1-15-2016

Elliott v. Murdock Appellant's Brief Dckt. 43410

IN THE SUPREME COURT OF THE STATE OF IDAHO

CANDACE ELLIOTT, individually and
FOR THE LOVE OF PETS FOUNDATION, INC.,
an Idaho corporation,
Plaintiff-Appellants,

v.

STEVE MURDOCK,
Defendant-Appellant.

Docket No. 43410

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District
Of the State of Idaho, for Jefferson County.

Honorable Alan C. Stephens, District Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CANDACE ELLIOTT, individually and FOR THE LOVE OF PETS FOUNDATION, INC., an Idaho corporation, Plaintiffs, Appellants, vs. STEVE MURDOCK, Defendant, Respondent.	SUPREME COURT NO. 43410 JEFFERSON COUNTY CASE NO. CV-2014-0238 APPELLANTS' BRIEF ON APPEAL

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1. Summary judgment shall be rendered when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). On appeal the Appellate Court liberally construes the entire record in favor of the nonmoving party and draws all reasonable inferences and conclusions in that party's favor. *Clark v. Spokesman-Review*, 163 P.3d 216, 219, 144 Idaho 427, 430 (Idaho 2007)Steele v. Spokesman-Review, 138 Idaho 249, 251, 61 P.3d 606, 608 (2002). If the evidence reveals no disputed issues of material fact, summary judgment is proper. Id.

2. In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication. See Gough v. Tribune-Journal Co., 73 Idaho 173, 177, 249 P.2d 192,194 (1952). As a fourth element, when a publication concerns a public official, public figure, or matters of public concern and there is a media defendant, the plaintiff must also show the falsity of the statements at issue in order to prevail in a defamation suit. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76, 106 S.Ct. 1558, 1563-64, 89 L.Ed.2d 783, 791-92 (1986). Finally, if the plaintiff is a public figure, the New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), standard applies, and the plaintiff can recover only if he can prove actual malice, knowledge of falsity or reckless disregard of truth, by clear and convincing evidence. *Clark v. Spokesman-Review*, 163 P.3d 216, 219, 144 Idaho 427, 430 (Idaho 2007); Steele, 138 Idaho at 252, 61 P.3d at 609; Bandelin v. Pietsch, 98 Idaho 337, 339, 563 P.2d 395, 397 (1977).

3. The New York Times standard applies to a public figure and he or she will recover only if he or she can prove actual malice, knowledge of falsity or reckless disregard of truth, by clear and convincing evidence. *Clark v. Spokesman-Review*, 163 P.3d 216, 219 144 Idaho 427, 430 (Idaho 2007); See Steele, 138 Idaho at 252, 61 P.3d at 609; Bandelin, 98 Idaho at 339, 563 P.2d at 397.

4. On a summary judgment motion by a defendant in a defamation action, the plaintiff must produce evidence creating a genuine issue of material fact and evidence a jury could find is clear and convincing the defendant acted with "actual malice." *Clark v. Spokesman-Review*, 163 P.3d 216, 219 144 Idaho 427, 430 (Idaho 2007).

5. When a claim or part of a claim must be proved by clear and convincing evidence, generally on a motion for summary judgment the Idaho Appellate Courts do not consider whether a party has produced clear and convincing evidence, but only "whether the evidence is sufficient to create a triable issue of fact." Country Cove Dev., Inc. v. May, 143 Idaho 595, 599, 150 P.3d 288, 292 (2006). However, the Idaho Supreme Court has adopted the United States Supreme Court standard for ruling on a motion for summary judgment in a defamation case which requires that the trial judge to bear in mind the actual quantum and quality of proof necessary. i.e., and to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of a judgment not supported by clear and

convincing evidence of 'actual malice.' "*Clark v. Spokesman-Review*, 163 P.3d 216, 219, 144 Idaho 427, 430 (Idaho 2007); Wiemer v. Rankin, 117 Idaho at 575, 790 P.2d at 356 (quoting Harte-Hanks, 491 U.S. at 685-86, 109 S.Ct. at 2695, 105 L.Ed.2d at 588. *Id* at 220 and 431.

6. Idaho appellate courts review a grant of summary judgment de novo. *Clark v. Spokesman-Review,* 163 P.3d 216, 144 Idaho 427 (Idaho 2007); Post Falls Trailer Park, 131 Idaho at 636, 962 P.2d at 1020." *Id* at 222 and 433

7. Deciding whether speech is of public or private concern requires a court to examine the "'content, form, and context'" of that speech, "'as revealed by the whole record.'" *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751; Dun & Bradstreet, supra, at 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (quoting Connick, supra, at 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708); *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347, (Idaho 1990).

8. In First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751;Bose Corp. v. Consumers Union of United States, Inc., Page 454 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting New York Times, supra, at 284-286, 84 S.Ct. 710, 11 L.Ed.2d 686).

9. In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751.

10. A speaker's personal motivation for his or her speech should be considered and may remove the speech from the province of public concern and the protection of the First Amendment. Tayoun v. City of Pittston, 39 F.Supp.3d 572, 581 (M.D.Pa. 2014).

11. In examining the content, form and context of alleged defamatory speech it is proper for the court to consider any pre-existing relationship or conflict between the speaker and the person defamed. *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751; Tayoun v. City of Pittston, 39 F.Supp.3d 572, 581 (M.D.Pa. 2014); *Gleason v. Smolenski*, No. SC 19342, (Connecticut Nov. 2015)

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12. The First Amendment does not protect speech made for some purpose other than for which the privilege is given. *Greene v. Tinkler*, 332 P. 3d , 21, 36 (Alaska 2014); *Gleason v. Smolenski*, No. SC 19342 (Connecticut 2015).

13, The first amendment cannot be used as a cloak or veil for intentionally tortious conduct that is only tangentially related to the claimed matter of public concern. *Gleason v. Smolenski*, No. SC 19342, (Connecticut 2015); See *Holloway v. American Media, Inc.*, supra, 947 F.Supp.2d 1261–65 (first amendment did not, as matter of law, shield tabloid newspaper from intentional infliction of emotional distress claim in light of allegations that it knowingly and maliciously published false information about death and burial of plaintiff's missing daughter, given preexisting animus between parties); cf. United States v. Sergentakis, United States District Court, Docket No. 15CR33 (NSR) (S.D.N.Y. June 15, 2015) (defendant's accusations that victim had engaged in child molestation and animal cruelty could be protected under first amendment in other contexts, but not in cyberstalking and witness retaliation case wherein they were ''thinly veiled'' revenge for victim's cooperation with investigation that led to defendant's guilty plea on other charges); People v. Little, Docket No. 4-13-1114, 2014 WL 7277785, *7 (Ill.App. December 22, 2014). But cf., contra., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 111 S.Ct. 2419, 2429 (1991); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666, 109 S. Ct. 2997 (1989); *Clark v. Spokesman-Review,* 163 P.3d 216, 144 Idaho 427 (Idaho 2007).

14. In attempts to distinguish between public and private concerns, courts have placed emphasis on the speaker's motivations for the speech under the context element of the inquiry--primarily personal motivations for the speech may remove speech from the province of public concern. *Tayoun v. City of Pittston*, 39 F.Supp.3d 572, 581 (M.D.Pa. 2014);See, e.g., *Feldman v. Philadelphia Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1994). " [P]ublic speech 'cannot constitute merely personal grievances.'" *Brennan v. Norton*, 350 F.3d 399, 412 (3d Cir. 2003) (quoting Feldman, 43 F.3d at 829). " Speech that is necessary or appropriate to enable citizens to make informed decisions about the operation of their government is of public concern, while speech by public employees addressing individual personnel disputes and grievances is not." *Pool v. VanRheen*, 297 F.3d 899, 906 (9th Cir. 2002).

15. A plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, *see Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Tavoulareas v. Piro*, 260 U.S. App.D.C. U.S. App.D.C.9, 66, 817 F. 2d 762, 789 (en banc), cert. denied, 484 U.S. 870 (1987), and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668, 109 S. Ct. 2997 (1989); *Clark v. Spokesman Review*, 144 Idaho 427, 163 P.3d 216 (Idaho 2007): *Gardner v. Hollifield,* 97 Idaho 607, at 610, 549 P.2d 266, at 269 (Idaho 1976).

16. "The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a **specific** public controversy, thereby becoming a public figure on a **limited range of issues**." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577, italics added (Ampex).)

17. To become a limited purpose public figure, a party must inject itself into "an existing public controversy[.]" (*Carver v. Bonds*, supra, 135 Cal.App.4th at p. 353, italics added.)

18. In "a much cited analysis" (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845), the court in *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287 (*Waldbaum*) explained that "[t]o determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some **specific question**." (emphasis added) (Id. at p. 1297, italics added, fn. omitted; accord *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254-255 ["courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies"],(italics added.) It is therefore clear that the public controversy into which a limited purpose public figure thrusts itself must be one that existed before the defendant made the defamatory statements at issue, **and the alleged defamation must be germane to the plaintiff's participation in that preexisting controversy.** (emphasis added). *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577 emphasis added; *LifeVantage Corp. v. MacFarland*, A141057 California Court Of Appeals, First District Fifth Division (2015) (Unpublished).

19. The standard of review of a trial court's decision of issues involving the introduction of evidence, is under an abuse of discretion [281 P.3d 120] standard. *Clair v. Clair*, 281 P.3d 115, 153 Idaho 278 (Idaho 2012); *State v. Perry*, 139 Idaho 520, 521, 81 P.3d 1230, 1231 (2003). The trial court has broad discretion to admit or exclude evidence. Id. at 521-22, 81 P.3d at 1231-32. " Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected." *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

20. The question of whether evidence is relevant is reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion.[1] State v. Shutz, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006). A district court's improper exclusion of evidence will be overturned on appeal if it affects a party's substantial right. *Clair v. Clair*, 281 P.3d 115, 153 Idaho 278 (Idaho 2012); *Perception Const. Management, Inc. v. Bell*, 254 P.3d 1246, 1249, 1250 151 Idaho 250 (Idaho 2011); I.R.E. 103; I.R.C.P. 61(a); *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

21. Evidence that is relevant to a material and disputed issue concerning the crime charged is generally admissible. *State v. Stevens*, 146 Idaho 139, 143, 191 P.3d 217, 221 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; see also *Stevens*, 146 Idaho at 143, 191 P.3d at 221. Whether a fact is of consequence or material is determined by its relationship to the legal theories presented by the parties. *State v. Johnson*, 148 Idaho 664, 671, 227 P.3d 918, 925 (2010). We review questions of relevance de novo. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993); *State v. Houser*, 41540 (unpublished) (Idaho App. 2014).

22. Appeals from an order of summary judgment are reviewed de novo, and on appeal the standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). Under this standard, disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. Where the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. *Huber v. Lightforce USA, Inc., 41887* (Idaho December 15, 2015); *Trotter v. Bank of N.Y. Mellon*, 152 Idaho 842, 845–46, 275 P.3d 857, 860–61 (2012) (footnotes, internal case citations, and internal quotation marks omitted).

23. When reviewing an order for summary judgment, the standard of review for the Appellate Court is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate if " the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. The Appellate Court exercises free review over questions of law. *Huber v. Lightforce USA, Inc., 41887* (Idaho December 15, 2015); *Fuller v. Dave Callister*, 252 P.3d 1266, 1269, 150 Idaho 848, 851 (Idaho 2011); 149 Idaho 609, 613, 238 P.3d 209, 213 (2010) (quoting *Vavold v. State*, 148 Idaho 44, 45, 218 P.3d 388, 389 (2009)).

24. The standard of review on appeal from an order granting summary judgment is the same standard that is used by the district court in ruling on the summary judgment. Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *McCann v. McCann*, 275 P.3d 824 (Idaho 2012).

25. When an Appellate Court reviews an order dismissing an action pursuant to summary judgment, after viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. 145 Idaho 670, 672-73, 183 P.3d 758, 760-61 (2008) (internal citations and quotations omitted). In addition, "the Court reviews an appeal from an order of summary judgment de novo, and the Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." Taylor v. McNichols, 243 P.3d 642, 648, 149 Idaho 826, 832 (Idaho 2010); Curlee v. Kootenai Cnty. Fire & Rescue, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008).

26. The Appellate Court employs an abuse of discretion standard when reviewing a district court's denial of a motion to amend a complaint to add additional causes of action. Spur Prod. Corp. v. Stoel Rives LLP, 142 Idaho 41, 43, 122 P.3d 300, 302 (2005). When reviewing an exercise of discretion on the part of a district court, this Court considers: " (1) whether the court correctly perceived that the issue was 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 to it; and (3) whether it reached its decision by an exercise of reason." Id. (quoting Estate of Becker v. Callahan, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004)); Taylor v. McNichols, 243 P.3d 642, 648, 149 Idaho 826, 832 (Idaho 2010).

27. An Appellate Court will not set aside the trial court's findings of fact unless they are clearly erroneous.; As to questions of law, the Court exercises free review. Humberger v. Humberger, 995 P.2d 809,811, 134 Idaho 39, 41 (Idaho 2000); See Jensen v. Jensen 128 Idaho 600, 604, 917 P.2d 757, 761 (1996).

28. The designation of a public figure may rest on two alternative bases: 'In some instances an individual may achieve such persuasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a **limited range of issues**.' 418 U.S. at 351, 94 S.Ct. at 3013. (emphasis added).*Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (Idaho 1977).

29. A citizen's participation in community and professional affairs does not automatically render him or her a public figure. 'It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation *in the particular controversy* giving rise to the defamation (or invasion of privacy).' *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789 (1974); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (Idaho 1977).

30. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public figure question *should be determined by reference to the individual's participation in the particular controversy* giving. (emphasis added) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-352, 94 S.Ct. 2997, 3000, 41 L.Ed.2d 789 (1974).

31. One test used to determine if a person is a public figure is whether the person occupies "a position of such 'persuasive power and influence' that he could be deemed one of that small group of individuals who are public figures for all purposes." *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 165, 99 S.Ct. 2701, 2706, 61 L.Ed.2d 450, 458 (1979). Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347, (Idaho 1990)

32. "A second test to determine if a person is a public figure is whether the person has thrust himself 'to the forefront of *particular public controversies* in order to influence the resolution of the issues involved.' " *Id.* at 165, 99 S.Ct. at 2706, 61 L.Ed.2d at 459 (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808 (1974)). In that circumstance the person would be a public figure for the limited purpose of comment on his connection with, or involvement in, the particular public controversy. (emphasis added). Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347, (Idaho 1990).

33. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolsten v. Readers Digest Ass'n.* 443 U.S. 157, at 167, 99 S.Ct. 2701, at 2707, 61 L.Ed.2d at 460; *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347, (Idaho 1990).

34. Liability for libel may attach when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact. *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347, 353(Idaho 1990).

35. The Idaho Supreme Court has rejected the idea that in cloaking statements as mere opinion a speaker cannot be held liable for slander: "The important consideration, then, is not whether the particular statement fits into one category or another, but whether the particular article [statement] provided sufficient information upon which the reader could make an independent judgment for himself." *Wiemer v. Rankin*, 117 Idaho 566, 572, 790 P.2d 347, 353 (Idaho 1990).

36. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The standard is a subjective one--there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of ... probable falsity." 491 U.S. at ----, 109 S.Ct. at 2696, 105 L.Ed.2d at 589 (citations omitted; emphasis added); *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347, (Idaho 1990).

37. The United States Supreme Court has refused "to create a wholesale defamation exemption for anything labeled opinion (citation omitted), recognizing that "expressions of `opinion' may often imply an assertion of objective fact," and that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447, 59 USLW 4726 (1991).

38. In ruling on a motion for summary judgment the trial court is to liberally construe the entire record in favor of the nonmoving party and draw all reasonable inferences and conclusions in that party's favor. *Steele v. Spokesman-Review,* 138 Idaho 249, 251, 61 P.3d 606, 608 (2002). *Clark v. Spokesman-Review,* 144 Idaho 427, 163 P.3d 216, (Idaho 2007).

39. Malice is defined for first amendment purposes as knowledge of falsity or reckless disregard of truth. Its essence is a knowing state of mind on the part of the publisher. *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (Idaho 1977).

40. The question whether the evidence on the record in a defamation case involving a public person is sufficient to support a finding of actual malice is a question of law. *Milkovitch v. Lorrain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989).

41. Rhetorical hyperbole is not slander because, under the circumstances the most careless reader [hearer] could not believe the statement was stating actual facts about the public person involved. *Milkovitch v. Lorrain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990).

42. In a defamation action, actual malice is a knowledge of falsity or reckless disregard of the truth. *Bandelin,* 98 Idaho at 339, 563 P.2d at 397. Mere negligence is insufficient; the plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of ...probable falsity." *Masson*, 501 U.S. at 510, 111 S.Ct. at 2429 (cite omitted) internal quotations and citations omitted).

43. The standard of actual malice is a subjective one. *Wiemer v. Rankin*, 117 Idaho 566, 575, 790 P.2d 347, 356 (1990) citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696 (cite omitted) (1989) (emphasis removed and internal quotations omitted).

44. Although actual malice is a subjective standard, in a case involving a public figure, self-interested denials of actual malice from the defendant can be rebutted with other evidence. *Clark v. Spokesman Review*, 144 Idaho 427, 163 P.3d 216 (Idaho 2007); *Gardner v. Hollifield,* 97 Idaho 607, at 610, 549 P.2d 266, at 269 (Idaho 1976).

45. A party responding to a summary judgment motion is not required to present evidence on every element of his or her case at that time, but must rather establish a genuine issue of material fact regarding the element or elements challenged by the moving party. *Thomson v. Idaho Insurance Agency, Inc.*, 126 Idaho 527, 530, 887 P. 2d 1034, 1037; *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 273, 869 P.2d 1365, 1368 (1994).

46. In Idaho the rule is that in order to maintain a libel action without a plea of special damages, a plaintiff must establish the words complained of are libelous *per se. Weeks v. M-Paragraph Publications, Inc.*, 95 Idaho 634, 516 P.2d 193 (1973); *Jenness v. Co-operative Publishing Co.*, 36 Idaho 697, 213 P. 351 (1923); *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 275 P.2d 663 (1954).

47. It is a matter of law or a matter of fact whether certain words are libelous *per se.* If the language used is plain and unambiguous it is a question of law for the Court to determine whether it is libelous per se, otherwise it is a question of fact for the trier of fact. *Weeks v. M-Paragraph Publications, Inc.*, 95 Idaho 634, 516 P.2d 193 (1973); *Bistline v. Eberle*, 88 Idaho 473, 401 P.2d 555 (1965); See also, *Gough v. Tribune-Journal Co.*, 75 Idaho 502 at 508. 275 P.2d 665, at 666 (1954).

48. In order to be libelous per se, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him[her] up to public hatred, contempt, or ridicule or cause him [her] to be shunned and avoided; in other words, they must reflect on his [her] integrity, his character, and his [her] good name and standing in the community, and tend to expose him [her] to public hatred, contempt or disgrace. The imputation must be one which tends to affect plaintiff in a class of society and annoys or irks plaintiff, and subject him to jests or banter, so as to affect his feelings. *Weeks v. M-P Publications, Inc.*, 95 Idaho 634, 516 P.2d 193 (1973); *Gough v. Tribune-Journal Co.*, 73 Idaho 173, at 179, 249 P.2d 192, at 195 (1952).

49. "Defamation is the communication of false information which tends to impugn the honesty, integrity, virtue or reputation of the person or entity about whom the statement is made, or exposes that person or entity to public hatred, contempt or ridicule. Libel is a form of defamation. Libel is he communication of defamatory information by written words, or by some form that has the characteristics of written words. Slander is a form of defamation by any other means." *Idaho Civil Jury Instruction* 4.80; *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 177, 249.

50. IDJI 4.82 – Elements of defamation – general case

In order to prove a claim of defamation, the plaintiff has the burden of proving each of the following elements;

1. The defendant communicated information concerning the plaintiff to others; and
2. The information impugned the honesty, integrity, virtue or reputation of the plaintiff or exposed the plaintiff to public hatred, contempt or ridicule; and
3. The information was false; and
4. The defendant knew it was false, or reasonably should have known that it was false; and
5. The plaintiff suffered actual injury because of the defamation; and
6. The amount of damages suffered by the plaintiff.

See Carver v. Ketchum, 53 Idaho 595, 26 P.2d 139; Klam v. Koppel, 63 Idaho 171, 118 P.2d 729; Adair v. Freeman, 92 Idaho 773, 451 P.2d 519.

51. IDJI 4.82.5 - Elements of defamation claim – public official or public figure

The plaintiff is a ["public official" or "public figure"]. In order to prove a claim of defamation against the defendant in this case, the plaintiff has the burden of proving each of the following elements;

1. The defendant communicated information concerning the plaintiff to others; and
2. The information impugned the honesty, integrity, virtue or reputation of the plaintiff or exposed the plaintiff to public hatred, contempt or ridicule; and
3. The information was false; and
4. The plaintiff was damaged because of the communication; and
5. The amount of damages suffered by the plaintiff.

The plaintiff must prove the following additional element by clear and convincing evidence:

6. The defendant knew the information was false, or acted with reckless disregard for its truth, at the time the information was communicated to others.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990); Bandeline v. Pietsch, 98 Idaho 337, 563 P.2d 395 (1977).

STATEMENT OF THE CASE

Nature of the Case

(i) Appellants, Candace "Andi" Elliott (Andi) and For The Love Of Pets Foundation, Inc. (Foundation), appeal the dismissal on summary judgment of their suit for defamation against Respondent, Steven Murdock (Murdock), for a statement he made during a call-in radio talk show (The Neal Larson Show) on March 22, 2012, originating from Idaho Falls:

> "If you listen - you know, words have meanings. If you listen to Andi's words, she claims not to be an animal activist or a humane society activist but that's kind of a bit windy. When she said that private property just in her statement to you is alright and everything, she thinks she is above the law, she's trespassed numerous times, there's ongoing court case in Jefferson County where she got the judge disputed cause she's special. She has to have a different judge to come in out of the area. Her shenanigans cost Jefferson County taxpayers a numerous amount of dollars. West Jefferson Landfill has a place for deceased livestock. People with the same mentality as Andi is what's done this to this horse market. We used to sell these slaughter horses. And in Portland, Oregon there's a horse meat market. In European countries horses are consumed by people all the time. **And Andi's humane society puts .02% of the money they hit everybody up back into the care of animals**."(emphasis added).
>
> (Memorandum Of Points And Authorities In Support Of Defendant Steven L. Murdock's Motion For Summary Judgments, p.7). A complete transcript of the radio talk show in question is set forth in the plaintiff's deposition, Exhibit 28).

It is the defendant's last statement (bolded) that is the subject of this appeal, which appellants believe is slanderous *per se*, falsely accusing Andi and the Foundation of obtaining and misusing donated funds fraudulently or under false pretenses. While conceding (arguendo) Plaintiff Andi Elliott may be a "limited public person" on the issue of animal welfare, Appellants appeal the district judge's findings of fact not supported by the record or relevant to any issue of animal welfare or the horse slaughter market. Appellants' appeal the court's striking entirely the

plaintiffs' declaration and exhibits offered in opposition to the motion for summary judgment, thus precluding any opportunity to defend against the summary judgment.

COURSE OF THE PROCEEDINGS

Plaintiffs filed their complaint against defendant for defamation in Jefferson County district court on March 19, 2014, alleging Defendant's statements made about them on a radio call-in talk show on March 22, 2012, were defamatory. Defendant answered, raising several defenses, including the statements were true or substantially true; that the statements were protected opinion; and that the statements were protected under Article I, Section 9 of the Idaho Constitution, and by the First and Fourteenth Amendments to the United States Constitution.

Discovery was undertaken, and Defendant's counsel, from San Francisco, deposed Plaintiff for two days, conducting the same in two parts, the first on June 27, 2014 and concluding on November 13, 2014, at the conclusion of which he announced he would complete the Plaintiff's deposition at a later date. On February 17, 2015 the defendant filed a motion for summary judgment, accompanied by: 1) a *Memorandum of points and authorities in support of defendant Murdock's motion for summary judgment*; 2) a *Compendium of evidence and declarations in support of defendant Murdock's motion for summary judgment* --listing 71 exhibits; 3) the *Declaration of Blair Olsen in support of motion for summary judgment*—including 11 of the exhibits listed in the *Compendium*; 4) the *Declaration of Ray Wong in support of motion for summary judgment*; 5) the *Declaration of Robin Dunn in support of motion for summary judgment*—referencing at least 6 of the exhibits listed in the *Compendium*; and 6) the *Declaration of Steven L. Murdock in support of motion for summary judgment*. Defendant

scheduled the hearing of his motion for summary judgment for March 26, 2015, and in response on February 26, 2015 Plaintiffs filed a *Motion For Extension And To Continue Hearing,* seeking additional time to complete discovery and to prepare and file opposing declarations and exhibits to Defendant's motion for summary judgment. Plaintiffs' motion for extension was heard telephonically on March 9, 2015, and on March 12 an order was entered granting Plaintiff's request for extension, re-setting the summary judgment for hearing April 20, 2015.

On March 19, 2015 Plaintiffs served three subpoenas for taking depositions of the defendant, Steve Murdock; the defendant's son, Chance Murdock; and Ronald Hillman, the latter two considered by Plaintiffs as critical potential non-party adverse witnesses for the Plaintiffs. On March 25, 2015 Defendant's counsel filed a *Motion For Protective Order And To Quash Subpoenas*, to which Plaintiffs objected, and with their objection requested in the alternative either additional time to respond to Defendant's motion for summary judgment, or to allow the depositions proceed on shortened notice. The Court heard the matter March 26, 2015, granting the defendant's motion to quash and ruling Plaintiff's planned depositions were not to be taken.

On April 2, 2015, Plaintiffs filed a *Motion To Amend Pleadings,* together with an *Objection And Motion To Strike Hearsay,* seeking an order to exclude from the Court's consideration on summary judgment, documents and exhibits containing hearsay and otherwise claimed by Plaintiffs to be inadmissible.

On April 6, 2015 Plaintiffs filed their opposing declaration to the defendant's summary judgment motion (*Declaration Of Plaintiff In Opposition To Defendant's Motion For Summary Judgment*) together with a list of Plaintiff's exhibits referenced in the affidavit, and *Plaintiffs' Brief In Opposition To Summary Judgment*).

On April 13, 2015 Defendant filed his *Reply Memorandum Of Points And Authorities In Support Of Defendant Steven Murdock's Motion For Summary Judgment*, as well as an objection and motion to strike Plaintiffs' **exhibits** (*Defendant Steven Murdock's Objections And Motion To Strike Exhibits Offered By Plaintiffs In Opposition To Defendant Murdock's Motion For Summary Judgment*), as well as an objection and motion to strike Plaintiffs' **declaration** (*Objection And Motion To Strike Of Defendant Steven Murdock To Declaration Of Plaintiff In Opposition To Defendant's Motion For Summary Judgment)* . Both Plaintiffs' and Defendant's motions were both heard April 20, 2015 together with the parties' oral arguments on summary judgment.

On April 30, 2015 the Court entered summary judgment for the defendant (*Decision And Order Re: Motion For Summary Judgment*) after excluding the **entire declaration and exhibits** of the Plaintiffs (*Decision and Order Re: Plaintiff's Motion To Strike Hearsay And Amend Complaint And Defendant's Motion To Strike Plaintiff's Declaration, Strike Exhibits And Take Judicial Notice Of Court Proceedings*). The court also granted Plaintiff's motion to strike the defendant's specific exhibits and statements objected to by the Plaintiffs. The Court also entered an order (*Order Re: Limitation On Filing*) limiting the *future* submission of documents to the Court of not more than 25 pages without prior consent.

In granting the defendant's motion for summary judgment the trial court indicated he did not rely on the proffered exhibits of the plaintiff or defendant, or the declarations of the parties, but relied instead on admissions and stipulations he believed were found in the record, together with records Defendant had asked the trial court to take judicial knowledge of. The findings of the trial court were as follows:

> "The parties have stipulated that:
> 1. Ms. Elliott has written at least dozens of letters to the editor regarding political and animal rights issues. Deposition of Candace Elliott (Elliott Depo.) pp. 154-158.
> 2. Ms. Elliott is a state coordinator for the Tea Party Patriots. Elliot Depo. p. 52.
> 3. As part of her duties as a state coordinator, Ms. Elliott organizes and speaks at public rallies. Elliott Depo. p. 53.
> 4. Ms. Elliott announced her candidacy for Sheriff of Jefferson County through the media. Elliott Depo. p. 288.
> 5. Ms. Elliott presents herself through the media as a political advocate. Elliott Depo. p. 301.
> 6. Ms. Elliot uses the foundation to help fund her animal advocacy activities. Elliott Depo. p.
> 7. For the Love of Pets Foundation relies on public donations for its operation. Plaintiff's brief in opposition to summary judgment p. 24.
> 8. Ms. Elliot used to be the president of the Humane Society of the Upper Valley. Elliott Depo. p. 18.
> 9. The For the Love of Pets Foundation is similar to a humane society. Elliott Depo. p. 47.
> 10. That there was an advertisement in the public media mentioning that the Humane Society used less than 1% of the donations received for the benefit of animals. Admitted in Open Court.
> 11. Ms. Elliott was convicted one time for trespassing. Elliott Depo. pp. 59-60.
> 12. Ms. Elliott was charged multiple times for trespassing. Elliott Depo. p. 54.
> 13. Defendant's brother and sister-in-law were witnesses to one such charge for trespassing. Plaintiff's brief in opposition to summary judgment pp. 21-22."

Plaintiffs urge the trial court erred 1) in striking the entire declaration and exhibits of the plaintiffs (or at least so much of the relevant portions thereof were offered in opposition to the declarations and exhibits proffered by the defendant in support of summary judgment) ; 2) in not examining or considering the defendant's motives in making the defamatory statements against

Plaintiffs; 3) failing to distinguish the particular issue of public concern being discussed (or at least defining it so broadly); 4) failing to ascertain whether the defendant's statement objected to was germane to the particular public issue; and 5) in relying on non-relevant factors such as Plaintiff's civic actions and writings not involving animal welfare (Decision And Order, p.3, "Stipulated Facts" nos. 2,3, 4,5), (and including the Foundation by association).

Appellants contest several of the court's findings, including, "Ms Elliott uses the foundation to help fund her "animal advocacy activities" ("Stipulated Facts" no. 6); the court's finding of a stipulation on the record, "That there was an advertisement in the public media mentioning that the Humane Society used less than 1% of the donations received for the benefit of animals" (Decision And Order, pp.3, Finding10); that "[t]he Foundation is simply a mechanism by which Ms, Elliott thrusts herself into the public controversy surrounding the treatment of animals and, therefore, is also a public figure" (Decision And Order, p.5). The plaintiffs appeal the court's finding the Foundation to be a public figure "by association with Ms. Elliott" (Decision And Order, p.5), and that the Foundation "uses its resources to alert the public of the mistreatment of animals" (Decision And Order, p.5). The plaintiffs appeal the Court's finding the plaintiffs had not presented sufficient evidence to overcome a summary judgment under either a negligence or clear and convincing standard (Decision And Order, p.7), especially so after the Court struck her declaration and exhibits.

While appellants do not contest the court's conclusion "Ms. Elliott is a public figure in the geographic area of Southeastern Idaho covered by the radio program referenced in the matter" *with respect to the welfare of animals*, Appellants appeal the failure of the court, by

exclusion of Plaintiff's declaration and exhibits, to examine the "content, form and context" and the circumstances and motivation of Mr. Murdock's statement, and whether under the circumstances, Mr. Murdock's statement were removed the protection of the First Amendment; and whether if Defendant's statement was germane to the public issue either being discussed on the radio talk show (animal welfare in general terms, or as Defendant's counsel stated, the "horse slaughter market" (*Defendant's Reply Memorandum*, p. 7) and distinguish the particular motivation of the defendant in making

STATEMENT OF THE FACTS

Plaintiff and Defendant are residents of Hamer, Jefferson County, Idaho (population 51 according to *Google* (citing the United States Census Bureau 2013) or 584 by another *Google* search) in Jefferson County, Idaho. Plaintiff, For The Love Of Pets Foundation, Inc., is a non-profit domestic 501C corporation set up and operated by Ms. Elliott to assist her and others financially in animal welfare efforts. It relies on donations for its operation, principally from Ms. Elliott, but has received donations from others also. In years past (more than two) Ms. Elliott had acted as the president of the Humane Society Of The Upper Valley.

On March 22, 2012 Plaintiff, Candace "Andi" Elliott, called the Neal Larson radio show on KID radio, 590/1240 AM, and 92.1 FM., joining in the discussion of the subjects being discussed, including neglected animals, whether new animal welfare laws were needed, the horse slaughter market and the proper way to dispose of unwanted horses. (a complete transcript of the radio show prepared by the defendant's counsel is set forth in the Plaintiff's deposition, Exhibit 28).

Her dialogue (excerpted from Defendant's Exhibit 28, Declaration Of Ray Wong), was as follows:

Andi	Neal, hi this is Andi from Hamer.
Neal Larson	Hi Andi. How are you?
Andi	I'm fine thins. I'm calling about the horse situation and Cala, if you ever have any questions you can always call the Sherriff's Department and as for a welfare check.
Cala	Oh good to know.
Andi	And always be sure – you're entitled to a follow-up report so always be sure of this so be sure to ask for that from the Sherriff's Department.
Cala	Okay.
Andi	But, I just to tell you all this has been going on for 15 to 20 years and I was first involved with this situation back in 2008 and then again in 2009 and this owner is notorious. She's very powerful in the _____ Horse Association and I don't why nobody has tried to follow through with this. I have some really cruel pictures of the horses back in 2008. In 2009 when I was calling back down to _____, she literally - I was - Danica Lawrence, a Channel 3 TV reporter and I were out in the roadway and this owner literally threatened to run us down with a car. Four or five officers came out. Anyhow, somehow the situation was resolved but not much was done. I don't understand.
Neal Larson	So, Andi is this an issue where she doesn't have the money and the resources to buy enough ford and to care for the animals properly? I mean, what is going on here that she has these horses even years later that aren't being taken care of?
Andi	Well, as of yesterday I was told by a friend that she has _____ sitting on her place. I was also told by a friend that used to show horses with her that her horses have always looked very marginal, so this is not something new. Of course, she continues to breed and, you know, there comes a point that you just can't afford to feed them anymore, but notwithstanding you need to put a bullet in her head or, you know, you put out a call for help and there will be people that will come in an help.
Neal Larson	Okay. Andi we – I don't know if you heard that last hour but we had a caller call in. She has horses. She lives fairly close to this woman and what does a person do? If they have animals, they can't afford them anymore and even if they're large animals – cows or horses, pigs, whatever it is – they can't afford to feed them anymore – what should they do?
Andi	Well, one person a couple of years ago, he had six horses he could no longer take care of. He put them in the trailer. Took them to the Bonneville County Landfill and shot them.
Neal Larson	And that's legal?
Andi	I don't know. It's legal to kill your own animals, yes.

Neal Larson	Okay. You can kill your animals. Is it legal to dispose of them in the landfill?
Andi	You know, that I don't know. But where else would you take them? I mean, within 24 hours the carcass by law is to be removed from the premises, but have you seen the pictures of those animals?
Neal Larson	Yeah, I mean I saw them online.
Andi	Yeah okay good. Then obviously those animals have been there a long time. _____ I mean, it's like I said, it's being going on for almost two decades.
Cala	Andi, what do you say to people who say hey, you know what, this is her personal property, she can do whatever she wants, it's not our role to interfere with what she's doing on her personal property?
Andi	Well, what I really want to say is hogwash, but what I would say professionally is that we have laws and the laws dictate that you must provide proper food, shelter and medical care for these animals in Chapter 25 of the Idaho Code. I think it's 35-(3511) or something like that. So we do have laws that should be enforced. The problem we have and I'm dealing with the situation in Madison County right now, two little ponies were so neglected, their hooves were so long and curled up like elves shoes and the whole foot has become deformed now and they both had to be euthanized. You know, we have laws but we have trouble getting law enforcement to enforce it and I've always said as meager as Idaho laws are, if we would just enforce what we have, the animals would be so much better. You know private property rights are great and all, but these are living, breathing, pain feeling animals that we're dealing with here.
Neal Larson	Yeah.
Andi	And I've always said – I'm not a tree hugger, I'm not an animal rights activist. I'm an animal welfare advocate. I just simply treat them humanely. That's all I have.
Neal Larson	Andi thank you for the call. We appreciate it and we know that this issue is near and dear to you and we appreciate you calling in today.

In response to the Plaintiff's comments, and after other callers had called on the issue of horse slaughter (Defendant's Exhibit 28, Declaration Of Ray Wong), Steve Murdock (identifying himself as "Steve from Hamer") called saying:

> If you listen - you know, words have meanings. If you listen to Andi's words, she claims not to be an animal activist or a humane society activist but that's kind of a big windy. When she said that private property just in her statement to you is alright and everything, she thinks she is above the law, she's trespassed numerous times, there's ongoing court case in Jefferson County where she got the judge disputed cause she's special. She has to have a different judge to come in out of the area. Her shenanigans cost Jefferson County taxpayers a numerous amount of dollars. West Jefferson Landfill has a place for

> deceased livestock. People with the same mentality as Andi is what's done this to this horse market. We used to sell these slaughter horses. And in Portland, Oregon there's a horse meat market. In European countries horses are consumed by people all the time. And Andi's humane society puts .02% of the money they hit everybody up back into the care of animals. (Defendant's *Memorandum of Points And Authorities In Support Of Defendant Steven L. Murdock's Motion For Summary Judgment*, p. 8, February 17, 2015)."

In response to these statements, Plaintiff, for herself and the Foundation, filed suit against Murdock for defamation, alleging several of the foregoing statements to be slanderous. Ultimately, however, in opposing summary judgment Plaintiffs narrowed their claims of slander to the defendant's statements as fact of the plaintiff having trespassed "numerous" times, and his statement, "And Andi's humane society puts .02% of the money they hit everybody up back into the care of animals." (Wong's reply memorandum, p. 12, 4/13/15). It is only the latter statement that is at issue in this appeal.

ISSUES PRESENTED ON APPEAL

a. Did the District Judge err in granting summary judgment in favor of the defendant?

b. Did the District Judge err in striking in their entirety the declaration and exhibits of Candace Elliott filed in opposition to defendant's motion for summary judgment?

c. Did the District Judge err in his findings of fact on which he based his conclusions and order for summary judgment?

d. Can an institution or entity be found to be a public person or entity because of association (i.e. Did the District Judge err in finding the Foundation a public entity by association to Ms. Elliott (Andi))?

e. Did the District Judge err in denying Plaintiffs' motion to amend their complaint?

f. Did the District Judge err in denying Plaintiffs' request to depose witnesses identified by Plaintiffs as vital to their case?

g. Was the defendant's statement regarding the plaintiff's germane to the particular public issue being discussed?

h. Was it error for the District Judge (in excluding the plaintiffs' exhibits and the declaration of Ms. Elliott, as well as the defendant's own declarations), to not consider the defendant's prior interaction with the plaintiff (set forth in her declaration and exhibits) and examine the motives for his statement ?

i. Are the plaintiffs entitled to show by circumstantial evidence the defendant's prior interactions with the plaintiffs, and the animus of the defendant in making his statement?

j. In Idaho can the animosity and motive of a defendant toward a limited public figure plaintiff, remove his declarations from the protection of the First Amendment or the protections of the Constitution of the State of Idaho?

k. Was the defendant's statements germane to the particular public issue being discussed on the talk show?

ARGUMENT

It is respectfully urged the trial court erred in striking in its entirety the declaration and exhibits of Ms. Elliott, offered in opposition to the defendant's motion for summary judgment. Without such the court found she had not offered sufficient evidence to overcome summary judgment either under a negligence standard or one of clear and convincing evidence of malice. CITE HERE Had the Court not struck her statements and exhibits in their entirety, as will be

discussed herein, it is urged the plaintiffs had ample evidence for a judge or jury to find the necessary element of malice by clear and convincing evidence to overcome summary judgment. It is recognized perhaps some exhibits and statements of the plaintiffs were not relevant, but it is urged the trial court should not have struck them wholesale, but only those items having nothing to do with the case or the defendant's allegations being responded to. It should be remembered, in proffering her declaration and exhibits found by the trial court to be not relevant, plaintiff was responding to the defendant's allegations, most of which were also not relevant, not true or without foundation.

The Idaho Supreme Court has indicated for issues involving the introduction of evidence, reviews of the trial court's decision is under an abuse of discretion [281 P.3d 120] standard. Clair v. Clair, 281 P.3d 115, 153 Idaho 278 (Idaho 2012); State v. Perry, 139 Idaho 520, 521, 81 P.3d 1230, 1231 (2003). The trial court has broad discretion to admit or exclude evidence, and to determine whether a witness is qualified as an expert. Id. at 521-22, 81 P.3d at 1231-32. " Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected." Burgess v. Salmon River Canal Co., 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

The question of whether evidence is relevant is reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion. State v. Shutz, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006). A district court's improper exclusion of evidence will be overturned on appeal if it affects a party's substantial right. Perception Const. Management, Inc.

v. Bell, 254 P.3d 1246, 1249, 1250 151 Idaho 250 (Idaho 2011, I.R.E. 103; I.R.C.P. 61(a); Burgess v. Salmon River Canal Co., Ltd., 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

There can be no argument the exclusion of Plaintiff's declaration and exhibit did not affect the plaintiffs' substantial rights.

Evidence that is relevant to a material and disputed issue … is generally admissible. *State v. Stevens*, 146 Idaho 139, 143, 191 P.3d 217, 221 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; see also *Stevens*, 146 Idaho at 143, 191 P.3d at 221. Whether a fact is of consequence or material is determined by its relationship to the legal theories presented by the parties. *State v. Johnson*, 148 Idaho 664, 671, 227 P.3d 918, 925 (2010). In this case, it is urged, the plaintiffs had a duty to respond to the allegations propounded by defendant seeking summary judgment.

A party responding to a summary judgment motion is not required to present evidence on every element of his or her case at that time, but must rather establish a genuine issue of material fact regarding the element or elements challenged by the moving party. *Thomson v. Idaho Insurance Agency, Inc.*, 126 Idaho 527, 530, 887 P. 2d 1034, 1037; *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 273, 869 P.2d 1365, 1368 (1994).

Appellate Courts review questions of relevance de novo. State v. Raudebaugh, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993); State v. Houser, 41540 (unpublished) (Idaho App. 2014).

Plaintiff Proffered Sufficient Evidence To Oppose Summary Judgment

Defendant and the trial court have asserted Plaintiffs have not offered sufficient evidence by which they can show malice by clear and convincing standard. It is respectfully urged, had the trial court not excluded Plaintiffs' exhibits and declaration in opposition to summary judgment, a review of the exhibits and statements in Plaintiffs' declaration show there was/is sufficient evidence. Although discovery had not been completed, Plaintiffs' declaration and exhibits contain, at least circumstantially, both in terms of quantity and quality by a clear and convincing standard, sufficient evidence by which a reasonable jury can find the defendant made his statements with malice, a knowledge of falsity, or in reckless disregard of the truth (i.e., with a "*high degree of awareness of probable falsity*" (*Clark, supra,* at 221)).

A plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, *see Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Tavoulareas v. Piro*, 260 U.S. App.D.C. U.S. App.D.C.9, 66, 817 F. 2d 762, 789 (en banc), cert. denied, 484 U.S. 870 (1987), and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668, 109 S. Ct. 2997 (1989); *Clark v. Spokesman Review*, 144 Idaho 427, 163 P.3d 216 (Idaho 2007): *Gardner v. Hollifield,* 97 Idaho 607, at 610, 549 P.2d 266, at 26.

As stated by the Idaho Supreme Court in *Gardner v. Hollifield,* 97 Idaho 607, at 610, 549 P.2d 266, at 269 (Idaho 1976):

> ... We take note that we are here dealing with difficult if not impossible, matters of plaintiff's proof. First, the matter of the supervisor of an employee making a determination and then expressing an opinion as to the employee's competence or incompetence is one that is highly subjective. Secondly, the proof of the superintendent's state of mind as being motivated by the intent to make a false statement as contrasted to

the voicing of genuinely held belief is also difficult if not impossible and **must resort to extrinsic circumstantial factors. Nevertheless, the enormous difficulties facing a plaintiff in such a situation does not authorize a court to issue summary judgment in the face of unresolved issues of material fact**. Here it is alleged that Campbell made false statements concerning Gardner's competence as a teacher, that Campbell knew his statements to be false and that Gardner was thereby damaged. Such allegations, if proven, present material issues of fact for resolution by a trier of fact and do not fall within the ambit of conditional privilege." (emphasis added). *Gardner v. Hollifield,* 97 Idaho 607, at 610, 549 P.2d 266, at 269 (Idaho 1976).

That a public figure plaintiff can use circumstantial evidence to prove necessary malice is also shown in the case of *Clark v. Spokesman Review*, 144 Idaho 427, 163 P.3d 216 (Idaho 2007):

> Actual malice is not defined as an evil intent or a motive arising from spite. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 111 S.Ct. 2419, 2429 (1991). In a defamation action, actual malice is a knowledge of falsity or reckless disregard of the truth. *Bandelin,* 98 Idaho at 339, 563 P.2d at 397. Mere negligence is insufficient; the plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of ...probable falsity." *Masson*, 501 U.S. at 510, 111 S.Ct. at 2429 (cite omitted) internal quotations and citations omitted). The standard of actual malice is a subjective one. *Wiemer v. Rankin*, 117 Idaho 566, 575, 790 P.2d 347, 356 (1990) citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696 (cite omitted) (1989) (emphasis removed and internal quotations omitted)). **However, although actual malice is a subjective standard, self-interested denials of actual malice from the defendant can be rebutted with other evidence.** (emphasis added). *Clark v. Spokesman Review*, 144 Idaho 427, 163 P.3d 216 (Idaho 2007); *Gardner v. Hollifield,* 97 Idaho 607, at 610, 549 P.2d 266, at 269 (Idaho 1976).

> Since the Idaho Supreme Court's ruling in *Clark v. Spokesman Review* , Id., (which with its progeny seemingly indicate the motives and personal animosity of the declarant are not relevant), the United States Supreme Court, in *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-7519, ruled otherwise, and indicated in First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751;Bose Corp. v. Consumers Union of United States, Inc., Page 454 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting New York Times, supra, at 284-286, 84 S.Ct. 710, 11 L.Ed.2d 686). Further, that in considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including

what was said, where it was said, and how it was said. *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751.

The United States Supreme Court, in *Phelps*, Id., indicated in examining the content, form and context of alleged defamatory speech it is proper for the court to consider any pre-existing relationship or conflict between the speaker and the person defamed. *Snyder v. Phelps*, 562 U.S. 443 (2011), 131 S.Ct. 1207, 179 L.Ed.2d 172, 79 U.S.L.W. 4135 09-751; Tayoun v. City of Pittston, 39 F.Supp.3d 572, 581 (M.D.Pa. 2014); *Gleason v. Smolenski*, No. SC 19342, (Connecticut Nov. 2015); cf *Greene v. Tinker*, 332 P.3d 21(Alaska 2014).

In subsequent decisions by other courts, relying on *Snyder, supra*, it is held a speaker's personal motivation for his or her speech should be considered and **may remove the speech from the province of public concern and the protection of the First Amendment**. *Tayoun v. City of Pittston*, 39 F.Supp.3d 572, 581 (M.D.Pa. 2014).

The First Amendment does not protect speech made for some purpose other than for which the privilege is given. *Greene v. Tinkler*, 332 P. 3d , 21, 36 (Alaska 2014); *Gleason v. Smolenski*, No. SC 19342 (Connecticut 2015).

In attempts to distinguish between public and private concerns, courts have placed emphasis on the speaker's motivations for the speech under the context element of the inquiry--primarily personal motivations for the speech may remove speech from the province of public concern. *Tayoun v. City of Pittston*, 39 F.Supp.3d 572, 581 (M.D.Pa. 2014);See, e.g., *Feldman v. Philadelphia Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1994). " [P]ublic speech 'cannot constitute

merely personal grievances.'" *Brennan v. Norton*, 350 F.3d 399, 412 (3d Cir. 2003) (quoting Feldman, 43 F.3d at 829). "Speech that is necessary or appropriate to enable citizens to make informed decisions about the operation of their government is of public concern, while speech by public employees addressing individual personnel disputes and grievances is not." *Pool v. VanRheen*, 297 F.3d 899, 906 (9th Cir. 2002).

In the instant case, a review of the content, form and context under which the defendant's statements were made, as contained in the stricken declaration and exhibits of the Plaintiff (as well as the defendant and his declarants) show a pre-existing relationship and conflict between the parties, and the animus of the defendant when he made his statements. Such evidence, stricken by the trial court, demonstrate the defendant's motives for his statements were not to promote public discourse or comment on a matter of public issue, but to harm the plaintiffs. Such evidence show his statement was "thinly veiled revenge" (*Gleason v. Smolenski*, No. SC 19342, (Connecticut 2015) for the plaintiff's having called for a welfare check of Defendant's brother's horses (paragraphs 31-34, Declaration Of Plaintiff In Opposition To Defendant's Motion For Summary Judgment, and Exhibits 6, 7 thereto), triggering a complaint by the brother's neighbor for trespass against the plaintiff, for which she was acquitted. Other examples of the defendant's animus to the plaintiff, his son and witnesses submitting declarations for the defendant are also contained in the plaintiff's declaration and exhibits, and amply demonstrate the likelihood Plaintiff's ability to show by clear and convincing evidence the defendant's "actual malice" and reckless disregard for the truth of his statements.

The courts hold the first amendment cannot be used as a cloak or veil for intentionally tortious conduct that is only tangentially related to the claimed matter of public concern. *Gleason v. Smolenski*, No. SC 19342, (Connecticut 2015); See *Holloway v. American Media, Inc.*, supra, 947 F.Supp.2d 1261–65 (first amendment did not, as matter of law, shield tabloid newspaper from intentional infliction of emotional distress claim in light of allegations that it knowingly and maliciously published false information about death and burial of plaintiff's missing daughter, given preexisting animus between parties); cf. *United States v. Sergentakis*, United States District Court, Docket No. 15CR33 (NSR) (S.D.N.Y. June 15, 2015) (defendant's accusations that victim had engaged in child molestation and animal cruelty could be protected under first amendment in other contexts, but not in cyberstalking and witness retaliation case wherein they were ''thinly veiled'' revenge for victim's cooperation with investigation that led to defendant's guilty plea on other charges); People v. Little, Docket No. 4-13-1114, 2014 WL 7277785, *7 (Ill.App. December 22, 2014). But cf., contra, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 111 S.Ct. 2419, 2429 (1991); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666, 109 S. Ct. 2997 (1989); *Clark v. Spokesman-Review,* 163 P.3d 216, 144 Idaho 427 (Idaho 2007).

It is urged the defendant's *animus defamandi* and personal motivation for his speech removed his statement from the purpose which the Constitution of the United States and the constitution of the State of Idaho protect, i.e., public comment on public issues; and that he was "dressing intentionally tortious conduct in the garb of the First Amendment" *Gleason v. Smolenski* , Id. As the Connecticut Supreme Court has said, "Even speech that relates to a matter of public interest loses its protection … if it is uttered with an intent merely to harass and with no

intent to persuade, inform, or communicate." (*Gleason v. Smolenski*, No. SC 19342, (Connecticut 2015)).

Also, if the plaintiff is a public person (or a limited public person), courts are required to examine the *particular* public issue in play and if the defendant's statement is **germane** to the matter of public interest being debated. This is illustrated by the case of *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577, wherein the California Court of Appeals, states:

> The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues. (Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351; Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 253 [208 Cal.Rptr. 137].) Copp v. Paxton (1996) 45 Cal.App.4th 829, 845-846 [52 Cal.Rptr.2d 831] sets forth the elements that must be present in order to characterize a plaintiff as a limited purpose public figure. First, there must be a **public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants**. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, **the alleged defamation must be germane to the plaintiff's participation in the controversy**.

That the defendant's statements must be germane to the plaintiff's participation in a particular controversy is further shown in a recent unpublished opinion the California Court of Appeals, in *LifeVantage Corp. v. MacFarland*, A141057, California Court Of Appeals, First District Fifth Division (2015) (Unpublished), wherein the Court stated:

> "The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a ***specific*** public controversy, thereby becoming a public figure on a ***limited range of issues***." (Ampex Corp. v. Cargle (2005) 128 Cal.App.4th 1569, 1577, italics added (Ampex).) To become a limited purpose public figure, a party must inject itself into "an existing public controversy[.]" (Carver v. Bonds, supra, 135 Cal.App.4th at p. 353, italics added.) In what our colleagues in Division One have called "a much cited analysis" (Copp v. Paxton (1996) 45 Cal.App.4th 829, 845), the court in Waldbaum v. Fairchild Publications, Inc. (D.C. Cir. 1980) 627 F.2d 1287 (Waldbaum) explained that "[t]o determine whether a controversy indeed existed and, if so, to define its contours, the

> judge must examine whether persons actually were discussing some ***specific question***." (Id. at p. 1297, italics added, fn. omitted; accord Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 254-255 ["courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies"], italics added.) It is therefore clear that the public controversy into which a limited purpose public figure thrusts itself must be one that existed before the defendant made the defamatory statements at issue, and the alleged defamation must be ***germane*** to the plaintiff's participation in that preexisting controversy. (Ampex, supra, 128 Cal.App.4th at p. 1577.)" *LifeVantage Corp. v. MacFarland*, A141057, California Court Of Appeals, First District Fifth Division (2015) (Unpublished) (bolded italics added).

It is urged the defendant's statements were not germane to the issue being discussed on the radio talk show. The subject of solicitation or misuse of charitable funds for the care of animals was never brought up nor advocated by the plaintiff. These were subjects injected into the conversation from left field by the defendant, solely for spite. Again, the language of the Idaho Supreme Court in *Wiemer* is instructive:

> "The Supreme Court has stated that " '[w]hether ... speech addresses a matter of public concern must be determined by [the expression's] content, form, and context ... as revealed by the whole record.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 2946, 86 L.Ed.2d 593, 604 (1985) (quoting *Connick v. Myers,* 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708, 720." Wiemer v. Rankin, 117 Idaho 566, 570-571, 790 P.2d 347, 352 (Idaho 1990.

In his order granting the defendant's motion for summary judgment (Decision And Order Re: Motion For Summary Judgment, April 30, 2015) the trial court recites the following as having been stipulated to:

> "The parties have stipulated that:
> 14. Ms. Elliott has written at least dozens of letters to the editor regarding political and animal rights issues. Deposition of Candace Elliott (Elliott Depo.) pp. 154-158.
> 15. Ms. Elliott is a state coordinator for the Tea Party Patriots. Elliot Depo. p. 52.
> 16. As part of her duties as a state coordinator, Ms. Elliott organizes and speaks at public rallies. Elliott Depo. p. 53.

17. Ms. Elliott announced her candidacy for Sheriff of Jefferson County through the media. Elliott Depo. p. 288.
18. Ms. Elliott presents herself through the media as a political advocate. Elliott Depo. p. 301.
19. Ms. Elliot uses the foundation to help fund her animal advocacy activities. Elliott Depo. p.
20. For the Love of Pets Foundation relies on public donations for its operation. Plaintiff's brief in opposition to summary judgment p. 24.
21. Ms. Elliot used to be the president of the Humane Society of the Upper Valley. Elliott Depo. p. 18.
22. The For the Love of Pets Foundation is similar to a humane society. Elliott Depo. p. 47.
23. That there was an advertisement in the public media mentioning that the Humane Society used less than 1% of the donations received for the benefit of animals. Admitted in Open Court.
24. Ms. Elliott was convicted one time for trespassing. Elliott Depo. pp. 59-60.
25. Ms. Elliott was charged multiple times for trespassing. Elliott Depo. p. 54.
26. Defendant's brother and sister-in-law were witnesses to one such charge for trespassing. Plaintiff's brief in opposition to summary judgment pp. 21-22."

Plaintiffs do not recall, and have not found in the record, the basis of the Court's above finding of fact number 10, allegedly "Admitted in Open Court." It is urged such finding is in error and without foundation.

Similarly, Plaintiffs believe in his finding the plaintiffs to be public figures, the trial court's reliance on factors: (1) with regard to political issues; (2) and (3), her activity as a state coordinator for the Tea Party Patriots; (4) her announcing her candidacy for sheriff\; and (6), her political advocacy for the Tea Party, was improper. A citizen's participation in community and professional affairs does not automatically render him or her a public figure. 'It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation *in the particular controversy* giving rise to the defamation (or invasion of privacy).' *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789 (1974); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (Idaho 1977). Likewise,

"A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolsten v. Readers Digest Ass'n.* 443 U.S. 157, at 167, 99 S.Ct. 2701, at 2707, 61 L.Ed.2d at 460; *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347, (Idaho 1990).

SUMMARY

It was error for the Court to exclude the entire declaration and exhibits of Andi Elliott, thereby disallowing the plaintiff's opportunity to oppose the summary judgment. Her declaration and exhibits offer ample evidence by which a court and a jury can find by clear and convincing evidence the defendant acted with malice. The court properly should have excluded only those portions not relevant to the case or not given in response to the allegations of the defendant and his declarants. The plaintiff's statements and her exhibits proffered were provided in rebuttal to the allegations of the defendant and his declarants, and the plaintiff had a duty to offer such. To the extent plaintiff's declaration and exhibits were not relevant it was only due to the fact she was responding to non-relevant or untrue allegations of the defendant.

Additionally, several of the trial court's findings of fact are not relevant, or accurate or founded on the record. The reliance by the court in looking at the plaintiff's civic activity and writings, unrelated to animal welfare, do not make her a public figure.

The trial court erred in not examining the content, form and context of the defendant's statement, and failing to examine the defendant's improper motive for his statements.

The defendant's statement was thinly veiled revenge, at most tangentially related, if at all, (Plaintiff denies it was) to the claimed matter of public concern being discussed; and his personal motivation and animosity under the circumstances (evidenced in the declarations of the parties), remove his statement from the province of public issue or concern. He should not be allowed, as the Connecticut Supreme Court said, to dress his intentional tortuous conduct in the garb of the First Amendment. The purpose of protecting free speech on issues of public concern were not a concern of the defendant's speech, and he should not be allowed the protection of the First Amendment.

It is respectfully urged the trial court erred in disallowing the plaintiff to proceed with deposing the defendant and witnesses Plaintiff deemed vital to opposing summary judgment, and failing to allow the Plaintiff to amend her complaint.

Respectfully submitted this 14 day of January, 2016.

Kent E. Whittington, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document, MOTION FOR EXTENSION OF TIME TO FILE BRIEF, upon the following this 15 day of November, 2015, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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