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Irish v. Hall Appellant's Brief 2 Dckt. 44794

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS IRISH and WANDA IRISH, husband and wife,

Plaintiffs/Appellants/Cross-Respondents,

v.

JEFFREY HALL and DONA HALL, husband and wife,

Defendants/Respondents/Cross-Appellants.

DOCKET NO. 44794-2017

Kootenai County Case No. CV-2015-5814

APPELLANTS' OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE CYNTHIA K.C. MEYER
DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a suit claiming defamatory slander and seeking injunctive relief brought by Dennis and Wanda Irish ("Irishes") against Jeffrey and Donna Hall ("Halls"). After the Irishes rested their case in chief at trial, the district court directed verdict again them and dismissed the action in its entirety.

B. Course of the Proceedings

On August 14, 2015, the Irishes filed a Verified Complaint for Injunctive Relief claiming defamatory slander against the Halls. R Vol. I, pp. 16-44. On October 2, 2015, the Halls filed their Answer to Complaint and Affirmative Defenses. R Vol. I, pp. 58-65. Many of the statements alleged by the Irishes were admitted by the Halls. *Id.*

A scheduling order was entered November 10, 2015. R Vol. I, pp. 66-67. A three-day jury trial was scheduled to commence November 28, 2016. R Vol. I, p. 72. The Halls submitted their trial brief on November 21, 2016. R Vol. I, pp. 268-70. The Irishes submitted their trial brief on November 23, 2016. R Vol. II, pp. 316-325.

The jury trial commenced November 28, 2016. Tr Vol. I, p. 3. After the Plaintiffs' rested their case in chief, the Halls attorney stated, "I guess I would like to make a directed verdict." R Vol. I, p. 195, ll. 6-7.

Although no motion per se was made, argument was then presented to the district court for its consideration on whether it should direct verdict against the Irishes. Tr Vol. I, p. 195, l. 9 – p. 100, l. 14. The Court perceived the Halls' counsel's statement as a motion for directed verdict based upon its statement that "[l]ast night at the end of the day, the defendant raised a motion for directed verdict." Tr Vol. II, p. 225, ll. 21-22.

The district court granted the motion for a directed verdict. Tr Vol. II, p. 229, ll. 14-19. The district court entered its written Order Granting Defendant's Motion for Directed Verdict on December 1, 2016. R Vol. II, pp. 335-336. A separate Judgment was entered December 1, 2016. R Vol. II, pp. 337-338.

On December 13, 2016, the Halls filed their Memorandum of Attorney Fees and Costs. R Vol. II, pp. 339-347. The Irishes filed their objection to the requested attorney fees and costs, and a declaration in support of the objection, and a motion to disallow such fees and costs on December 23, 2016. R Vol. II, pp. 348-399. On January 10, 2017, the Halls filed a Motion to Strike a Portion of Plaintiffs' Objection to Defendants' Memorandum of Attorney Fees and Costs. R. Vol. II, pp. 400-402.

Even though the memorandum and objection were filed, the Irishes then filed a separate motion to disallow the attorney's fees and costs on January 10, 2017. R Vol. II, pp. 403-404. The Halls responded by moving for an award of attorneys' fees and costs and supporting memorandum on January 31, 2017. R Vol. II, pp. 462-478.

The Halls' request for fees and costs was heard by the trial court on February 14, 2017. R Vol. III, pp. 580-581. An Order Granting Defendants' Costs was filed February 17, 2017. R Vol. I, p. 15. The district entered its order denying the request for attorney fees on February 21, 2017. R. Vol. III, pp. 580-581.

The Irishes filed their Notice of Appeal to the Supreme Court on January 10, 2017. R Vol. II, pp. 405-415. It was later amended on January 25, 2017. R Vol. II, pp. 451-461. The Halls filed a Notice of Cross-Appeal on March 17, 2017. R Vol. III, pp. 582-585.

C. Concise Statement of Facts

This case involves a series of statements made by Jeffrey Hall and Dona Hall about Wanda Irish and Dennis Irish. Wanda Irish has been the mayor of the City of Harrison since 2010. Tr Vol. I, p. 102, ll. 7-12. Dennis Irish is her husband. R Vol. I, p. 16, ¶ 1, p. 58, ¶ 1 (complaint and answer).

The tension between the Halls and the Irishes appears to have arisen from an incident which occurred on May 28, 2012, at approximately 12:00 a.m., when the Halls' truck and boat trailer were towed off a public easement. R Vol. p. 17, ¶ 5, p. 59, ¶ 3 (complaint and answer); Tr Vol. I, p. 110, l. 7 – p. 112, l. 8; p. 168, ll. 4-7. Jeffrey Hall telephoned Wanda Irish and accused her of having his vehicle and trailed towed. Tr Vol. I, p. 110, l. 7 – p. 112, l. 8; p. 168, ll. 4-7. Due to the vulgar language used by Mr. Hall, Mayor Irish hung up on him. *Id.* He and his wife, Dona continued to call several more times in the same time period. *Id.* In total, there were eight consecutive calls approximately fifteen to thirty seconds apart, from Jeffrey Hall and Dona Hall answered by Mayor Irish wherein the Halls used vulgar language and accused her of causing Jeffrey Hall's truck to be towed, to which she responded by hanging up the phone. Tr Vol. I, p. 112, l. 9 – p. 113, l. 20. Dennis Irish answered the ninth call and threatened to call the sheriff if the telephone harassment did not stop. Tr Vol. I, p. 113, l. 18- p. 114, l. 5; p. 182, l. 9 – p. 183, l. 20.[1]

Soon after this towing incident, Jeffrey Hall put posters in his vehicles accusing Mayor Irish of being a liar. Tr Vol. I, p. 117, l. 8 – p. 119, l. 18; Trial Exhibit 1.[2] He also informed the

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[1] A subsequent inquiry by the Mayor revealed that the camp host had the car towed. Tr p. 114, ll. 6-21.

[2] The trial court ruled these 2012 statements were outside the statute of limitations, but allowed them to give context to the Halls' statements and actions. This ruling is not challenged on appeal.

City Council that Mayor Irish was a liar and had his car towed. Tr Vol. I, p. 115, l. 22 – p. 116, l. 7. Mayor Irish was visiting relatives out of town when the car was towed. Tr Vol. I, p. 116, l. 13-p. 117, l. 7.18. She did not request the Kootenai County Sheriff's deputy to have the car cited, or towed. Tr Vol. I, p. 171, ll. 14-15. Jeff Hall and Dona Hall admitted since the towing incident to the date the complaint was filed in August 2015, Jeffrey Hall and Dona Hall have continued to demand an apology form Wanda Irish for their car being towed and payment by her in the amount of $200 for the May 28, 2012, tow bill. R Vol. I, p. 17, ¶ 5, p. 59, ¶ 4 (complaint and answer).

The Halls' grudge over the towing incident manifested in several areas. On May 7, 2015, the Mayor's brother and sister-in-law reserved space at the City's campground. Tr Vol. I, p. 125, l. 5 – p. 126, l. 11. The Mayor loaned her boat to her brother for the week and he moored it at the dock reserved for paying guests at the campground. *Id.* Jeff Hall took offense to the presence of the boat and confronted the Mayor at City Hall, claiming it was illegal for her boat to be moored at the campground dock and claiming something should be done about it. Tr Vol. I, p. 127, ll. 6-17. When the Mayor explained to him it was not illegal because she loaned her boat to her brother for the week, and he was a paying campground guest, Hall remarked "There she goes, She thinks she's king again [sic]." *Id.* Prior to this incident, Jeffrey Hall had accused the Mayor of favoring her family members on social media. Tr Vol. I, p. 129, l. 20 – p. 130, l. 8. The Halls admitted Jeffrey Hall posted a picture of Plaintiffs' boat to social media. R Vol. I, p. 19, ¶ 13; p. 59, ¶ 13 (complaint and answer).

On May 10, 2015, Kathleen Durfee, the park manager for Idaho Parks and Recreation, who oversees the Coeur d'Alene, Trail, utilized the conference room at City Hall for a meeting she was holding. Tr Vol. I, p. 121, l. 6 – p. 122, l. 17. Neither the Mayor nor the City participated in the meeting because it was unrelated to City business, Tr Vol. I, p. 121, l. 18 – p. 123, l. 9. At the

conclusion of the meeting, Jeffrey Hall entered City Hall and accused the Mayor in front of her staff and the 8-10 officials leaving the meeting of holding "secret meetings" in violation of the public open meeting law, and once again accused her of being a liar when she denied the allegation. Tr Vol. I, p. 122, l. 10- p. 125, l. 4.

In 2013, the Halls accused Dennis Irish of criminally stalking them. Tr Vol. I, p. 158, l. 19 – p. 159, l. 25; p. 180, l. 22 – 182, l. 3; Trial Exhibit 2. The State of Idaho filed charges against Dennis Irish, which were later dismissed. Tr Vol. I, p. 132, l. 1 – p. 136, l. 12; p. 180, l. 22 – p. 181, l. 11; Trial Exhibit 2. The Irishes spent $5,000 to defend the criminal charges. *Id.*

The City of Harrison maintains a gravel easement at the Gateway Marina. Tr p. 105, ll. 7 -15. In June or July 2015, Mayor Irish went to the area to investigate an issue involving Jeffrey Hall and the easement. Tr Vol. I, p. 106, ll. 19-23. The Halls claimed gravel had been stolen from the easement. Tr Vol. I, p. 107, ll. 15-20. Three sheriff's deputies were present when she arrived. Tr Vol. I, p. 106, l. 19 – p. 107, l. 3. Jeffrey Hall demanded Mayor Irish remove from the easement, again using vulgar language. Tr Vol. I, p. 107, ll. 1-8. In fact, any gravel on the easement was the City's. *Id.* Mayor Irish had directed the City's public works employee, Justin Little, do gravel maintenance work on the easement. R p. 130, l. 21 – p. 131, l. 25. Jeffrey Hall again accused Wanda Irish of being a liar. *Id.*

The Halls admitted at the outset of the litigation that on June 4, 2015, they received a cease and desist letter warning and notifying them to cease and desist from harassing and slandering the Irishes. R Vol. I, p. 20, ¶ 20; p. 59, ¶ 18 (complaint and answer); pp. 32-33 (exhibit to complaint). The Halls admitted on July 4, 2015, Jeff Hall distributed a letter to the campground host accusing Mayor Irish and her husband of spying and corruption. R Vol. I, p. 22, ¶ 27; p. 43, p. 61, ¶ 25 (complaint and answer).

The Halls admitted between July 3, 2015 to July 12, 2015, Defendants business wi-fi access designation was "Mayor Wanda Irish Terrorist." R Vol. I, p. 20, ¶ 22; p. 59 ¶ 20 (complaint and answer). Around July 3, 2015, Wanda Irish discovered that her cellular phone showed an available wi-fi beam (access portal) named "Mayor Wanda Irish terrorist" when accessed at one location, and again on July 12, 2015, (although Trial Exhibit 3, page 2, showed it truncated "Mayor Wanda Irish terror..." for the July 12, 2015 phone snap shot). Tr Vol. I, p. 146, l. 4 – p. 149, l. 17; p. 149, l 24 – 150, l. 7; Trial Exhibit 3.

After discovering the first wi-fi beam, another cease and desist letter was sent by the Irishes' attorney on July 7, 2015, to the Defendants. R Vol. I, p. 152, l. 8 – 153, l. 4; Trial Exhibit 4. The Halls admitted they received the letter dated July 7, 2015, from the Irishes' attorney, again warning them to cease slanderous statements against the Irishes. R Vol. I, p. 21, ¶ 23, p. 39, p. 60, ¶ 21 (complaint and answer).

Wanda Irish then discovered the business wi-fi portal name was changed to "[s]he really is a terrorist". Tr Vol. I, p. 153, l. 21 – p. 154, l. 16. Shortly before trial, Jeff Hall admitted to Wanda Irish he put out the wi-fi beams which called Wanda Irish a terrorist, and it was wrong and childish. R Vol. I, p. 150, l. 18 – p. 151, l. 4. The Halls admitted on or about July 9, 2015, Defendants changed their business wi-fi access designation to "she really is a Terrorist". R Vol. I, p. 21, ¶ 21; p. 60, ¶ 22 (complaint and answer).

Dennis Irish testified that he is a corporate network consultant and specializes in maintaining networks for corporations that have between 20 and 120 workstations. Tr Vol. I, p. 177, l. 11 – l. 6. Dennis Irish works with Dominic Como, who was gradually taking over his business. R. Vol. I, p. 178, ll. 15-20. In approximately July 2015, Dennis Irish and Como were making a business service visit to Harrison Dock Builders. Tr Vol. I, p. 178, l. 21 – p. 180, l. 18.

Como drove the vehicle. *Id.* Dona Hall was standing in the public road visiting with another gentleman. *Id.* They did not move over to allow the vehicle to pass, so Como passed them using the shoulder of the road. *Id.* Dona Hall then made inappropriate gestures at the vehicle. *Id.*

Dona Hall then called Mayor Irish at City Hall and accused Dennis Irish of stalking her. Tr Vol. I, p. 158, ll. 19- p. 159, l. 20. Then Jeff Hall and Dona Hall went to City Hall and confronted Mayor Irish, and again alleged Dennis Hall was stalking Dona Hall because he had used the public road near their home. *Id.* Wanda Irish explained that Dennis Irish was going on a client call. *Id.*

After this occurrence, Wanda Irish saw a wi-fi beam which read: "Dennis and Wanda Irish stocking U2". Tr p. 157, l. 24 – p. 158, l. 18. The Halls admitted on or about July 12, 2015, they changed their home wi-fi designation to "Dennis and Wanda Irish stocking [sic] U2." R Vol. I, p. 21, ¶ 25; p. 60, ¶ 23 (complaint and answer). This wi-fi access was broadcast long after the criminal case against Dennis Irish was dismissed for lack of evidence.

The final wi-fi beacon said, "Move Irish." Tr Vol. I, p. 160, ll. 17 – 25; Trial Exhibit 8. The Halls admitted on August 6, 2015, they changed their home wi-fi access to "Move Irish". R Vol. I, p. 22, ¶ 28; p. 60, ¶ 26 (complaint and answer).

The trial court recognized "[d]efamation is a morass of gray areas. It's very difficult to prove. It kind of reminds me of the Shrek movie when Shrek talks about onions and having layers and you peel back a layer and there's another layer and another layer and another layer." Tr Vol. 2, p. 229, ll. 14-19.

The district court held all the statements raised at trial were published, but concluded all were opinions. Tr Vol. II, p. 226, l. 3 – p. 238, l. 4. On appeal, the Irishes claim the district court

erred when ruling on the publication "Dennis and Wanda Stocking U2". While the district court recognized this statement was published[3], it held it was an opinion. The Court found:

> The next statement, "Dennis and Wanda [s]tocking U2", again, who are they talking about? And then with the misspelling of "stalking," again we know that what was intended is s-t-a-l-k, stalking, harassing, spying on, or at least I think that's the intent. I think that's a reasonable inference based on the evidence that that was the intent of that name, but it's misspelled s-t-o-c-k-i-n-g, and the there's "U2," you, the letter, and 2, the numeral.
>
> For someone who is seeing that for the first time, what does that mean? Does it mean that they're actually stocking U2 albums for sale? Sounds kind of preposterous, but I don't know that it's any more preposterous than another interpretation. And, again, I believe it's an opinion. I don't believe it's subject to something that can be proven or disproven.

Tr Vol. II, p. 236, l. 11 – p. 237, l. 1.

II. ISSUES ON APPEAL

1. Did the district court err in determining "Dennis and Wanda stocking U2" was publication of Hall's opinion instead of publication of an alleged criminal act?

III. STANDARD OF REVIEW

In *Smith v. Mitton*, 140 Idaho 893, 897, 104 P.3d 367, 371 (2004), this court reviewed the standard of review for when a directed verdict is granted and held:

> "In determining whether a directed verdict or judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally." *Lunders v. Estate of Snyder*, 131 Idaho 689, 695, 963 P.2d 372, 378 (1998) (quoting *Quick v. Crane,* 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986)). Therefore, this Court "must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury." *General Auto Parts Co., Inc. v. Genuine Parts Co.,* 132 Idaho 849, 855, 979 P.2d 1207, 1213 (1999) (quoting *Herrick v. Leuzinger,* 127 Idaho 293, 297, 900 P.2d 201, 205 (Ct. App. 1995)).

[3] Tr Vol. II, p. 235, l. 14 – p. 236, l. 2.

> "The 'substantial evidence' test does not require the evidence be uncontradicted. It requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper." *Id.* at 855, 979 P.2d at 1213 (quoting *All v. Smith's Mgmt. Corp.,* 109 Idaho 479, 480, 708 P.2d 884, 885 (1985)). A directed verdict is proper, then, "only where the evidence is so clear that all reasonable minds would reach only one conclusion: that the moving party should prevail." *Sheridan v. St. Luke's Reg'l Med. Ctr.,*135 Idaho 785, 785, 25 P.3d 88, 98 (quoting *Student Loan Fund of Idaho, Inc. v. Duerner,* 131 Idaho 45, 51, 951 P.2d 1272, 1278 (1997)).

Further in *Quick v. Crane*, 111 Idaho 759, 763-64, 727 P.2d 1187, 1191-92 (1986), this court held:

> Whether that evidence is sufficient to create an issue of fact is purely a question of law. *Gmeiner v. Yacte*, 100 Idaho 1, 4, 592 P.2d 57, 60 (1979); *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 883, 664 P.2d 787, 788 (Ct.App.1983). [T]he trial judge is not free to weigh the evidence or pass on the credibility of witnesses and make his own separate findings of fact and compare them to the jury's findings as he would in deciding on a motion for a new trial. *Gemeiner, supra* 100 Idaho at 4, 592 P.2d at 60. Rather, the trial judge must view all of the evidence and all inferences drawn therefrom in favor of the non-moving party, and decide if there was substantial evidence to justify submitting the case to the jury, or, in other words, that there can be but one conclusion as to the verdict that reasonable minds could have reached. *Stephens, supra* 106 Idaho at 253, 678 P.2d at 45; *Brand S Corp. v. King*, 102 Idaho 731, 733, 639 P.2d 429, 431 (1981).
>
> In determining whether a directed verdict or judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally. *Gmeiner, supra* 100 Idaho at 4, 592 P.2d at 60. Whether a verdict should be directed, as noted above, is purely a question of law and on those questions, the parties are entitled to full review by the appellate court without special deference to the views of the trial court. Wright & Miller, 9 Federal Practice & Procedure § 2536 at 595 (1971 & Supp.1985); *Carey v. Jackson*, 603 P.2d 868, 877 (Wyo.1979).
>
> Hence, this Court must review the record of the trial below and draw all inferences from the evidence in a light most favorable to the non-moving party to determine if there was substantial evidence to justify submitting the case to the jury.

IV. ARGUMENT

A. Introduction

The district court correctly perceived its role in granting a Rule 50 motion for directed verdict. And much of what it ruled regarding statements being opinions was correct. However, in concluding that the published accusation by the Halls that Dennis and Wanda Irish were stalking people, the trial court strayed from the proper analysis and committed error. The district court erred by failing to recognize that the published statement "Dennis and Wanda Irish stocking U2" was defamation per se, and when considered in combination with the other facts of this case presented a question of fact to be determined by a jury.

B. Legal Standard

"In determining the defamatory character of a publication [the article] must be read and construed as a whole; the words used are to be given their common and usually accepted meaning and are to be read and interpreted as they would be read and understood by the persons to whom they are published." *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 508, 275 P.2d 663, 666 (1954). In analyzing whether a statement is defamatory *per se*, this Court in *Weeks v. M-P Publications*, 95 Idaho 634, 636-37, 516 P.2d 193, 195-196 (1973), has held that "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." (citing *Bistline v. Eberle*, 88 Idaho 473, 401 P.2d 555 (1965); *Gough v. Tribune-Journal Co.*, 75 Idaho 502 (1954).

With this, if a statement is one that "impute[s] conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute and such kind as to involve infamous punishment [death or imprisonment] or moral turpitude conveying the idea of

major social disgrace" it is defamatory *per se*, "that is, actionable without allegation and proof of special damages..." *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 890, 522 P.2d 1102, 1111 (1974).

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. *Clark v. Spokesman-Review*, 144 Idaho 427, 430 (2007). This is the standard regarding Dennis Irish.

Wanda Irish is a public figure. "[I]f 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*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007).

"Actual malice is not defined as an evil intent or a motive arising from spite. In a defamation action, actual malice is knowledge of falsity or reckless disregard of truth. 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. The standard of actual malice is a subjective one. However, although actual malice is a subjective standard, self-interested denials of actual malice from the defendant can be rebutted with other evidence." *Id.* at 29.

C. The district court erred as a matter of law in holding the publication "Dennis and Wanda Irish stocking [stalking] U2 [you too]" was merely an opinion, and directing verdict against the Irishes.

The district court erred when it found that the published statement "Dennis and Wanda Irish stocking U2" was an opinion. The trial court failed to consider all elements of the testimony

presented by the Plaintiffs as true, and to draw every legitimate inference most favorably to the Irishes.

The first element of defamation that the trial court considered was whether the Halls communicated information concerning the Irishes to others. While the district court recognized that a wi-fi access designation met the definition of a publication to others because it was picked up by all devices with wireless capabilities within range, including cellular phones, the district court observed that the statement did not indicate who it was talking about, and therefore was not a publication about the Irishes.

The statement itself specifically says "Dennis and Wanda". Harrison is a very small community of approximately 200 people. Tr Vol. I, p. 142, ll. 20-21; p. 181, ll. 4-5. As demonstrated in the Statement of Facts, the Halls had engaged in an extensive campaign spanning several years of communicating negative opinions about the Irishes, whose first names were Dennis and Wanda, which increased exponentially in the summer of 2015, within this small community. They had even reported to the Kootenai County sheriff's department that Dennis Irish was stalking Dona Hall, leading to a criminal charge against Dennis Irish.

Although the published statement may not have included the Irishes' last name, a trier of fact could easily determine, based upon the totality of the evidence, that the communication referred to the Irishes. These facts included the small size of the community, the 2012 towing dispute, the 2012 posters in their vehicles accusing Wanda Irish of being a liar, the 2013 criminal charges filed by the Halls against Dennis Irish, the campground flyer accusing the Irishes of spying, the hostile attitude and continuing allegation that Wanda Irish was a liar expressed during the 2015 gravel incident, and the several wi-fi beam publications in 2015 with negative comments about Wanda Irish. It is reasonable to believe that those members of the community who have

observed this ongoing smear campaign ran by the Halls would understand the accusation was targeted and Dennis and Wanda Irish. Further, both Dennis Irish and Wanda Irish confirmed that people within the community approached and inquired about the statements made via the wi-fi beam. Tr Vol. I, p. 142, l. 8 – p. 143, l. 6. Had there been confusion regarding which "Dennis and Wanda" was referenced in the publication, there would not have been such inquiries.

The next concern raised by the trial court was the misspelling of "stalking" as "stocking" and using the phrase "U2". The trial court recognized that in the context of the admitted facts and testimony received at trial, a reasonable inference could be drawn from the evidence that "stocking" was misspelled and was intended to impart that Dennis and Wanda Irish were stalking people. Further, in this day and age of texting and the use of truncated slang, a jury could have reasonably found that "U2" was slang for "you too." Therefore, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the Irishes, there existed substantial evidence to justify submitting the case to the jury. It was for the jury, not the court, to determine if the publication concerned Wanda and Dennis Irish as alleged.

The trial court in its analysis then reasoned that a jury might infer that Dennis and Wanda Irish were stocking record albums for sale from the band "U2". This analysis was improper with respect to a directed verdict. It was not true to the analysis in which the trial court was to engage. A directed verdict is proper "only where the evidence is so clear that all reasonable minds would reach only one conclusion: that the moving party should prevail." *Sheridan v. St. Luke's Regional Medical Center*, 135 Idaho 775, 785, 25 P.3d 88, 98 (quoting *Student Loan Fund of Idaho, Inc. v. Duerner*, 131 Idaho 45, 51, 951 P.2d 1272, 1278 (1997)).

The district court did not discuss the remaining elements in its analysis. Instead, it concluded that regardless of which meaning discussed above was imparted to the statement by a

jury, even though it was an exaggeration and hyperbolic, it was a statement of opinion. Tr Vol. 2, p. 236, l. 8-10. Statements of opinion enjoy the constitutional protection provided by the First Amendment. *Elliott v. Murdock*, ___ Idaho ___, 385 P.3d 459, 465 (2016) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007 (1974)).

Turning to the second element, the Irishes had to provide evidence that the publication was defamatory. Stalking is a crime in Idaho. *See* I.C. §§ 18-7905 and 18-7906. If convicted of stalking in the first degree (I.C. § 18-7905), it is a felony and carries a penalty that can include imprisonment for a period not to exceed five (5) years. If convicted of stalking in the second degree (I.C. § 18-7906), it is a misdemeanor and can include imprisonment in the county jail for not more than a year. The felony can be charged by indictment or information. *See generally* Idaho Code Title 19, Chapters 14 and I.C.R. 7. The misdemeanor may be prosecuted by complaint or a uniform citation. *See* I.C.R 3 and I.C.R 3.1.

The Halls imputed criminal conduct to the Irishes, stalking, which constitutes a criminal offense chargeable by information or indictment, and punishable by imprisonment. Thus, the allegation was defamatory per se. *See Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 522 P.2d 1102 (1974) (affirming that oral statements alleging a business owner was a liar and thief were slanderous per se). Indeed, the very fact that the trial court believed the language to be subject to multiple reasonable interpretations because of the spelling "stocking," means that the jury should have been provided the opportunity to determine whether the publication was defamation *per se*. *Weeks v. M-P Publications*, 95 Idaho 634, 636-37 (1973) (if language used is not plain and unambiguous it is a question of fact for the trier of fact).

Contrary to the district court's ruling, when the Halls published the accusation that Wanda and Dennis Irish stalked them, it was no longer only an opinion. Certainly, one can hold the

opinion that another has committed a crime. However, once one publishes that accusation to the world at large, it is no longer an opinion because it involves defamation per se.

Besides the above elements, Wanda Irish, as a public figure, had to present evidence to the jury that was clear and convincing that the Halls acted with actual malice towards her. Given the totality of the circumstances and the evidence as discussed in the statement of facts in this opening brief, a jury could find from the evidence that the Halls, or either of them, knew the stalking accusation against Wanda Irish was false, or that the Halls, or either of them, acted with reckless disregard for its truth when the information was communicated with others. The Halls knew that the criminal charge based arising from their prior allegations against Dennis Irish was dismissed by the prosecutor. They had two warnings to cease harassing the Irishes. They knew that the act of stalking allegedly engaged in by Dennis Irish comprised being a passenger in a car traveling upon a public road. Wanda Irish was not even present. Their spectrum of actions, including accusing the Irishes of stalking them, appear to have been motivated by a desire to harass and annoy the Irishes in retaliation for an injustice they felt was inflicted on them by Wanda Irish when their vehicle was towed. A jury could reasonably conclude the Halls acted with actual malice when they published the statement with respect to Wanda Irish.

V. CONCLUSION

The directed verdict should be reversed and this matter should be remanded for a trial on the merits.

RESPECTFULLY SUBMITTED this 1st day of August, 2017.

JAMES, VERNON & WEEKS, P.A.

Susan P Weeks

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of August, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Erik P. Smith ERIK P. SMITH, P.C. 311-B Coeur d' Alene Ave. Coeur d'Alene, ID 83814	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Facsimile

Christine Amore

The undersigned does hereby certify that the electronic brief is in compliance with all the requirements set out in I.A.R. 34.1, and that an electronic copy was served on the court and each party at the following email addresses:
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