, LLC*, 177 Idaho 70, ___, 585 P.3d 314, 323 (2026).

Like special relationship theories generally, the “quintessential aspects” of a duty to protect are the defendant’s authority and practical ability to superintend the plaintiff’s physical person. *GSN Cap., LLC v. Shoshone City & Rural Fire Dist.*, 173 Idaho 345, 356, 541 P.3d 703, 714 (2024) (“[C]ourts conducting a special relationship inquiry must first consider whether the hallmarks of a special relationship—custody and control—are present . . .”). *GSN Capital* instructs that, once these hallmarks are established, the analysis proceeds to a second step: determining “whether policy considerations support imposing an affirmative duty” by weighing the seven *Rife* factors. *Id.* at 354, 541 P.3d at 712 (citing *Brown v. USA Taekwondo*, 483 P.3d 159, 162 (Cal. 2021)); *see Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995) (listing the seven-factor test).

The Infangers have failed to establish that the Division had custody and control over Ms. Infanger and thus failed to establish circumstances that would give rise to a duty of protection on the Division’s part. The district court concluded that the Division owed no such duty to Ms. Infanger specifically because it never “took possession of the airplane” she was piloting in a manner that rendered her “unable to protect herself from the danger posed by Gem State’s exhaust stacks,” nor did the Division have “physical custody of the decedent herself.” Given the absence of custody and control—the “quintessential aspects” of a special relationship—we are persuaded that the district court correctly determined there was no duty of protection running from the Division to Ms. Infanger. *See Spears*, 177 Idaho at ___, 585 P.3d at 323 (noting a duty to protect arises when the plaintiff is “deprived of personal autonomy” so that they rely on the defendant for safety).

C. The district court correctly determined that the Division’s contract to conduct 5010 inspections on behalf of the FAA could not support liability under either contract or tort theories.

Finally, the Infangers challenge the district court’s characterization of their reliance on the Division’s 5010 inspection contract with the FAA as a third-party-beneficiary breach-of-contract claim. The Infangers alleged that the Division’s inspection of the Burley airport was grossly negligent because its inspector reported to the FAA that the height of Gem State’s exhaust stacks was 70 feet when they are in fact over 100 feet high. The record shows that the erroneous measurement was adopted by the FAA in its Chart Supplement which, according to the Infangers, “provides comprehensive information on airports, including runway lengths, widths and obstructions located in the vicinity of the airport” to pilots.

The district court struggled to discern “[t]he legal theory upon which [the Infangers] believe they may recover damages due to the [Division]’s alleged breach of its contractual obligations to the FAA . . . , other than a general reference to the tort of negligence.” It ultimately analyzed the allegations pertaining to the 5010 inspection contract under the theory that Ms. Infanger was a third-party beneficiary of the Division’s contract, and that the Division’s conduct amounted to a breach of that contract. The district court concluded this theory could not prevail because Ms. Infanger was not an intended beneficiary of the contract.

The Infangers contend that the district court should have understood the 5010 inspection contract as the basis for an assumed duty theory. The problem with this position is that the Infangers never argued an assumed duty theory to the district court. The Infangers cannot raise an assumed duty theory for the first time on appeal. *See Choice Feed, Inc.*, 168 Idaho at 140, 481 P.3d at 94 (citation omitted). This Court’s preservation doctrine exists for a reason: it ensures fairness by requiring parties to present their legal theories to this Court in a manner that permits meaningful adjudication. If an issue is not presented to the district court, the opportunity for meaningful adjudication at the appellate level is generally foreclosed. *State v. Miramontes*, 170 Idaho 920, 924–25, 517 P.3d 849, 853–54 (2022). That is especially true where, as here, the defendant has not had a fair opportunity to contest a plaintiff’s theory of liability with their own evidence and argument before the trial court. It is apparent that throughout this litigation the Division and the district court never understood the Infangers to be arguing an assumed duty theory. Only on appeal did it become clear that the Infangers were pursuing that theory. Without a clear articulation of the legal theories at issue, the district court could not meaningfully apply Rule 56, nor can this Court conduct a principled appellate review.

There is no question that Ms. Infanger's death was a profound tragedy and one that might have been avoided had various public and private actors exercised greater vigilance. But that reality cannot alter the fact that the Infangers failed to establish a basis for imposing a duty of care on the Division. Therefore, we affirm the district court's grant of summary judgment in favor of the Division.

D. The Division is not entitled to an award of attorney fees on appeal.

As the prevailing party, the Division requests an award of attorney fees on appeal under Idaho Code section 12-117. We decline to award attorney fees to the Division because the Infangers brought this case on reasonable bases of both fact and law.

Section 12-117 of the Idaho Code provides that a state agency, as the prevailing party, is entitled to an award of attorney fees if "the nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117(1). We have explained that the standard for awarding attorney fees under section 12-117 is identical to the standard we apply under Idaho Code section 12-121. *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 525, 387 P.3d 761, 778 (2015).

Under section 12-121, this Court may award reasonable attorney fees to the prevailing party upon finding that "the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.C. § 12-121. Generally, "when a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation." *C & G, Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001).

We decline to award attorney fees. Here, the Infangers attempted to raise several tort theories relating to the Division's alleged negligence in inspecting the Burley Municipal Airport and in regulating hazards adjacent to the runway. That those theories were unartfully presented does not diminish their reasonable basis in fact and law. Accordingly, we decline to award attorney fees against the Infangers.

IV. CONCLUSION

Based on the foregoing reasons and authorities, we affirm the district court's grant of summary judgment in favor of the Division. We decline to award attorney fees. As the prevailing party, the Division is entitled to costs as a matter of course. I.A.R. 40(a).

Chief Justice BEVAN, and Justices MOELLER, ZAHN and MEYER CONCUR.