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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DUANE M. SIERCKE, Plaintiff/Appellee, vs. ANNALLI S. SIERCKE, (n/k/a ANALLI SALLA) Defendant/Appellant.	Docket No. 47196-2019 Kootenai County Docket No. CV2017-1996

BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District for Kootenai County.
Honorable Judge Simpson, District Judge Presiding

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Table of Contents

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

OTHER AUTHORITIES **PAGE**

STATEMENT OF THE CASE

1. NATURE OF THE CASE

This appeal concerns the central question of whether a report to law enforcement of domestic violence, subjects the reporter to a civil defamation claim or whether such reports are protected by an absolute or qualified privilege. The Court in this case refused to recognize either privilege as applying and therefore not only permitted the claim to proceed to the jury, but failed to instruct on the additional element of malice that would apply to a qualified privilege. Finally, the appeal questions the applicability of a defamation per se jury instruction where the Plaintiff was relieved of having to prove damages.

2. PROCEDURAL HISTORY

Plaintiff, (Appellee Duane "Siercke") filed a civil complaint for defamation, wrongful civil proceedings and abuse of process against his ex-wife, the Defendant (Appellant Analli "Salla"). (R. pp. 2, 16-28). Salla counterclaimed for battery and intentional infliction of emotional distress. (R. pp. 5, 29-39).

In the course of the parties' pre-trial compliance, both parties submitted their proposed jury instructions to the Court. Siercke filed his proposed instructions on June 18, 2018. (R. pp. 54-90). On June 20, 2018, Salla filed her written objections to Plaintiff's proposed jury instructions, including her objections to Siercke's defamation claims and his defamation per se jury instruction. (R. pp. 92-96).

Siercke's defamation claim centered on Salla's 911 call, report to law enforcement and later to a prosecutor and counselor that Siercke had committed acts of domestic violence against her. The Defendant argued that such statements were entitled to absolute privilege and she objected to a defamation per se jury instruction. (R. 92-97). The Court did not afford any form of

privilege to the statements and instructed the jury on defamation per se over Defendant's objections. (R. 127, 131-133).

After a five-day jury trial in March 2019, the jury denied all claims except Siercke's defamation claim against Salla. The jury awarded damages to Siercke, according to a defamation instruction that did not require that he establish that Salla's statements were made in bad faith or with malice. The jury's damage award in the amount of $25,000 was instructed by a defamation per se instruction that did not require any proof of damages. The district court entered its Judgment in accordance with the jury's verdict on April 10, 2019. (R. 154-155).

On April 22, 2019, Defendant filed her Motion for New Trial. (R. pp. 14, 156-164.) After hearing on the motion, the district court entered its Order on Defendant's Motion for a New Trial which denied the motion on June 21, 2019. (R. pp. 14, 165-179). Defendant filed her Amended Notice of Appeal herein on July 18, 2019. (R. p. 14). This appeal follows Defendant's Second Amended Notice of Appeal filed on August 15, 2019. (R. p. 15).

3. STATEMENT OF FACTS

On March 7, 2016, Appellee, Duane Siercke (Sierkce) and Appellant, Annali Salla (Salla), then husband and wife and parents of two young children, both called 911 to report an incident of domestic violence. (Tr. Ballman, p. 10). They had been discussing a possible divorce and the custody of the children when Salla reported that Siercke had grabbed her violently by the head and tore an earring from her ear, causing her ear to bleed. (Id., pp. 10, 16). Kootenai County Sheriff Deputy Ballman responded with another officer to the scene and both officers separately interviewed both Salla and Siercke. Deputy Ballman found Siercke calm and apparently in control of his emotions, behavior consistent with Deputy Ballman's experiences in interviewing controlling, domestic abusers. (Id., p. 30). Siercke alleged that Salla was "framing"

him and he had not touched her (Id., p. 11). Deputy Ballman found Salla "very, very upset" and "crying, very emotionally distraught…at times had a hard time articulating pretty much anything." (Id., p. 23). Deputy Ballman also noticed that "she had blood coming out of her earlobes." (Id.). Consistent with his training and experience in domestic violence, he found Salla not wanting Siercke to be arrested and not wanting to share the audio recording of their physical encounter that Salla had recorded. (Id.). After the on-scene investigation, interviews with both parties and the children, and a review of Salla's recording of the incident, Deputy Ballman made the decision to arrest Siercke for domestic violence with traumatic injury in the presence of a child.[1] (Id., p. 31). Deputy Ballman testified that he completed and filed his probable cause affidavit in support of his arrest and sent his reports to the Prosecuting Attorney who decided whether or not to file a criminal complaint. (Id., p. 37). Salla made no decision on whether or not Siercke was charged. The decision to arrest and request charges were made by Deputy Ballman. (Id., p. 34). Deputy Ballman believed that Salla actually asked him not to arrest or charge Siercke. (Id.)

Siercke testified as follows regarding his monetary claim and damages. That because of Salla's report to law enforcement and prosecutors and his subsequent arrest, overnight at the jail and criminal charges that he "had to pay, I think $500, or something of that nature" to bond out of jail. (Siercke Tr. at 59). He also had to hire an attorney to represent him on the criminal charges and subsequent divorce complaint filed by Salla. (Id., p. 60). Siercke had to miss work as a result of the criminal charges, but testified "I can't remember exactly how many…it wasn't a

[1] While Deputy Ballman arrested for domestic violence with traumatic injury, the arrest led to a criminal complaint by the Kootenai County Prosecutor of misdemeanor domestic battery and the trial court instructed the jury on the elements of misdemeanor domestic battery. (R., p. 129). The trial court did not distinguish between a felony and misdemeanor criminal charge in its defamation per se instruction No. 6 (R., p. 127).

large number though." (Id., p. 61). Siercke also testified that he lost sleep and went to counseling and because of the criminal no contact order could not see his children until temporary orders were issued in the divorce case in August, 2017. (Id., pp. 61-65). When asked about his damages, Siercke said "I was going to ask for $50,000…I think that's a fair amount, more than fair amount to ask, considering all the circumstances of myself and of my ex-wife." The only specific damage amounts Siercke testified to outside of the $500 bond, came in during re-direct examination and over Defendant's objections. (Id., p. 155-156). Siercke testified that he had paid his counselor "over $800." (Id., p. 156). He lost income in the amount of $1,300. (Id., p. 180). Finally, he testified that his $50,000 damages claim included all three of his claims and the lost income and counseling costs. (Id.).

Though Plaintiff had mentioned in his direct testimony that he had to hire an attorney for the divorce and the criminal charges, these claims had been precluded as adjudicated in a prior proceeding. (R., p. 176).

Notwithstanding that the focus of Plaintiff's defamation claims involved Salla's report to law enforcement of domestic violence, the Court did not instruct the jury on any form of privilege to be afforded Salla's statements, nor did the Court require the Plaintiff to establish any additional elements of proof. (R., p.116-153). Indeed, the Court's Instruction No. 13 outlined the claim of defamation as having only three elements, as follows:

In order to prove a claim of defamation, the Plaintiff, Duane Siercke has the burden of proving each of the following elements:

1. The Defendant Analli Siercke, nka Salla, communicated information concerning the Plaintiff Duane Siercke to others; and
2. The information imputed that Plaintiff Duane Siercke had committed a crime; and

3. The information was false.

(R., p. 133). The Court therefore did not require elements 4, 5 and 6 of Idaho Civil Jury Instruction on defamation. including that: (4) The defendant knew it was false, or reasonably should have known that it was false; (5) The plaintiff suffered actual injury because of the defamation; and (6) the amount of damages suffered by the plaintiff. IDJI 4.82

Additionally, the Court did not instruct the jury on bad faith or malice requirements for Plaintiff to establish his defamation claim had the court afforded Salla at least a qualified privilege. (R. p. 133).

Further, and notwithstanding that Salla reported to police that her husband had committed misdemeanor domestic battery, that Siercke was charged with misdemeanor domestic battery, that the Court instructed on misdemeanor domestic battery and it being a crime, the Court gave the jury a defamation per se instruction. (R. 127, 129). Salla objected to the instruction. The Court gave the instruction. Siercke did not have to prove damages. The jury awarded Siercke $25,000 pursuant to the court's erroneous instructions.

4. STATEMENT OF ISSUES ON APPEAL

Salla's appeal from this Judgment and the trial judge's denial of her motion for a new trial presents this Court with three issues. First and foremost, whether reports of criminal activity to law enforcement, their agents, and prosecutors, like those made by Salla here, are subject to civil defamation claims and/or whether an absolute or qualified privilege should be applied to such statements. Second, whether the trial court's failure to afford an absolute privilege or, at a minimum instruct the jury on the bad faith and malice requirements of a qualified privilege, require a new trial. And finally, whether Siercke was entitled to a defamation per se jury instruction where Salla's report to law enforcement involved only misdemeanor domestic battery

allegations, and resulted in him being charged with only misdemeanor domestic battery where misdemeanor charges not subject to charging by information or indictment as required by Idaho precedent.

5. STANDARD OF REVIEW

This Court exercises free review as to questions of law. *Kaai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992).

Whether jury instructions have been correctly given is a question of law. *Ballard v. Kerr,* 160 Idaho 674, 702, 378 P.3d 464, 492 (2016), quoting *Mackay v. Four Rivers Packing Co.*, 151

Idaho 388, 391, 257 P.3d 755, 758 (2011)."When considering whether a jury instruction should or should not have been given, the Court considers 'whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." *Id.* When error is committed in the giving of a jury instruction, it will be reversible error where "the jury instructions, taken as a whole mislead or prejudice a party." *Mackay*, 151 Idaho at 391, 257 P.3d at 758. A jury instruction is prejudicial when it "could have affected or did affect the outcome of the trial." *Garcia v. Windley*, 144 Idaho 539, 164 P.2d 819 (2007). A new trial should be granted where the party demonstrates that the error affected the jury's conclusion. *Ballard*, 160 Idaho 674, 702, 378 P.3d 464, 492 (2016). The appellant bears the burden to clearly show prejudicial error from an erroneous jury instruction. *Clark v. Klein,*137 Idaho 154, 159, 45 P.3d 810, 815 (2002).

6. SUMMARY OF ARGUMENT

An individual's statements to law enforcement and prosecutors during investigation of criminal activity are entitled to absolute immunity such that an action in defamation cannot be

brought. At a minimum, qualified immunity should be afforded to such statements so that the Plaintiff faces a higher burden of proof and/or more stringent elements to prove in his defamation claim, including bad faith and malice.

An individual against whom a claim of misdemeanor domestic battery has been made is not entitled to a defamation per se jury instruction on his defamation claim and must instead be required to prove his damages. Here, the Defendant did not prove his damages and the jury's award that was based upon the defamation per se jury instruction must be reversed.

The trial court's errors in interpreting the law relating to defamation, instructing the jury incorrectly require a reversal of the Judgment and remand for a decision consistent with this Court's direction on application of either absolute or qualified privileges to statements made by Salla to law enforcement and prosecutors.

7. ARGUMENT

a. Siercke's Defamation Claims were Barred by an Absolute Privilege

Statements that form the basis of a complaint to law enforcement and prosecutors should be deemed the first step in a judicial proceeding and such statements should be afforded absolute immunity from a defamation claim by the person against whom such statements were made. See, *Malmin v. Engler*, 124 Idaho 733, 736, (Ct. App. 1993) ("defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged") quoting *Richeson v. Kessler*,73 Idaho 548, 551-52, 255 P.2d 707, 709 (1953), RESTATEMENT (SECOND) OF TORTS § 586 (1977). See also, *Richmond v. Nodlan*, 552 N.W.2d 586 (N.D. 1996)(citizens and law enforcement have a common interest in investigating criminal activity and the discussion of potential suspects of criminal activity is relevant to that common interest).

The Ninth Circuit established this this important privilege in reviewing a defamation claim alleged to have occurred at a public meeting in Lewiston, Idaho. *Borg v Boas,* 231 F.2d 788, (9th Cir. 1956) While the *Borg* case involved a different underlying factual scenario – a newspaper's reports relating to criminal allegations against public officials - the case established important precedent in Idaho in the context of defamation claims stemming from criminal allegations to public officials:

> It is hornbook learning that the actions and utterances in judicial proceedings so far as the actual participants therein are concerned and preliminary steps leading to judicial action of an official nature have been given absolute privilege. Of particular interest are proceedings leading up to prosecutions or attempted prosecutions for crime. The common law placed a veil of secrecy about the proceedings of a grand jury, so that all persons might freely disclose their suspicions and deductions without the danger of a libel suit as a result of an attempt at law enforcement. But a written charge or information filed with the prosecutor or the court is not libelous although proved to be false and unfounded. Furthermore, **the information given to a prosecutor by a private person for the purpose of initiating a prosecution is protected by the same cloak of immunity and cannot be used as a basis for an action for defamation**.

Id. at 794 (9th Cir. 1956) (emphasis added).

An absolute privilege rule for private persons who report crimes to law enforcement and prosecutors regarding criminal activity is followed in several jurisdictions in the United States. See *Mazanderan v. McGranery*, 490 A.2d 180, 182 (D.C. 1984); *McCutcheon v. Moran*, 99 Ill. App. 3d 421, 54 Ill. Dec. 913, 425 N.E.2d 1130, 1133 (1st Dist. 1981); *Starnes v. International Harvester Co.*, 184 Ill. App. 3d 199, 132 Ill. Dec. 566, 539 N.E.2d 1372, 1374–75 (4th Dist. 1989)(communications to federal law enforcement officials); *Bradley v. Avis Rental Car System, Inc.*, 902 F. Supp. 814, 820 (N.D. Ill. 1995);*Vincent v. Williams*, 279 Ill. App. 3d 1, 216 Ill. Dec. 13, 664 N.E.2d 650, 655 (1st Dist. 1996); *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, 2014 WL 641933 (Ill. App. Ct. 1st Dist. 2014)(a complaint to the Chicago police superintendent for purpose of instituting criminal charges involved a ranking official with quasi-judicial

functions and was entitled to absolute privilege); *Shea v. Winnebago County Sheriff's Department*, 746 Fed. Appx. 541, 543, 546 (7th Cir. 2018), cert. denied, 139 S. Ct. 1200 (2019)(applying the Illinois rule of absolute privilege in an alleged sibling dispute over control of an elderly mother and her estate, a criminal battery claim against plaintiff-brother, together with a charge of theft of keys to plaintiff's mother's house and commission of a hit-and-run offense against a caregiver to the mother); *Illaraza v. HOVENSA LLC*, 2014 WL 5859168, 15-16 (D.V.I. 2014); *Savoy v. Univ. of Akron*, 2014-Ohio-3043, 15 N.E.3d 430, 435, 307 Ed. Law Rep. 1073 (Ohio Ct. App. 10th Dist. Franklin County 2014); *Eddington v. Torrez*, 311 Mich. App. 198, 874 N.W.2d 394 (2015), appeal denied, 498 Mich. 951, 872 N.W.2d 474 (2015) (any change in the absolute privilege rule was for the supreme court or legislature). *In re Quarles*, 158 U.S. 532, 535-36, 15 S. Ct. 959, 39 L. Ed. 1080 (1895)(every private citizen has a constitutional right to inform executive officers of charges of criminality; such communications are absolutely privileged under the law of defamation); *Pawlowski v. Smorto*, 403 Pa. Super. 71, 588 A.2d 36, 41-42 (1991); *Pennoyer v. Marriott Hotel Services, Inc.,* 324 F. Supp. 2d 614, 616-19 (E.D. Pa. 2004); *Marino v. Fava*, 915 A. 2d 121, 122–24 (Pa. Super. 2006)(following *Pawloski*, the court extended an absolute privilege for complaints to police officers about criminal charges to applications to mental health officials for an involuntary commitment); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1201 (D. Nev. 2009); *Vogel v. Gruaz*, 110 U.S. 311, 315-16, 4 S. Ct. 12, 28 L. Ed. 158 (1884); *Cutts v. American United Life Ins. Co.,* 505 So. 2d 1211, 1215 (Ala. 1987); *Bergman v. Hupy*, 64 Wis. 2d 747, 221 N.W.2d 898, 902 (1974); *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121, 127–28 (1979); Frazier v. Bailey, 957 F.2d 920, 932–33 (1st Cir. 1992); *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234 (2d Cir. 1996), (statements to the IRS and U.S. Attorney's office were absolutely privileged); Restatement (Second) of Torts § 598, comm.

e (1977) ("formal or informal complaints to a prosecuting attorney or other law enforcement officer concerning violations of the criminal law are absolutely privileged" under § 587, infra); Restatement (Second) of Torts § 587, comm. b (1977) (the absolute privilege of a party applied to "information given and informal complaints made to a prosecuting attorney or other proper officer preliminary to a proposed criminal prosecution whether or not the information is followed by a formal complaint or affidavit"); *Presson v. Bill Beckman Co., Inc.*, 1995 OK CIV APP 44, 898 P.2d 179 (Okla. Ct. App. Div. 3 1995) (letter sent to IRS alleging tax fraud), cert. denied (1995).

California has routinely applied absolute immunity to these situations. See *Devis v. Bank of America*, 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238, 242 (2d Dist. 1998) (in dicta the court adopted a good faith limitation). But compare *Williams v. Taylor*, 129 Cal. App. 3d 745, 181 Cal. Rptr. 423, 427-28 (3d Dist. 1982) (disagreed with and questioned by *Fenelon v. Superior Court*, 223 Cal. App. 3d 1476, 273 Cal. Rptr. 367 (4th Dist. 1990)); *Passman v. Torkan*, 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291, 296 (2d Dist. 1995) (following Williams and rejecting Fenelon) (the court was interpreting an absolute statutory privilege accorded to "any other official proceeding authorized by law"). Recently, the court issuing *Fenelon* has repudiated it and adopted the absolute privilege rule of *Williams* and progeny. Most notable in the context of this appeal, the California Court of Appeals in *Navarette v. Holland*, issued a superseding opinion holding that statements by a claimed spousal abuse victim to police overheard by a neighbor were absolutely privileged. 4 Cal. Rptr. 3d 702, 76 P.3d 363 (Cal. 2003).

Where the defendant officially swears out a criminal complaint, that complaint was absolutely privileged under the judicial proceedings rule. *O'Connell v. Bank of Boston*, 37 Mass. App. Ct. 416, 640 N.E.2d 513, 517 (1994); *Remley v. State*, 174 Misc. 2d 523, 665 N.Y.S.2d

1005, 1008 (Ct. Cl. 1997) (the court distinguished cases involving information given a district attorney, where only a qualified privilege applied); *Pitts v. Newark Bd. of Educ.*, 337 N.J. Super. 331, 766 A.2d 1206, 1209–10, 151 Ed. Law Rep. 517 (App. Div. 2001) (a filed criminal trespass complaint was absolutely privileged).

This view, considered the minority rule, treats the formal complaint or informal charge of crime to a prosecuting attorney, police, coroner or IRS as the "initial step" —comparable to appearance before a grand jury—and "an integral part of the regular course of justice." See *Bergman v. Hupy*, 64 Wis. 2d 747, 221 N.W.2d 898, 901–02 (1974) (the court gave an absolute privilege as to statement to an assistant district attorney but opined that statements to police were only qualifiedly privileged—the court noted that a prosecutor's discretion to prosecute or not "approaches the quasi-judicial"); *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121, 128 (1979). Such reports are “statements preliminary” to judicial proceedings. *Pennoyer v. Marriott Hotel Services, Inc.*, 324 F. Supp. 2d 614, 619 (E.D. Pa. 2004).

The qualified privilege rule has been rejected in circumstances such as those presented in this case because of the risk that even "honest litigants will be put to trouble, time and expense in defending themselves against vexatious lawsuits," thereby deterring citizens from making even good faith allegations of criminality. *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121, 128 (1979). In light of the criminal penalties for making false official statements and the availability of other tort remedies—abuse of process and malicious prosecution —in at least some egregious cases, "the substantial interest of society in encouraging citizens to report suspected criminal activity" "far outweigh[s]" complainant's reputational interest. Id. Limited case law has extended the absolute privilege rule to reports of sexual assault to campus police at a private educational institution. See *Razavi v. Walkuski*, 2016 IL App (1st) 151435, 404 Ill. Dec. 156, 55 N.E.3d 252,

256-58, 332 Ed. Law Rep. 1087 (App. Ct. 1st Dist. 2016)(the court cited the "chilling effect of deterring victims" by any other policy and could not discern any legitimate policy in not allowing the same immunity merely because alleged victims chose to contact campus security rather than city police).

In this case, Siercke brought a civil tort claim in defamation against Salla for her having reported his domestic abuse. His argument at trial focused on her reports to law enforcement and prosecutors and the impact of his subsequenty being charged with a misdemeanor domestic battery. (Tr. Siercke, 45-48, 55-64).

Salla argued that she was entitled to absolute immunity from such claim as specifically set forth in her motion to the Court relating to jury instructions. (R., p. 93). With the paucity of Idaho case law on this particular issue relating to defamation claims stemming from reports to law enforcement and prosecutors, Salla cited to *Carpenter v. Grimes Pass Placer Mining Co.,* 19 Idaho 384, 114 P. 42 (1911) in which the Supreme Court pronounced that "the ends of justice and the public good can best be served by allowing litigants to freely plead any pertinent or material matter in a judicial proceeding…holding them accountable only for defamatory matter which is neither pertinent nor material to the subject under inquiry." Id. 19 Idaho 384, at 393-95, 114 P. 42, at 45-47. The district court ignored this claim of privilege and allowed the defamation claim to proceed to jury verdict.

In her motion for a new trial, Salla cited to *Borg v. Boas,* 231 F.2d 788 (9th Cir. 1956) as further authority for her claim of absolute privilege and demand for a new trial. The court rejected her claim by distinguishing her claim from *Dickenson Frozen Foods, Inc. v. J.R. Simplot Company* 164 Idaho 669,434 P.3d 1275 (2019), a case applying the absolute litigation privilege to statements made by a business in a federal civil complaint. (R., p. 168-170). In its order

denying the motion for new trial, the Court provided no explanation a to why the *Borg* case, more squarely on point, did not apply to the facts of this case. (R., p.165-173).

Salla submits that she was entitled to absolute privilege on the statements she made to law enforcement and prosecutors regarding Siercke's domestic violence and the trial court erred in permitting the claim to go to the jury.

b. Alternatively, at a minimum, Salla's reports to Law Enforcement & Prosecutors about Siercke's domestic violence were entitled to a Qualified Privilege

Even if this Court determines that an absolute privilege is not warranted under the circumstances of this case, this Court should, at a minimum, follow the majority of jurisdictions in the United States that recognize the important public policy in affording a qualified privilege for statements made to law enforcement and prosecutors during the investigation of criminal activity.

Even applying the less protective "qualified immunity" standard to Appellant's statement to law enforcement about her ex-husband's domestic violence against her would necessarily require a higher standard of proof than was applied in this case and the element of bad faith and malice.

For example, in the leading case the New York Court of Appeals held that oral statements to a district attorney and a later affidavit proffered under threat of a grand jury subpoena were only qualifiedly privileged. *Toker v. Pollak*, 44 N.Y.2d 211, 405 N.Y.S.2d 1, 376 N.E.2d 163, 167–69 (1978). While acknowledging that an appearance before a grand jury would be absolutely privileged, the court held that a district attorney functioning in the capacity of recipient of charges of crime does not function as a judicial official but as the equivalent of a police officer. Id. 167-168. It concluded that a qualified privilege sufficed "to foster the public

purpose of encouraging citizens to come forth with information concerning criminal activity" and opined that "[o]nly those who act out of malice, rather than public interest need hesitate before speaking." Id. at 168.

In another, more recent case, the Florida Supreme Court held that the facts therein—a fabricated charge of murder by the family of plaintiff against him and use of a stress analyzer to detect who would be the most convincing liar—constituted an "eloquent argument" for only a qualified privilege. *Fridovich v. Fridovich*, 598 So. 2d 65, 68–69 (Fla. 1992). And see *Moore v. Bailey*, 628 S.W.2d 431, 433–36 (Tenn. Ct. App. 1981)(rejecting absolute privilege as to a 10-year pattern of complaints based on a "history of … unjustified hostility.").

Under a qualified privilege standard, information supplied in good faith and without proven malice, will not support a defamation claim. *Barlow v. International Harvester*, 95 Idaho 881, 522 P.2d 1102 (1974). A qualified privilege is lost when it is demonstrated that "the publication of the defamatory material" was made "with express malice." Id. 95 Idaho at 892, 522 P.2d at 1113, citing *Walker & Associates, Inc. v. Remie Jaussaud & Assoc.*, 497 P.2d 949, at 951; *Abrahamsen v Mountain States Telephone & Tel. Co.*, 494 P.2d 1287 at 1289. "Express malice, or malice in fact, is the publication of defamatory matter in bad faith, without belief in the truth of the matter published, or with reckless disregard of the truth or falsity of the matter." Id. at 892, 1114. Further, "the determination of whether a given set of facts constitutes a 'privileged occasion,' in regard to liability for defamation, is a matter of law for the determination of the court," which must then instruct the jury accordingly. Id. "The question of whether the publication was actuated by express malice, and the privilege thereby nullified, is a question for the jury." Id. citing, *Browder v. Cook*, 59 F.Supp. 225, 231 (D. Idaho 1944). It is therefore erroneous for the Court to take the question of malice from the jury. Id.

Here, the Court's Instruction No. 10 in which it set forth the elements the Plaintiff was required to prove to establish his defamation claim contained no malice element, nor any bad faith or reckless disregard for the truth element. The Court therefore failed to afford the Defendant even the minimal qualified privilege which the majority of jurisdictions in the United States afford Defendants facing similar defamation claims. (R., p. 131).

Indeed, the trial court in this case provided a defamation instruction with only 3 elements and failed to even set forth the elements in the Idaho Civil Jury Instruction form defamation instruction. ICJI which requires that six (6) elements be proven. Specifically, IDJI 4.82 requires:

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

The Court's instructions in this case instead required only that the Plaintiff prove that: (1) The Defendant Analli Siercke, nka Salla, communicated information concerning the Plaintiff Duane Siercke to others; (2) The information imputed that Plaintiff Duane Siercke had committed a crime; and (3) information was false. (R., p. 133). The Court's instructions in this case cut out elements 4, 5, and 6. Even if a defamation per se instruction was appropriate, the critical fourth element concerns intent. The Plaintiff in this case was not required to show the Defendant's intent – a critical element in every defamation claim. Additionally, the Court did not require the plaintiff to show malice or bad faith which elements were essential if Salla was entitled to a qualified privilege.

Ultimately, with only the 3 elements to consider, the jury decision for Plaintiff was made substantially easier and actually resulted in the jury finding for the Plaintiff on his claims. This error can be described in no other way than as misleading and prejudicing Salla. The jury instructions in this case could have affected and did affect the outcome of the trial. The error in this case affected the jury's conclusion because they were not held to the correct elements of the law of defamation, nor instructed according to any privilege that should have been afforded to Salla's reports.

c. Plaintiff was not entitled to a Defamation Per Se Instruction

Plaintiff alleged that by calling 911, reporting the crime of domestic battery to law enforcement and prosecutors – all of which led to his arrest and prosecution, the Defendant committed defamation per se. Plaintiff filed proposed jury instructions following the law of defamation per se.

On June 20, 2018, the Defendant filed her written objections to the instructions proposed by Plaintiff. (R., p. 92-97). Specifically, the Defendant objected to Plaintiff's proposed instruction numbered 2, 10 and 12 relating to defamation per se as follows:

> Plaintiff proposes slander per se instructions which are not appropriate under the facts upon which he now proposes to narrowly focus his slander claim. Plaintiff's claim focuses on Defendant's statements to law enforcement and prosecutors in their pursuit of criminal charges against the Plaintiff. The charges were initiated by law enforcement after both parties called 911 on March 7, 2016. Defendant's statements in the context of the domestic violence judicial proceedings are subject to an absolute litigation privilege.

(Id., at 93).

Over Defendant's objections, and notwithstanding Idaho and Ninth Circuit precedent on this issue, the trial court nonetheless gave Instruction No.6:

> The Plaintiff Duane Siercke is entitled to an award of damages without having to prove damages **if false statements made by Analli Siercke, nka Salla**, impute that

the Plaintiff Duane Siercke engaged in a criminal offense." (Jury Instruction No. 6). (R., p. 127).

Moreover, even as to that portion of Plaintiff's claims to which it could be argued that absolute immunity did not attach, such as statements to a school counselor or friends, the civil

claim of defamation per se requires that the statement uttered alleges a felony. At the jury instructions conference, Defendant reminded the trial court of this important point and cited the court to the recent case of *Irish v. Hall*, 163 Idaho 603, 416 P.3d 975 (2018). That case made clear that to be defamatory per se, the conduct alleged must "impute conduct constituting a criminal offense chargeable by indictment or by information." *Id.* at 607, 979. The domestic battery uttered by the Defendant and squarely at issue in this case as set forth specifically in this Court's jury instruction No. 8 provided that "A household member who commits a battery, as defined in section 18-903, Idaho Code, against another household member which does not result in traumatic injury is guilty of misdemeanor battery." (R., p. 129). This instruction makes clear that the proof before the jury was an allegation of misdemeanor domestic battery. As a matter of law, a misdemeanor allegation cannot constitute defamation per se. The trial court erred in giving the defamation per se instruction and the judgment must be reversed and a new trial ordered.

Notwithstanding Defendant's written and oral objections to a defamation per se instruction, the trial court gave this erroneous instruction to the jury. The trial court was wrong on the law and this error established an incorrect burden of proof and permitted a verdict to be entered that was not supported by the law. The Defendant was not required to prove damages, did not prove damages constituting $25,000 and the jury awarded damages

in the amount of $25,000 because of this erroneous instruction. This error in instructing the jury is reversable and requires a new trial.

8. Conclusion

Allowing a private Plaintiff who has been charged with criminal offense after a private citizen has reported their criminal conduct to law enforcement and prosecutors to bring civil defamation claims against the private citizen reporter will have a dramatic chilling effect on the administration of criminal justice in Idaho.

Idaho precedent and a substantial number of other jurisdictions around the country support the application of an absolute privilege to private citizens reports to law enforcement and prosecutors about criminal activity to which they are a witness and/or victim. An absolute privilege would bar the exact type of lawsuit brought against Salla, a victim of domestic violence, in this case. The majority of jurisdictions in this country provide for at least a qualified privilege concerning such reports and require Plaintiffs to establish that the reports were made in bad faith and with malice.

The trial court in this case extended no privilege to Salla's statements to police and prosecutors and critically erred in instructing the jury by requiring the Plaintiff to only establish 3 elements and without requiring the Plaintiff demonstrate, malice, bad faith, or even the Defendant's intent.

Finally, by instructing the jury according to a defamation per se instruction, the Court ignored the requirement that a felony, chargeable by indictment or information, need be the subject matter of the statement.to qualify for a defamation per se instruction, if such instruction were otherwise appropriate in cases involving reports to law enforcement and prosecutors.

These critical errors in the trial court's instructions to the jury, taken as a whole, misled

or prejudiced Salla. Requiring a jury to only find 3 of the 6 elements of a claim and refusing to afford a privilege that the law recognizes and reflect that privilege in instructions to the jury most certainly affected the outcome of the trial in this case. Salla has therefore met her burden of establishing that the instructions could have affected or did affect the outcome of the trial.

There can be no question that this diminished burden made it far easier for the jury in this case to find for the Plaintiff on his defamation claim and award the $25,000 verdict that was awarded. This prejudicial error requires reversal and remand for a new trial in this matter.

Dated this 25th day of February, 2020.

BOLTON LAW, PLLC
Attorney for Defendant/Appellant

/s/ K. Jill Bolton
K. JILL BOLTON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of February, 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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