10-26-2017

Irish v. Hall Appellant's Reply Brief 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' ANSWERING BRIEF

Appeal from the District Court of the First Judicial District in the State of Idaho,
In and for the County of Kootenai

The Honorable Cynthia K.C. Meyer
District Judge Presiding

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INTRODUCTION

The district court committed error in concluding the published accusation by the Halls that Dennis and Wanda Irish were stalking them was an opinion. Contrary to the assertions made by the Halls in their response, the statement "Dennis and Wanda Irish stocking U2" was not "merely an opinion" or "hyperbole and colloquial speech." This statement followed dismissal of a criminal charge accusing Dennis Irish of stalking Dona Hall. The published statement was an allegation by the Halls that the Irishes were engaged in criminal activity. As such, it was defamation per se. A reasonable jury could have concluded based on the language of the statement, read in the context of the situation at hand, that the communicated statement was defamatory in nature. Therefore, the district court erred in directing verdict against the Irishes because it failed to draw every legitimate inference in favor of the Irishes as required.

LEGAL STANDARD

Revisiting the standard previously discussed by the Irishes and the Halls in their prior briefs, a defamation action requires proof of the following elements: (1) communication of information concerning the plaintiff to others; (2) the information was defamatory, and (3) the plaintiff was damaged because of the communication. *Clark v. Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007). These are the elements which must be proven by the typical person claiming defamation, including Dennis Irish.

Public figures, like Wanda Irish, must prove an additional element of malice on the part of the speaker. *Id.* ("[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.").

In *Clark*, this Court explained malice regarding defamation of public figures:

> 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 431, 163 P.3d at 220.

A charge of defamation comes down to the truth of the statements alleged as defamatory. *See Steele v. Spokesman-Review*, 138 Idaho 249, 253, 61 P.3d 606, 610 (2002). "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). Some statements are so injurious to a person's reputation that they can be defamatory *per se*. *See Weeks v. M-P Publications*, 95 Idaho 634, 636, 516 P.2d 193, 195 (1973). "[I]f 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." *Id.* This Court further explained what statements rise to level of libelous per se in *Gough v. Tribune-Journal Co.*:

> 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 (sic) him to jests or banter, so as to affect his feelings.

Gough v. Tribune-Journal Co., 73 Idaho 173, 179, 249 P.2d 192, 195 (1952).

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).

ARGUMENT

I. 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.

The first element of defamation considered by the trial court was whether the Halls communicated information concerning the Irishes to others. The district court held that the 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 of the signal, including cellular phones. The Halls dispute this holding in their response on appeal, which is discussed later in this reply.

The Halls do not dispute they created the wi-fi beam "Dennis & Wanda Irish stocking U2".[1] The Halls assert even if this signal was a communication as required by the defamation elements, the district court's holding was correct because the statement was an "opinion and protected by the First Amendment." Respondent's Brief, p. 12 (Sept. 21, 2017). They further assert that "the Halls have a constitutionally protected right to criticize the mayor." *Id.*

[1] Tr. Vol. I, p. 157, l. 24 – p. 158, l. 18, Trial Exhibit 6.

While it is true that the Halls have the right to hold any opinion about the Irishes they wish to have, and a right to criticize the mayor as a public official which does not extend to Dennis Irish, once the Halls published accusations that Dennis and Wanda Irish were engaged in criminal activity, the Halls' privately-held opinion lost its status as a protected opinion. Once one publishes a communication that another has committed a crime to the world at large, it is defamation per se unless it is true. Interspersing the accusation with acronyms and intentional or unintentional misspellings does not change the nature of the accusation although the acronyms and misspellings may cause the statement to no longer be plain and unambiguous, thus creating a question of fact for the trier of fact.

Stalking is a crime in Idaho, carrying a penalty which can include imprisonment for up to five years, depending on the degree. I.C. § 18-7905. A reasonable jury could have found the Halls accused both Irishes of stalking, a criminal offense chargeable by information or indictment and punishable by imprisonment. Thus, a reasonable jury could have found the allegation was defamatory per se. *See Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 552 P.2d 1102 (1974) (affirming that oral statements alleging a business owner was a liar and thief were slanderous per se).

The Halls further assert that their communication accusing the Irishes of stalking was "hyperbole," citing *Weeks v. M-P Publications, Inc.* for support. *Weeks* involved an editorial article published in a weekly newspaper in Jerome, Idaho which accused the city council members of being "teeny tyrants" and "these three stooges." *Weeks*, 95 Idaho at 636, 516 P.2d at 195. These statements against the city council members were not accusations of criminal conduct, but rather editorial musings of disgruntled constituents. The Court in *Weeks* properly held such statements

were "nothing more than hardy, uninhibited statements" about the actions of public officials and therefore were not libelous per se. *Id.* at 639, 516 P.2d at 198.

The statement "Dennis and Wanda Irish stocking U2" is not merely "ribald or robust criticism" of Wanda Irish's political decisions. Rather, a reasonable jury could find this statement, communicated to all who viewed the Halls' wi-fi beacon, accused both Irishes of serious criminal activity, an accusation which caused members of the community to question Wanda Irish about the statements made via the wi-fi beam. Tr. Vol. I, p. 142, l.8 – p. 143, l. 6.

Further, the Halls' accusation was not "colloquial speech," as asserted by the Halls. Colloquial speech includes slang and expressions that are used in everyday, informal conversation. As the Halls aptly describe, the phrase "You're killing me!" is an example of a colloquialism, by which it is not meant that a person is literally committing a homicide. However, contrary to the Halls' assertions, the phrase "stalking you too" does not share the same colloquial status. The phrase "Dennis and Wanda Irish stocking U2" could be found by a reasonable jury to be an assertion by the Halls that each of the Irishes was engaged separately or together in the criminal activity of stalking them.

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 (2001) (quoting *Student Loan Fund of Idaho, Inc. v. Duerner*, 131 Idaho 45, 51, 951 P.2d 1272, 1278 (1997)). Even though stalking was misspelled, and the statement used slang for "you too," the jury could have reasonably determined, based on the context of the statements, the overwhelming history of contentious

dispute between the parties, the size of the community[2] and the previous criminal charges of stalking brought against Dennis Irish by Dona Hall that the statement was intended to accuse the Irishes of criminal activity. As the court has recognized in *Barlow v. Int'l Harvester Co.*, *supra*, a statement "imput[ing] 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" is defamatory per se, "without allegation and proof of special damages." *Barlow*, 95 Idaho at 890, 522 P.2d at 1111. A reasonable jury could have found this statement was defamatory per se and the district court's grant of directed verdict against the Irishes was error.

II. The district court's did not commit error when it held that the Halls' statement was published and communicated to third persons.

As stated above, the first element that the trial court discussed in her oral ruling was whether the Halls communicated information concerning the Irishes to others. This is a required element in a defamation claim.

Harrison is a very small community of approximately 200 people. Tr. Vol. I, p. 14, ll. 20-21. Its main gathering places are the post office and the grocery store. Tr. Vol I, p. 181, ll. 4-5.

The Halls contend the trial court's holding that the wi-fi beam was a publication was wrong because no member of the community testified, and Wanda Irish only saw the wi-fi beam while at her home. This argument ignores Wanda Irish's testimony that people within the community had approached her and inquired about the accusation made via the wi-fi beam accusing her and her husband of stalking. Tr. Vol. I, p. 142, l. 8 – p. 143, l. 6.

As the trial court aptly stated:

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[2] Harrison is a small city with a population of approximately two hundred (200) citizens. Tr. Vol. I, p. 142, ll. 20-21.

> 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 . . . 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. . . . 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. Vol. II, p. 227, l. 22 – p. 228, l. 8; p. 205, l. 20–23.

On the issue of communication of the wi-fi beacon to third parties, the trial court correctly analyzed the evidence in the light most favorable to the Irishes, as required under a motion for directed verdict. The trial court did not, as the Hall assert, presume an element of the case. There was sufficient admissible evidence, including the testimony of Wanda Irish, for a reasonable jury to find the element of publication was met. The district judge did not err in viewing this element in the light most favorable to the Irishes in deciding the directed verdict.

III. Wanda Irish presented sufficient evidence upon which a jury could find the additional element of malice required for defamation of public figures.

As discussed above, public figures claiming defamation, like Wanda Irish, must prove an additional element of malice on the part of the speaker. Malice is "knowledge of falsity or reckless disregard of truth." *Clark v. Spokesman-Review*, 144 Idaho 427, 431, 163 P.3d 216, 220 (2007). The standard for showing malice is clear and convincing evidence. *Id.*

The evidence showed the Halls previously filed a criminal complaint against Dennis Irish which resulted in a charge against Dennis Irish for stalking Dona Hall, which was dismissed by the prosecutor after discussing the facts with Dennis Irish for approximately ten (10) minutes. Tr. Vol. I, p. 130, l. 1-25. Additionally, the Halls received two written warnings from the Irishes' attorney to cease harassing the Irishes. Tr. Vol. I, p. 152, l. 8, - p. 153, l. 4, Trial Exhibit 4.

The Halls again claimed Dennis Irish was stalking Dona Hall after the criminal charges were dismissed. Tr. Vol. I, p. 158, l. 19 – p. 159, l. 20. The second act of stalking which Dennis Irish allegedly engaged in comprised being a passenger in a car traveling on a public road to make a call on a client, and encountering Dona Hall standing in the middle of the road visiting with another person. Tr. Vol. I, p. 178, l. 21 – p. 180, l. 12. Wanda Irish was not even present. Dona Hall called Wanda Irish at city hall alleging Dennis Irish was stalking her because he had gone by her house while she was there. Tr. Vol. I, p. 158, l. 19- p. 159, l. 19. Wanda Irish informed Dona Hall that Dennis Irish was going to see a client. *Id.* After that, both Halls went to the city hall to confront Wanda Irish and accuse Dennis Irish of stalking Dona Hall. *Id.* Thereafter, the Halls beacon designation was changed to "Dennis and Wanda Irish stocking U2". *Id.*

The Halls admitted in their answer the wi-fi beams (a set accusing Wanda Irish of being a terrorist and the wi-fi beam accusing the Irishes of stalking them) were created by them. Jeffrey Hall admitted to Wanda Irish that the wi-fi beams were childish. Tr. Vol. I, p. 150, l. 13-p.151, l. 4.

Wanda Irish was not even present at the alleged "stalking incident" raised by the Halls to her shortly before the creation of the wi-fi beacon. A trier of fact could have viewed this testimony combined with the testimony of the long and acrimonious relationship between the Halls and the Irishes, to reach a conclusion that the Halls acted with knowledge of the falsity of their claim that Wanda Irish had stalked them, or reckless disregard of truth. The jury could also have viewed the testimony of the long and acrimonious relationship of the Halls with Wanda Irish and concluded that the Halls spoke with malice in accusing Wanda Irish of stalking them.

CONCLUSION

Based on the foregoing, it was improper for the district court to grant the Halls' motion for directed verdict. The directed verdict should be reversed, and this matter should be remanded for a trial on the merits.

CROSS-RESPONDENTS' RESPONSE TO THE CROSS-APPEAL

STATEMENT OF FACTS

Many of the statements made in the Halls' brief to this Court include allegations of fact raised in the post-trial affidavits of Jeffrey Hall and a former deputy sheriff, Matt Edmonds. These facts were not raised at trial and the Irishes disagree with Edmonds' characterization of the interaction between the parties. Based upon the dismissal of the stalking charge alleged by Dona Hall against Dennis Irish, it appears the prosecutor also did not agree with the former deputy sheriff's assessment of the circumstances.

In response to the facts presented in Respondent's brief to this Court, the Irishes do not dispute that the Halls have been the owners of a private marina, Gateway Marina, for quite some time, nor do they dispute that the Halls experienced some backlash from the community when they purchased the marina. However, the Irishes were not a party to the backlash against the Halls; in fact, Jeffrey Hall admits in his Affidavit in Support of Motion for Attorney's Fees, "I considered Wanda and Dennis Irish as some of my first Idaho friends. They befriended us and I socialized with them often in the early years of 2004." R. Vol. III, p. 491.

In 2010, Wanda Irish became mayor of the City of Harrison, a role she has held ever since. In her duties as mayor, it fell to Wanda Irish to assert use of a city easement which was granted by the Halls' predecessors upon a portion of the Halls' real property. R. Vol. III, p. 517. This easement

was granted for use by the public for "public parking purposes." *Id.* As a condition of the easement, the City was required to "maintain the property." *Id.* In maintaining the property for its public parking purpose, Mayor Irish was obligated to remove several planter boxes put in place by Jeffrey Hall which were impeding the flow of traffic. R. Vol. III, p. 527. She only did so after Jeffrey Hall refused her requests to relocate them. *Id.* Every effort was made to allow the Halls the opportunity to remove their encroachments upon the easement without formal legal action taken against them. When the Halls refused to cooperate with the maintenance of the easement, Mayor Irish, in her capacity as the city's representative, was forced to file a complaint to enforce the city's easement. R. Vol. III, pp. 508–516. This dispute between the City of Harrison and the Halls was resolved through mediation in 2015. Mayor Irish's signing of the complaint and removal of Jeffrey Hall's obstruction upon the easement quickly inspired a very personal and contentious attack by the Halls against the Irishes.

The dispute between the parties was heightened after Mayor Irish called the sheriff to address Jeffrey Hall's illegally parked truck on the easement. R. Vol. I, 17 (complaint). In Edmonds' opinion, Jeffrey Hall's truck was not illegally parked and he refused to issue a citation or have the truck towed. R. Vol. III, p. 577. The Irishes then left the state to visit some family for the weekend. Tr. Vol. I, p. 167, ll. 12–14. While the Irishes were out of town, the campground host had Jeffrey Hall's truck towed for being illegally parked, an event with which the Irishes were not involved. Tr. Vol. I, p. 171, ll. 3-13.

Despite Mayor Irish's absence from the City when the Halls' truck was towed, Jeffrey Hall accused Mayor Irish of towing the truck from the Halls' property. Tr. Vol. I, p. 111, ll. 1–2. In fact, it was the campground host that towed the Halls' truck. Tr. Vol. I, p. 115, ll. 14–15. Jeffrey Hall confronted Mayor Irish about the towing of his vehicle during a public City Council meeting.

R. Vol. III, p. 491. Additionally, the Halls called the Irishes repeatedly, accusing the Mayor of having his vehicle and trailer towed and using profuse profanity and vulgar language. Tr. Vol. I, p. 110, l. 7–p. 112, l. 8; p. 168, ll. 4–7. These calls continued until Dennis Irish answered the ninth call and threatened to call the sheriff if the telephone harassment didn't stop. Tr. Vol. I, p. 112, l. 9–p. 114, l. 5; p. 182, l. 9–p. 183, l. 20. Over a significant period of time following the towing, the Halls posted several statements throughout town accusing Mayor Irish of being a liar and a terrorist. Tr. Vol. I, p. 117, l. 8–21.

In 2012, in response to increased incidents of vandalism and graffiti in the city, Dennis Irish installed a security camera system for the city. Tr. Vol. I, p. 97, ll. 15–18. The Halls complained that these cameras were pointed at them and their properties, despite no evidence supporting those allegations. R. Vol. III, p. 498. Dona Hall submitted several public records requests seeking information concerning Plaintiff's private business and the location of security cameras located on Plaintiff's private property. R. Vol. I, pp. 128–53. These requests did not seek information relating to the conduct or administration of the City of Harrison obtainable under the Idaho Public Records Act, I.C. § 74-101, et seq., and were made for an improper and harassing purpose.

The Halls' belief that the Irishes' security cameras were spying on them led the Halls to seek a "No Trespass" order against the Irishes from the sheriff.[3] R. Vol. III, pp. 502, 577. After the issuance of this directive, Dennis Irish entered what he believed was public right of way and the public parking lot, located upon the public easement. R. Vol. III, p. 502. The Halls telephoned

[3] Jeffrey Hall's affidavit and Matthew Edmonds' affidavit discuss a "trespass order" arising from a request that the Irishes be "trespassed" from the Halls' business. No restraining order was issued by a court. It appears that the former deputy sheriff believed he had the power to issue an oral order to the Irishes not to enter the Halls' property.

former deputy sheriff Edmonds, who issued a citation against Dennis Irish for stalking Dona Hall without any in-person investigation. R. Vol. II, p. 476. The stalking charge was dismissed by the deputy prosecuting attorney after ascertaining the facts. Tr. Vol. I, p. 132, l. 7–25.

Despite the dismissal of the criminal charges against Dennis Irish, the Halls persisted in accusing Dennis Irish of stalking Dona Hall. Tr. Vol. I, p. 158, ll.19–p. 159, l. 20. They published a wi-fi beacon accusing both Irishes of stalking them. Tr. Vol. I, pp. 158–160.

Throughout the duration of the Halls' dispute with the Irishes, Jeffrey and Dona Hall engaged in "reprehensible" conduct and "shameful behavior," as pointed out by the district judge. Tr. Vol. II, p. 238, ll. 5–9, 25; p. 239, l. 1 ("I think the conduct as I have heard it is reprehensible. It's childish, it's harassment, it's ridiculous. If I were the Irishes, I would be terribly, terribly upset. I would certainly consider filing a lawsuit. It's untenable. . .. And Mr. Hall, I'm just – this is shameful behavior. It really is."). Some of this "reprehensible" conduct included: Jeffrey Hall physically pacing outside of Wanda Irish's office waiting for her to be alone and then entering her office to yell at her alleging that she has been running secret meetings; Jeffrey and Dona Hall yelling at, threatening, and ordering the Irishes, their family members, and City employees to leave the public easement located on the Halls' property; Jeffrey Hall posting pictures of the Irishes' boat to social media with false and malicious comments stating Wanda Irish "can do anything because she thinks she [is] a King;" the Halls proclaiming to third parties that Wanda Irish is "running a corrupt business" and has "corrupted the local city government by favoring her family members;" the Halls taking photographs of the Irishes while the Irishes were on the deck of their private home; the Halls telling Wanda Irish, when on the public easement, to "get the fuck off my property" and calling Wanda Irish "that bitch" when ordering other city employees off the public easement; and the Halls driving their vehicles in an unnaturally slow fashion and honking their

horn without any basis or reason to do so past the Irishes' residence to menace and intimidate them. R. Vol. II, p. 318–19.

Shortly before trial in this matter, Jeffrey Hall came to Wanda Irish's place of work, demanded she dismiss her case against him, and threatened to "reopen" the criminal stalking case against Dennis Irish if she didn't. R. Vol. II, p. 420 (Declaration of Wanda Irish in Support of Motion for Injunction).

This behavior persisted even after the directed verdict was granted, forcing Wanda Irish to file for an injunction and protective order against the Halls pursuant to I.R.C.P. Rule 65(a) and (e)(2). R. Vol. II, pp. 431–450. After trial concluded, Jeffrey Hall again came to City Hall on non-government business and accused the Mayor of being a liar. *Id.* He was instructed to direct all communications to the Irishes through counsel. *Id.* Later that same day, Jeffrey Hall came to Mayor Irish's office again, demanded payment of his attorney fees, threatened to "have a talk with [Mayor Irish's] husband" if she didn't write him a check that moment, and insinuated that he had the "judge and prosecutor in his 'back pocket.'" *Id.* at 421. Jeffrey Hall continued to confront the Irishes on multiple occasions thereafter, calling Mayor Irish's cell phone, leaving voice messages, coming by her workplace, interrupting city business meetings, and accusing the Mayor of lying in front of speakers and attendees at these meetings. *Id.* On one occasion, Jeff Hall's behavior turned physically violent and he attempted to strike the Mayor in the face with his cell phone, causing witnesses to intervene and the sheriff to be called. *Id.* at 423. A temporary protection order was granted. R. Vol. II, pp. 447–50.

STANDARD OF REVIEW

The decision to award or deny attorney fees to a party is within the sound discretion of the trial court. *Smith v. Mitton*, 140 Idaho 893, 901, 104 P.3d 367, 375 (2004). Such an award or denial is reviewed on appeal under an abuse of discretion standard. *Id.*

Under Idaho Code § 12-121, a "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." (emphasis added).

ARGUMENT

I. The trial court did not abuse its discretion in denying the Halls' request for attorney fees

A. A party which prevails on a directed verdict is not automatically entitled to an award of attorney fees

The Halls assert the grant of a directed verdict automatically establishes that the Irishes acted unreasonably in pursuing their defamation complaint and the trial court was required to award them attorney fees pursuant to I.C. § 12-121. The Halls cite to *Anderson v. Ethington*, 103 Idaho 658, 659 (1982) to support this proposition. The *Anderson* case was decided prior to the enactment of Idaho Rule of Civil Procedure 54(e)(1), when the decision to award attorney fees was committed entirely to the sound discretion of the court. That broad discretion was later limited by passage of I.R.C.P. 54(e)(1) to cases which were brought, pursued or defended frivolously, unreasonably or without foundation. *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016). The latest enactment of I.C. § 12-121 also limits the award of attorney fees where cases are brought, pursued or defended frivolously, unreasonably or without foundation.

The *Anderson* case involved a directed verdict. The issue on appeal was whether a denial of summary judgment against the third-party plaintiff precluded the trial court later finding the third-party plaintiff's case was brought without foundation. The *Anderson* court concluded it did

not because the standard for summary judgment was different. The *Anderson* court did not hold that grant of a directed verdict mandates that a trial court must find that the plaintiff's case was brought without foundation.

B. The Irishes' suit was not brought or pursued frivolously, unreasonably or without foundation.

The Halls argue under the broader standard of *Anderson* that the Irishes' case was pursued without foundation. The Irishes' defamation claim was not frivolous, unreasonable, or without foundation, as alleged by the Halls under the current standard. For years, the Irishes were forced to endure the Halls' barbs, harassment and false criminal allegations, conduct by the Halls that the district judge deemed "childish," "ridiculous," "shameful" and "reprehensible." Tr. Vol. II, p. 238, ll. 6–7, 25. In fact, the trial court itself stated: "If I were the Irishes, I would be terribly, terribly upset. I would certainly consider filing a lawsuit. It's untenable." Tr. Vol. II p. 238, l. 7–9. Even Mr. Hall admitted his behavior had been childish. R. Vol. II, p. 389.

Further, the trial court recognized "[d]efamation is a morass of gray areas" and "[t]here is evidence that these statements were seen by others . . .." Tr. Vol. II p. 22, l. 22–23; p. 229, l. 14–15. Moreover, the trial court agreed that the Irishes' interpretation of the Halls' statement was accusing them of stalking was a reasonable inference to draw. Tr. Vol. II p. 236, l. 16. The trial court determined, based on the evidence, testimony, and credibility of the parties before it, that there was no basis to award attorney's fees to the Halls, even though they were the prevailing party on the directed verdict. The Halls have failed to show how the trial court abused its discretion in so holding. Therefore, this Court should uphold the trial court's denial of attorney fees to Respondents.

C. The trial court did not abuse its discretion by failing to award attorney fees based on the other grounds raised by the Halls in their cross appeal

The Halls also claim an award of attorney fees was proper because the Irishes pled multiple causes of action which were barred by the statute of limitations, and because the Irishes requested a jury instruction for punitive damages even though the verified complaint failed to assert a punitive damage claim.

The Halls request attorney fees for the Irishes' causes of action for defamatory slander which were barred by the statutes of limitation. Contrary to the Halls assertion in their appeal, they did not have to defend multiple counts of defamatory slander. There was only one cause of action alleged in the verified complaint for defamatory slander and one cause of action for injunctive relief which the Halls had to defend.

While there were many statements made by the Halls which were alleged in the facts of the verified complaint, some of which standing alone might fall outside the statute of limitations, this does not convert the alleged facts to separate causes of action. Many of these statements appear to have been asserted to support the element of malice which a public figure is required to demonstrate in a slander case. The trial court directed verdict on the only count of defamatory slander raised by the Irishes, and the directed verdict was unrelated to the statutes of limitation. The trial court did not abuse its discretion by failing to award the Halls attorney fees as the prevailing party on non-existent multiple counts of defamatory slander.

The Halls also request attorney fees for prevailing on a non-existent punitive damage cause of action. The Halls' argument regarding punitive damages is muddled. On the one hand, they complain that punitive damages were not alleged in the verified complaint. Yet on the other hand, they concede I.C. § 6-1604 precludes such a practice.

Nonetheless, the Halls contend the trial court abused its discretion by failing to award them attorney fees as the prevailing party on this unasserted claim for punitive damages. This argument was never raised to the trial court to rule upon, so there is no basis to claim an abuse of discretion by the trial court in addressing it.

Even had the Halls raised this issue to the district court, the trial court would have been unable to award attorney fees to the Halls on this item for two reasons. First, punitive damages are just that, they are an element of damage, and not a separate cause of action. Second, even if they were interpreted to be a separate cause of action, a trial court would be hard pressed to hold a party prevailed on an unasserted claim to sustain an award of attorney fees.

ATTORNEY FEES ON APPEAL

The Halls are not entitled to attorney fees on appeal. Idaho Code section 12-121 provides that a court may award reasonable attorney's fees in any civil action to the prevailing party when the court is left with the abiding belief that the matter was brought, pursued, or defended frivolously, unreasonably and without foundation. This is the same standard applied pursuant to Rule 54. *See Balderson v. Balderson*, 127 Idaho 48, 54, 896 P.2d 956, 962 (1995) (quoting *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979).

The Irishes have not acted frivolously, unreasonably or without foundation in law or fact in pursuing this appeal. Contrary to the Halls' assertion, this Court is not being asked to second guess the trial court and re-weight the evidence. .

Instead, the Irishes' appeal focuses upon a holding by the trial court which the Irishes contend did not follow the applicable legal standard for a directed verdict. Namely, that the trial court confused an ambiguous accusation of a crime, which is for the jury to decide, with a stated opinion. This confusion is seen in the trail court's discussion of its decision where it recognized

that the Irishes' interpretation of the statement "Dennis and Wanda Irish Stalking U2" as accusing them of criminal activity was a reasonable inference to be drawn from the statement, and then moved on from this conclusion to declare the statement was an opinion because it would be impossible to prove or disprove whether the Irishes were stalking the Halls. Tr. Vol. II, p. 236, l. 11 – p. 237, l. 1. Proving whether an alleged criminal act has occurred is not impossible. It is this contradiction in the trial court's logic in directing verdict which supported the appeal filed by the Irishes. Raising this issue on appeal was not frivolous, unreasonable, or without foundation in law or fact.

CONCLUSION

The Irishes respectfully request this Court affirm the district court's denial of attorney fees below, and deny the Halls attorney fees on appeal on their cross appeal.

RESPECTFULLY SUBMITTED this 24th day of October, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2017, I caused to be served a true and correct copy of the foregoing by U.S. Mail to all counsel of record as follows:

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

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