9-21-2017

Irish v. Hall Respondent's Brief Dckt. 44794

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS IRISH and WANDA IRISH, husband and wife,

Plaintiffs/Appellants/Cross-Respondents,

vs.

JEFFREY HALL and DONA HALL, husband and wife,

Defendants/Respondents/ Cross-Appellants.

DOCKET NO. 44794-2017

Kootenai County Case No. CV-2015-5814

RESPONDENT'S 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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STATEMENT OF THE CASE

I. Nature Of The Case

This case commenced with a Verified Complaint seeking numerous counts of defamation and injunctive relief brought by Wanda and Dennis Irish ("the Irishes"). After the Irishes presented their entire case and rested, Jeffrey Hall and Donna Hall ("the Halls") moved for a directed verdict, which was granted by the trial court. Subsequently the Halls filed a Motion for Attorneys' Fees, which motion was denied by the trial court.

II. Statement Of Facts

Mr. Hall testified by way of his Affidavit in Support of the Motion for Attorneys' Fees. (R., Vol. III, p. 489) He testified to his long-tenured ownership of the city's marina, including restaurant, bar, storefront, and only petroleum pump. (R., Vol. III, p. 490) Upon their purchase of the marina, the Halls experienced immediate harassment from the community, including from both Mr. and Mrs. Irish. (R., Vol. III, p. 490) More specifically, the Halls had a long-standing dispute with Wanda Irish about the city easement for parking on the Hall's real property. (R., Vol. III, p. 490) Wanda Irish, as the elected mayor, caused the destruction of the Halls' personal property, and said she "was doing us a favor by not burning them.". (R., Vol. III, p. 492-3) As mayor, Wanda Irish insisted that the Halls' real property was meant to assist the city's other income-producing endeavors. (R., Vol. III, p. 493-4) Eventually the mayor used her elected office and openly campaigned against the Halls in the public press and the city's own literature. (R., Vol. III, p. 494, 527-31)

Mayor Irish eventually signed a complaint and caused it to be filed in district court against the Halls, proposing to take the Halls' real property by prescriptive easement, contrary to the plain language of the city's easement. (R., Vol. III, p. 495-6, 508-516)

Mayor Irish ordered the Halls to remove their personal vehicle off of their own real property. The sheriff was called and a deputy arrived on the scene and refused to tow the Halls' personal vehicle or cite them for a law violation as insisted by Mayor Irish. (R., Vol. III, p. 496) In the Affidavit in Support of the Motion for Attorneys' Fees, Kootenai County sheriff's deputy, Matt Edmonds, testified he received dozens of telephone calls from Mayor Irish complaining about the Halls. (R., Vol. III, p. 576) Deputy Edmonds personally traveled to Harrison numerous times at the prompting of Mayor Irish. The mayor insisted that the Halls be cited and that their vehicle be towed, and Deputy Edmonds informed her personally that neither could occur and the mayor was noticeably displeased. (R., Vol. III, p. 577)

He never observed an actual violation of the law or disturbance of the peace, and his conclusion was that it was clear Mayor Irish simply did not like the Halls. Deputy Edmonds never saw Mr. Hall be rude or use profane language in any of his visit. *Id.*

Despite the police involvement, the next day the Halls found their personal vehicle towed from their own property. Mr. Hall confronted Mayor Irish in a City Council meeting. Mayor Irish agreed to refund the cost of the towing. (R., Vol. III, p. 497) When Mr. Hall failed to receive reimbursement, he protested by placing signs in his vehicle about Mayor Irish. *Id.*

In 2012 the Halls discovered a camera aimed at their store front door, which was very disturbing to Mr. and Mrs. Hall. *Id.* Shortly thereafter the Halls discovered several CCTV cameras placed in and around the city and campground, many of which were aimed at their business. (R., Vol. III, p. 498)

During this time, Mr. Hall had been elected as a city Council member. *Id.* Mr. Hall was formerly an electrical contractor in California and very familiar with the exact type of CCTV camera and system in place throughout the city. (R., Vol. III, p. 498) Mr. Hall went directly to the mayor and city officials for information relating to the CCTV, but was told by Mayor Irish to make public records request for any of the information regarding the CCTV. *Id.* The Halls made several public records request. *Id.* It was eventually discovered that Dennis Irish purchased, installed, and owned the entire CCTV system. (R., Vol. III, p. 499) Despite their best efforts, the Halls never received any recorded information from the CCTV system. (R., Vol. III, p. 500-01)

In 2013, because of the Irish's behavior, the Halls sought a "No Trespass" order against Dennis Irish and Wanda Irish with the Kootenai County sheriff's office. (R., Vol. III, p. 502, 577) The sheriff's office delivered the notice of "No Trespass" and within just a few days again contacted Mr. Irish directly about his alleged violation. Based on Mr. Irish's admissions, the Kootenai County Sheriff's deputy issued a citation for stalking. (R. Vol. III, p. 577) Thereafter, Wanda Irish's calls continued to the sheriff and they were

constant, frustrating, without merit, and meant to harass Mr. and Mrs. Hall. (R., Vol. III, p. 577-78)

The Halls published several opinions about Mayor Irish. This included their home Wi-Fi beam which read: "Dennis and Wanda Irish stocking U2". The beam was seen by no person other than the Irishes at their personal residence. (Tr., p. 158, L. 10)

The Halls attended mediation regarding their litigation with the City of Harrison in December 2015, completely resolving the lawsuit. On that same day Mr. Hall agreed and took down any and all business and personal wireless IDs mentioning the Irishes. (R., Vol. III, p. 504)

ISSUES ON APPEAL/CROSS-APPEAL

1. Did the district court correctly grant the Hall's motion for directed verdict regarding the statement "Dennis and Wanda stocking U2"?

2. Did the district court err in determining that the Halls were not entitled to attorney's fees?

3. Are the Halls entitled to attorney's fees on appeal?

STANDARD OF REVIEW

I. Review Of Grant Of Directed Verdict – De Novo

"Whether a directed verdict should be granted is purely a question of law upon which the parties are entitled to full review by the appellate court without special

deference to the views of the trial court." *Beco Constr. Co. v. Harper Constr.*, 130 Idaho 4, 7 (1997) (citing *Quick v. Crane*, 111 Idaho 759, 764 (1986); *City of Lewiston v. Lindsey*, 123 Idaho 851, 854 (Ct. App. 1993)). "In reviewing the grant or denial of a directed verdict on appeal, we apply the same standard that governed the trial court's decision." *Id.* (citing *Lawton v. City of Pocatello*, 126 Idaho 454, 458 (1994); *Quick*, 111 Idaho at 764; *Western Stockgrowers Assoc. v. Edwards*, 126 Idaho 939, 941 (Ct. App. 1995); *City of Lewiston*, 123 Idaho at 854)). "A directed verdict is proper only where the evidence is so clear that all reasonable minds could reach only one conclusion: that the moving party should prevail." *Lawton v. City of Pocatello*, 126 Idaho 454, 458 (1994). "On appeal, our standard of review is the same." *Id.*

II. Review Of Denial Of Attorneys' Fees – Abuse Of Discretion

"The award of attorney fees rests in the sound discretion of the trial court, and the burden is on the person disputing the award to show an abuse of discretion...If there is a legitimate, triable issue of fact, attorney fees may not be awarded..." *Ross v. Ross*, 142 Idaho 536, 539 (Ct.App. 2006)(citing *Nampa & Meridian Irr. Dist.*, 135 Idaho 518, 525 (2001)).

ARGUMENT

I. The District Court Correctly Granted The Motion For Directed Verdict.

The elements for a directed verdict are delineated in Rule 50 of the Idaho Rules of Civil Procedure. The trial judge based her analysis on Rule 50, stating: "First, in ruling on

a Rule 50 motion for directed verdict, the trial 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." (Tr., Vol. II, p. 226, L. 3-8).

To show defamation under Idaho law, the Irishes had the burden of proof to show by a preponderance of the evidence that the Halls: (1) communicated factual information concerning the Irishes to others, (2) that the information was defamatory, and (3) that the Irishes were damaged because of that communication. *Clark v. The Spokesman-Review*, 144 Idaho 427, 430 (2007). Wanda Irish is a public figure, and it was acknowledged at trial and in this appeal that she had the additional burden to prove by clear and convincing evidence the element of malice. *See Bandelin v. Pietsch*, 98 Idaho 337, 339 (1977). "Malice has been generally defined in Idaho courts as a reckless disregard for the truth or falsity of a statement." *Weaver v. Stafford*, 134 Idaho 691, 701 (2000).

The determination of whether a statement is libelous or slanderous *per se* is generally a question of law for the court. *Bistline v. Eberle*, 88 Idaho 473, 478 (1965). This Court has stated, "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 for the trier of fact." *Weeks v. M-P Publications, Inc.*, 95 Idaho 634, 636 (1973). The alleged defamatory writing must be read and construed as a whole. *Id.* The words in the statement are to be given their "common and usually accepted meaning" and should be read and interpreted as they would be "read and interpreted by the persons to whom they were

published." *Id.* (quoting *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 508 (1954)). In determining whether a statement is libel *per se* the court must be able to presume as a matter of law that the statement:

> will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule or cause him to be shunned and avoided; in other words, they must *reflect on his integrity, his character, and his good name and standing in the community*, and tend to expose him to public hatred, contempt or disgrace. The imputation must be one which tends to affect plaintiff in a class of society whose standard of opinion the court can recognize.

Weeks, 95 Idaho at 636-637 (quoting *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 179 (1952)) (emphasis added).

The Irishes rested their case at trial after calling each other as the only two witnesses. Viewing all evidence presented at trial in a light most favorable to them, not one of the "Factual Allegations" in the Irish's Verified Complaint (paragraphs 5 through 28), was sufficiently proven. Therefore, the Halls were granted a directed verdict. The trial judge stated the following in her opinion granting the Halls' motion for directed verdict:

> Public figures, including you politicians or political officers, hold themselves open to public criticism and comment and also have the means to respond publicly to criticism, and that is why in order to establish defamation, they must establish by clear and convincing evidence that the defendant knew the information was false or acted with reckless disregard for its truth at the time the information was communicated.

(Tr., Vol. II, p. 230, L. 1-19).

A. The communication was opinion and protected by the First Amendment.

The trial judge followed well-established law and held that "Dennis and Wanda stocking U2" was not "...anything more than a statement of opinion. 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. 239, L. 7-19). This Court has distinguished between fact and opinion in the context of the First Amendment protection against liability for defamation as follows:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.
> . . .
> The Supreme Court has also noted the difficulty of determining whether a statement is one of fact or opinion. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). One means of differentiating between fact and opinion in this context has been formulated by the Second Circuit:
>
> An assertion that cannot be proved false cannot be held libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. See *Gertz v. Robert Welch, Inc.*, supra, 418 U.S. at 339-40, 94 S.Ct. 2997; *Buckley v. Littell*, 539 F.2d 882, 893 (2nd Cir. 1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777 (1977).

Wiemer v. Rankin, 117 Idaho 566, 571 (Idaho 1990), 790 P.2d 347, 352 (Idaho 1990).

The Halls have a constitutionally protected right to criticize the mayor. Their protected speech included placards in car windows, attending city Council meetings, running for elected office, and using Wi-Fi ID beams.

B. The communication was hyperbole.

Opinions and hyperbole are protected by the First Amendment and beyond the reach of defamation suits. "Political epithets and hyperbole leveled against the actions of public officials are within the freedom of expression protected by the First Amendment...." *Hemingway v. Fritz*, 96 Idaho 364, 366 (1974). In this matter, the trial judge stated:

> And the backdrop of this and the thing I think we really need to keep in mind is the First Amendment. Speech is protected. Not all speech, certainly not all speech, but opinions are more protected than virtually anything else. And political opinions are even more protected than opinions about other things, or expressions of art, for example. And this is true even when opinions are offensive and terribly offensive without sometimes a basis.

(Tr., Vol. II, p. 230, L. 11-19).

In aid of their IRCP 50 Motion, the Halls cited *Gardner v. Martino*:

> In *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir.1990), we held that the threshold question after Milkovich in a defamation claim is "whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact." If the answer is no, the claim is foreclosed by the First Amendment. We use a three-part test to resolve this question: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates the impression, and (3) whether the statement in question is susceptible of proved true or false. Partington, 56 F.3d at 1152 (citing Unelko, 912 F.2d at 1053); see also Knievel, 393 F.3d at 1075 (noting the three parts for the "totality of the circumstances" test as (1) the broad context; (2) the specific context and the content of the statement; and (3) whether the statement is sufficiently factual to be susceptible of being proved true or false.

563 F.3d 981, 987 (9th Cir. 2009)

The trial judge held, "I think it is an exaggeration, I think it's hyperbole, and I don't think it is actionable defamation..." (Tr., Vol. II, p. 236-237, L. 20-1).

In the case of *Weeks v. M-P Publications, Inc.*, this Court affirmed the use of the term 'blackmail' as "rhetorical hyperbole, a vigorous epithet" used by those who considered the negotiating tactics of a real estate developer to be extremely unreasonable. *Weeks*, 95 Idaho at 638 (citing *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

Weeks clarified the nature and use of hyperbole when it addressed an allegedly libelous newspaper article, stating:

> While this article could not be called a classic in English literature, it is evident that the writer did not intend that it should be taken literally, but rather as a hyperbole of speech, and it would be so understood by the ordinary reader. It is not an unusual example of that form of ribaldry resorted to by a class of writers in describing the acts and conduct of their rivals or those they seek to criticize, where such writers have not the necessary skill or cleverness to express themselves in a more parliamentary manner. The article is an exemplification of a form of caricature that frequently appears, but in a more approved and refined form, in the current newspapers of the day, whereby they attempt to emphasize and set forth the shortcomings of men prominent in public life, or political parties, or reform movements against which the writer is seeking to create an adverse public opinion. Many of these writings and cartoons appearing in the public press are often useful in creating and directing public opinion toward needed reforms or the suppression of evil. If the law should hold all this class of articles, whether by pictures or writing, actionable per se, without a showing of malice or pecuniary loss to the party alleged to have been injured, it would so effectively restrain the press and tend to prevent it from giving the needed publicity to matters of vital importance to the public welfare that it would greatly impair one of the most potent influences for good

> we have, for all experience shows that there is no power so great in suppressing wrong as its pitiless exposure in the public press.

Id. (*citing Jenness v. Co-operative Publishing Co.*, supra, 36 Idaho at 702).

As an everyday example, the statement, "You are killing me!" Is not an assertive fact that one is homicidal contrary to the law of Idaho, but hyperbole and colloquial speech. The allegation that the Halls made an assertive fact that Mr. or Mrs. Irish were committing the crime of stalking fails to recognize that the Halls were engaging in hyperbole to criticize Mayor Irish. They were not making an assertive fact. The Wi-Fi beam was a sentence fragment. The phrase lacked any context or details to be perceived as an assertive fact. It could not communicate with the specificity needed to make a reasonable person think it was a factual allegation that Mr. and Mrs. Irish:

> Knowingly and maliciously engages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress; or engages in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.

Idaho Code § 18-7906(1).

C. The communication was not actually communicated to a third person.

For a statement to be defamatory it must be communicated to a party other than the plaintiff in the case (i.e., a third party). *Clark*, 144 Idaho at 430, (citing *Gough*, 73 Idaho at 177).

Only Mr. and Mrs. Irish testified. No member of the community testified they personally witnessed the communication by the Halls that "Dennis and Wanda stocking U2." Wanda Irish testified she saw the Wi-Fi beacon "Dennis and Wanda Irish stocking U2" only from her home. (Tr., p. 158, L. 10)

The trial court disregarded the lack of evidence and stated:

> There is evidence that these statements were seen by others, based on not only the Irishes testifying that people ask them about it, but as far as the court is concerned, when I open up my phone and turn to certain applications, my example would be Pandora, I go to open Pandora in my office to listen to some music, always a screen pops up saying do you want to connect to this Wi-Fi, this one, this one, this one, or this one. It's that same kind of thing. People would have seen that, there is no question in the court's mind that that would have been obvious to others.

(Tr., pp. 227-8)

The trial court further stated:

> ... I find it a bit difficult to go along [With the notion that there was a failure to prove the communication to others] ... what other purpose would there be to name your Wi-Fi beacon Wanda Irish -- or Mayor Irish terrorist or Mayor Irish lied, other than to communicate those words?

(Tr., p. 205, L. 10-23)

However the burden of proof was on the Irishes and the trial court's statement that "people *would* have seen that" is an error of law. The trial court incorrectly relieved the complaining party of its burden of proof, replacing it with judicial presumption and her own personal experience.

Wanda Irish testified regarding other allegedly defamatory statements including Exhibit number 3, "Mayor Wanda Irish terrorist". (Tr. p. 146. L. 11) She also testified she did not want to go out anymore because she did not want to be asked "questions and people saying, are you really a terrorist." (Tr. p. 164, L. 3) There was testimony about the signs in Mr. Hall's vehicle saying "Wanda Irish is a liar," and that people would point to the signs and question the mayor. (Tr. p. 183, L. 21-25) There was testimony about "when people asked you about a beacon saying Wanda Irish is a terrorist," (Tr., p. 186, L. 13-14) and "did anyone come up to you?" "Yeah, when that terrorist thing came out, yeah." (Tr. p. 189. L. 1-7)

There was no admissible evidence proving by a preponderance that the home Wi-Fi beacon "Dennis and Wanda Irish stocking U2" was published to any third party other than Mr. and Mrs. Irish. Only one witness testified to seeing the Wi-Fi beacon, and that was Mrs. Irish, at her home. (Tr., p. 158, L. 10) No citizen of the community and no member of the press testified. The trial court cannot presume any element of the case.

Communication to a third party is an essential element of the cause of action.

D. The communication was not defamation *per se*.

When something is alleged to be defamatory *per se*, the entire utterance must "considered as a whole in the plain and natural meaning of the words used, and as a person of ordinary intelligence and perception would understand...". *Gough,* 73 Idaho at 178. "In determining whether a writing or publication is libelous *per se*, it must be stripped

of all innuendo, colloquium, and explanatory circumstances. *Id.*, at 179 (quoting *Ellsworth v. Martindale-Hubbell Law Directory, Inc.*, 66 N.D. 578, 587 (1936)).

In *Barlow v. International Harvester Co.*, 95 Idaho 881, 890 (1974), this Court stated that:

> Defamatory utterances regarding an individual are slanderous *per se*, that is, actionable without allegation and proof of special damages, if they fall into one of four categories. One of these categories comprises utterances which impute "conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute, and of such kind as to involve infamous punishment (death or imprisonment) or moral turpitude conveying the idea of major social disgrace." (*Cinquanta v. Burdett,* 154 Colo. 37, 38 (1963)).

This Court in *Weeks v. M-P Publications*, stated that:

> 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 up to public hatred, contempt, or ridicule or cause him to be shunned and avoided; in other words, they must reflect on his integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt or disgrace. The imputation must be one which tends to affect plaintiff in a class of society whose standard of opinion the court can recognize. *It is not sufficient, standing alone, that the language is unpleasant and annoys or irks plaintiff, and subject him to jests or banter, so as to affect his feelings.*

Weeks, 95 Idaho at 637 (emphasis added, citing *Gough*, 73 Idaho at 179).

E. Wanda Irish failed to meet her burden of proof regarding malice.

Unlike statements between private individuals, statements criticizing public officials in their official conduct are afforded further First Amendment protection and

damages are not presumed. *New York Times Co, v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)). For Mayor Irish to recover for an allegedly libelous statement, she must show by clear and convincing evidence that Mr. Hall acted with malice. *Id.* (See also *Anderson. v. Liberty Lobby Inc.*, 477 U.S. 242, 254-55, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202, 215-16 (1986)). Malice requires a showing that the writer knew the statement was false or acted with reckless disregard as to the truth or falsity of the statement. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332, 94 S.Ct. 2997 (1974)[1]. *Steele v. The Spokesman-Review*, 138 Idaho 249, 252 (2002) (quoting *New York Times Co.*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 721, 11 L.Ed.2d 686.)

Ill will and a desire to do harm does not meet the actual malice requirement. *Week*s, 95 Idaho at 637.

> Actual malice is not defined merely as an evil intent or an improper motive arising from spite. In a defamation action, actual malice is proving by clear and convincing evidence the 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 probably falsity.

Clark, 144 Idaho at 431 (internal quotations and citations omitted).

The overarching concern in the actual malice standard is the consideration of the compelling First Amendment interest in debate of public issues and those in government

[1] While *New York Times* and *Gertz* were cases involving the media, the protections of these cases were extended to non-media speakers in *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)..

who are in a position to resolve public issues. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Id.*

In this case, Wanda Irish has failed to submit any admissible evidence to overcome her clear and convincing burden of proof regarding malice.

II. The Trial Court Abused Its Discretion In Refusing To Award Attorneys' Fees To The Halls.

Idaho Code § 12-121 provides in pertinent part:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

This is in line with the historical view taken by Idaho Courts holding that former I.C. § 12-121 should be read together with former section I.R.C.P. 54(e)(1), to allow the award of attorney's fees in those situations in which the Court finds that the action was "brought, pursued or defended frivolously, unreasonably or without foundation." *Ortiz v. Reamy*, 115 Idaho 1099, 1101 (Ct. App. 1989).

A. The Halls were the prevailing party and were entitled to attorney's fees.

In determining whether there is a prevailing party, the Court should first look to I.R.C.P. 54(e)(1) which incorporates I.R.C.P. 54d(1)(B) which provides:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties.

As such, since the Court has ruled in a directed verdict that reasonable minds could not conclude a verdict in favor of the Irishes, the Halls were the prevailing party in this action for purposes of costs and attorney's fees.

> In considering a motion for directed verdict, the trial court is to accept the truth of the adverse evidence and every inference that may legitimately be drawn from the adverse evidence in the light most favorable to the nonmoving party. The motion should not be granted if the evidence is of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the nonmoving party would be proper.

Sun Valley Shopping Center, Inc. v. Idaho Power Co., 119 Idaho 87, 91 (1991), quoting *Stephens v. Stearns*, 106 Idaho 249, 252-253 (1984).

B. The Irishes' litigation was unreasonable, frivolous, and without foundation.

In this case, the Irishes failed on each and every cause of action asserted in their Complaint. The Halls prevailed on directed verdict despite the Irish's persistent and unreasonable efforts to accuse the Halls of defamation.

i. All of the Irishes' actions failed to survive even a directed verdict, which is by definition without foundation.

As stated above, a motion for directed verdict would not be granted if reasonable minds could conclude that a verdict in favor of the nonmoving party would be proper. *Sun Valley*, at 91. Therefore, in granting the directed verdict, the Court already determined that the Irishes acted unreasonably in pursing their defamation complaint (i.e., reasonable people could not disagree). Therefore, the trial court should have further found that the Irish's case was unreasonably pursued and the Halls were entitled to an award of attorney's fees under I.C. § 12-121.

Similar to this case, in *Anderson v. Ethington*, 103 Idaho 658, 659 (1982), the defendants moved for a directed verdict after the plaintiffs' had rested, and the trial court granted the directed verdict in favor of the defendants and awarded them attorney's fees pursuant to I.C. § 12-121. *Id.* The court concluded on directed verdict that the complaint was without reasonable foundation. *Id.* Also similar to this case, the plaintiffs in *Anderson* argued against attorney's fees stating that the testimony at trial indicated that the defendant had in fact committed tortious conduct. *Id.* However, the Idaho Court of Appeals concluded, "The trial court had the opportunity to observe the witnesses and the evidence which was introduced. The court concluded that the testimony did not support such a contention when it stated that the claim was without reasonable foundation and when it entered a directed verdict in favor of respondent." *Id.* The Appellate Court affirmed the directed verdict and award of attorney's fees pursuant to § 12-121.

ii. The Verified Complaint signed by the Irishes and their attorney pled causes of action that were void on their face because of the statute of limitations.

A defamation claim must be brought within in two years or it is barred by the Statute of Limitations. Idaho Code § 5-219(5). The Irishes unwisely pursued several time-barred, frivolous causes of actions in their Verified Complaint. Even if the Irishes were unaware of the statute of limitations upon the filing of their Verified Complaint, they were definitely made aware of the statute of limitations when the Halls filed their Answer to the Irish's Verified Complaint. Yet the Irishes unlawfully pursued the frivolous causes of actions all of the way to trial, causing further expense to the Halls.

iii. The Irishes improperly sought punitive damages.

The Verified Complaint in this matter failed to assert punitive damages, or reserve the right to move the court for an amendment of the pleadings to include punitive damages. The Irishes failed to file a pretrial motion.

The Irish's trial preparation included jury instructions on punitive damages, despite pretrial failure of compliance with I.C. § 6-1604, which requires a motion and order of the court in order to amend the complaint seeking punitive damages, allowing Defendants to file an amended answer and possible counterclaim. I.C. § 6-1604(2) states as follows:

> In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has

> established at such a hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages...

The Irishes submitted both jury instructions and verdict forms that included claims for punitive damages. Such actions are contrary to established law and practice, and to proceed to trial on such errors is frivolous, unreasonable, and without foundation.

I. The Halls Are Entitled To Attorney's Fees On Appeal.

The Halls seek attorney's fees under Idaho Code Section 12-121. The Irishes acted frivolously, unreasonably or without foundation in law or fact in pursuing this appeal. See *Elliott v. Murdock*, 161 Idaho 281, 289 (2016). In *Elliot*, the Petitioner's original complaint stated that several of the Respondent's statements defamed her. *Id.* The Respondent won on summary judgment, and the Petitioner only appealed a single statement. *Id.* This Court stated there was no basis in fact or law for the Petitioner's claims, and that she had been so instructed by the district court below. "[Petitioner's] appeal is frivolous and was unreasonably brought. She merely invites us to second-guess the district court's well-reasoned opinion. Accordingly, we award attorney's fees on appeal to Mr. Murdock per Idaho Code section 12-121." *Id.*

Attorney's fees should be awarded to the Halls on appeal, because it is established case law that when:

> [S]uch circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law. Further, attorneys fees on appeal have been awarded under Section 12-121 when appellants 'failed to add

> any new analysis or authority to the issues raised below' that were resolved by a district court's well-reasoned authority.

Id. Citing *Snider v. Arnold*, 153 Idaho 641, 645-646 (2012) and *Wagner v. Wagner*, 160 Idaho 294, 302 (2016).

Similar to the Petitioner in *Elliott*, in this case the Irishes have failed "to add any new analysis or authority" to their appeal. Furthermore, the Irishes are asking this Court to second-guess the trial court's correct application of well-established law. Therefore, the Halls should be awarded attorney's fees for the Irish's frivolous appeal.

CONCLUSION

The trial court should be affirmed in its directed verdict, and the Halls should be awarded attorney fees both at trial and on this appeal based on Idaho Code § 12-121, and Idaho Appellate Rules 40 and 41.

DATED this 21 day of September, 2017.

ERIK P. SMITH
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2017, I caused to be served a true and correct copy of the foregoing by the methods indicated below, and addressed to all counsel of record as follows:

Susan P. Weeks JAMES, VERNON & WEEKS, P.A. 1626 Lincoln Way Coeur d'Alene, ID 83811 Fax: 208/664-1684	☐ U.S. MAIL ☐ HAND DELIVERED ☑ FACSIMILE ☐ ELECTRONIC MAIL

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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