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Siercke v. Siercke Respondent's Brief Dckt. 47196

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

DUANE M. SIERCKE,

Plaintiff/Respondent,

vs.

ANALLI S. SIERCKE, nka: SALLA

Defendant/Appellant.

DOCKET NO. 47196-2019

Kootenai County Case No. CV-17-1996

BRIEF OF RESPONDENT DUANE M. SIERCKE

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

HONORABLE BENJAMIN SIMPSON
District Court Judge, Presiding

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A.

NATURE OF THE CASE

The above-named Appellant, Analli S. Siercke, nka: Salla (hereinafter: "Salla") appeals the Trial Court's Jury Instructions and denial of the Motion for New Trial relative to the jury verdict awarding damages to the above-named Respondent, Duane M. Siercke (hereinafter: "Siercke") on his claim of Slander.

B.

COURSE OF THE PROCEEDINGS

Duane filed a Complaint against Anna alleging claims of Slander, Abuse of Process and Wrongful Civil Proceedings (R. p. 14-28). Anna filed an Answer and Counterclaim denying the substantive allegations contained within the Complaint and asserted claims against Duane of Battery and Intentional Infliction of Emotional Distress (R. p. 29-39). Duane filed a Reply to the Counterclaim (R. p. 5). Anna filed an Amended Answer and Counterclaim asserting affirmative defenses res judicata and collateral estoppel (R. p. 10).

A 5 day jury trial on the Parties respective claims was conducted from March 18, 2019 until March 22, 2019. (R. p. 13) The jury returned a favorable verdict for Duane on his claim of Slander and awarded him monetary damages (R. p. 13). The jury found against Duane on his remaining claims and found against Anna on her claims (R. p. 13). A monetary judgment was entered against Anna consistent with the jury's verdict (R. p. 13).

Anna filed a Motion for New Trial which was denied by the Trial Court (R. p. 14). The instant appeal followed.

C.

STATEMENT OF THE FACTS

Prior to the date which forms the allegations which are central to this case, Duane and Anna were residing together as a married couple with two minor children. (Pl. Ex. 5, P. 630 and 631).

On March 7, 2016, Anna alleged facts to law enforcement which resulted in Duane being arrested and jailed for felony domestic battery in the presence of minor children (Pl. Ex 5, P. 628, 631 and 632; Pl. Ex. 9, P. 622 and 624).

On March 8, 2018, a Criminal Complaint was filed against Duane alleging domestic battery in the presence of a minor child (Pl. Ex. 6).

On June 6, 2016, the criminal charges against Duane resulting from Anna's allegations made on March 7, 2016, were dismissed (Pl. Ex. 8).

On September 29, 2016, Anna filed a Sworn Petition for Protection Order (Pl. Ex. 9). Therein, Anna reiterated her allegations relative to domestic violence that she made on March 7, 2016 (Pl. Ex. 9). At the time Anna filed the Sworn Petition for Protection Order, she and Duane were exercising parenting time with their minor children pursuant to a Court order (Pl. Ex. 9, P. 613).

On September 29, 2016, based upon Anna's allegations, the Court entered a Temporary Ex Parte Protection Order (Pl. Ex. 10) which left intact the parenting plan the required exchanges to be conducted at the police department (Pl. Ex. 10. P. 655).

The next day, September 30, 2016, Anna filed an Application to Modify the Temporary Ex Parte Protection Order alleging that on September 28, 2016, Duane had "... physically and emotionally harmed..." one of their minor children (Pl. Ex. 11).

Based upon Anna's allegations, an Amended Ex Parte Temporary Protection Order was entered on September 30, 2016.the Amended Order prohibited Duane from exercising any parenting time with his minor children (Pl. Ex. 12).

On October 7, 2016, he Ex Parte Temporary Protection Order was dismissed after a full hearing. The Court concluded that there was insufficient evidence to support the issuance of a Protection Order (Pl. Ex. 13);

From the outset Duane denied Anna's allegations of domestic violence against her and the minor children and asserted that Anna was attempting to “frame him” (Pl. Ex. 5; Pl. Ex. 9; Pl. Ex. 13; Tr. P. 52, Ln. 4-25; Tr. P. 53 through 59 and Tr. P. 60, Ln. 1).

Duane filed an action against Anna for claims, including Slander, wherein Duane alleged that Anna falsely alleged that he had physically abused her and a minor child, that Anna knew the allegations were false and that the false allegations had impugned his honesty, integrity, virtue and reputation (R. p. 22-23).

Duane's Proposed Jury Instructions No. 2 and No. 10 contain the proper language relative to a claim for slander per se, in that the jury may award damages without proof of damages if statements made by Annaimpute that Duane engaged in a criminal offense (R. p. 59 and 74).

Duane's Proposed Jury Instruction No. 11 contains the proper elements of a claim of Slander Per Se (R. p. 76).

Duane's Proposed Jury Instruction No. 12 contains the proper elements of a claim of Slander Per Se, and appropriately instructed the jury on their obligations should they find the claim proven (R. p. 78.)

Among others, Anna objected to Duane's Proposed Jury Instructions No. 2, 10, 11 and 12 on the grounds that Anna had the right to claim an "absolute litigation privilege", and that a slander per se instruction was inappropriate (R. p. 92-97).

Anna did not assert the "litigation privilege" as an affirmative defense in the Answer or the Amended Answer to Duane's Complaint (R. p. 10).

The Court gave Jury Instructions No's. 6 and 13 to the jury and were appropriate considering all of the evidence presented to the jury at trial including but not limited to testimony of witnesses, audio recordings and documentary evidence (R. p. 127 and 133).

Anna filed a Motion for New Trial alleging that improper jury instructions had been given and that the "litigation privilege" applied(R. p. 156-164).

In deciding the Motion for New Trial the Trial Court found that the "litigation privilege" did not apply and that Anna's deficient Motion for New Trial only preserved or objection to Jury Instruction No. 6. The Trial Court concluded that based upon the entirety of the evidence, Jury Instruction No. 6 was properly given. Lastly, the Trial Court found that Anna's objection to Jury Instruction No. 7 was without merit. (R. p. 165-179).

D.

ISSUES ON APPEAL

1. **Did the Court Err in Failing to Instruct the Jury on Absolute or Qualified Privilege ?**

2. **Did the Court Err in Failing to Instruct the Jury on the Bad Faith and Malice Requirements of Qualified Privilege?**

3. **Did the Court Err in Instructing the Jury on Defamation Per Se?**

4. **Did the Court Properly Deny the Motion for New Trial?**

5. **Did Salla Provided an Insufficient Record on Appeal?**

6. **Is Siercke is Entitled to an Award of Attorney Fees and Costs?**

E.

ARGUMENT

1. The Court Properly Declined to Instruct the Jury on Absolute or Qualified Privilege.

A. Standard of Review - Jury Instructions

1. ***Mackay v. Four Rivers Packing Co., 151 Idaho 388, 257 P.3d 755 (Idaho 2011)***

The propriety of jury instructions is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given is whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." ***Clark v. Klein, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002)*** (internal citations omitted). This Court reviews jury instructions as a whole to determine whether the instructions fairly and adequately present the issues and state the law. ***Silver Creek Computers, Inc. v. Petra, Inc., 136 Idaho 879, 882, 42 P.3d 672, 675 (2002)***. Even where an instruction is erroneous, the error is not reversible unless the jury instructions taken as a whole mislead or prejudice a party. ***Id***. Likewise, a special verdict form does not constitute reversible error unless it incorrectly instructed the jury as to the law or its form was confusing. ***VFP VC v. Dakota Co., 141 Idaho 326, 332, 109 P.3d 714,***

720 (2005) (citing Le'Gall v. Lewis Cnty., 129 Idaho 182, 185, 923 P.2d 427, 430 (1996)).

On appeal from a judgment entered on a jury verdict, this Court will not set aside the verdict if it is supported by substantial and competent evidence." ***Stoddard v. Nelson, 99 Idaho 293, 296, 581 P.2d 339, 342 (1978)***. The evidence supporting the jury's verdict may be contradicted, but the verdict will be upheld if it is " of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper." ***Mann v. Safeway Stores, Inc., 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974)***. This Court will not second guess the jury's determinations as to the weight of the evidence and witness credibility. ***McKim v. Horner, 143 Idaho 568, 572, 149 P.3d 843, 847 (2006)***.

B. Absolute Litigation Privilege Does Not Apply

1. *Dickinson Frozen Foods, Inc. v. J.R. Simplot Co., 164 Idaho 669, 434 P.3d 1275 (Idaho 2019)*

This Court has said "defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged and will not support a civil action for defamation ...." ***Richeson v. Kessler, 73 Idaho 548, 551-52, 255 P.2d 707, 709 (1953).*** The privilege applies even if the defamatory statements were "made maliciously and with knowledge of its falsity." ***Id. at 552, 255 P.2d at 709***. We have also stated that "[t]he term judicial proceeding is not restricted to trials, but includes every proceeding of a judicial nature before a court or official clothed with judicial or quasi judicial power." ***Id. at 551, 255 P.2d at 709***.

Accordingly, for litigation privilege to apply, two requirements must be satisfied. Those two requirements are that (1) "the defamatory statement was made in the course of a proceeding" and (2) it "had a reasonable relation to the cause of action of that proceeding ...." ***Weitz v. Green, 148 Idaho 851, 862, 230 P.3d 743, 754 (2010)***. When those two requirements are met, the "statement may not be used as the basis for a civil action for defamation." ***Id***.

In this case, the district court found that the parties did not dispute that the statements made in the Washington complaint and amended complaint were part of a judicial proceeding. DFF does not dispute this on appeal. Thus, the only remaining issue is whether the second prong of the litigation privilege inquiry is satisfied; that is, whether the defamatory statement "had a reasonable relation to the cause of action of that

> proceeding ...." ***Weitz, 148 Idaho at 862, 230 P.3d at 754; see also Richeson, 73 Idaho at 551-52, 255 P.2d at 709.***
>
> This Court has consistently indicated that litigation privilege should broadly apply. The policy for such broad application, this Court explained, is that, "[litigation] privilege is predicated on the long-established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of reprisal through a civil suit for defamation or libel." ***Taylor v. McNichols, 149 Idaho 826, 836, 243 P.3d 642, 652 (2010)***. "[I]f any circumstances would support a finding that attorney actions are pertinent to litigation then absolute immunity should protect the attorney." ***Id. at 841, 243 P.3d at 657 (citing Singh v. HSBC Bank USA, 200 F.Supp.2d 338, 340 (S.D.N.Y.2002))***. This Court went on to say that "[p]roceedings connected with judicature of the country are so important to the public good it is only in extreme cases and circumstances that a libelous publication in a judicial proceeding can be used as the basis for damages in a libel suit." ***Richeson, 73 Idaho at 552, 255 P.2d at 709***.

As set forth below, it is incumbent upon Salla to provide this Court with an adequate record to review the actions of the Trial Court. Salla has failed in that regard. Missing from the record on appeal is a complete trial transcript. In addition, missing from the record is a transcript of the oral objections and arguments made by Salla to Siercke's proposed jury instructions as well as the Trial Court's reasoning in ruling upon Salla's objections. The oral objections made on the record, the arguments in support thereof and the Trial Court's deliberative process and ruling upon the same are alluded to in the Order on Defendants Motion for New Trial (R. p. 165 and 166). It is the province of this Court, when reviewing whether a jury was properly instructed, to determine whether there was evidence at trial to support the instruction, and whether the instruction is a correct statement of the law. Without an actual trial transcript containing the entirety of all of the witness testimony, and a transcript of the objections, arguments and ruling relative to the jury instructions, this Court is left without an

adequate record to conclude that the Trial Court's jury instructions were in error. As set forth below, error shall not be presumed. Instead, missing portions of the record are to be presumed to support the action of the Trial Court. Therefore, Salla's appeal of this issue fails as a matter of law.

However, should this Court consider this issue, despite to the lack of inappropriate record, Salla was not entitled to a jury instruction on absolute immunity for the reasons articulated by the Trial Court in the Order on Defendants Motion for New Trial. In the Trial Court's decision, the Trial Court cited the appropriate law (***Dickinson Frozen Foods, Inc. v. J.R. Simplot Co., 164 Idaho 669, 434 P.3d 1275 (Idaho 2019)***), and cited specific facts developed at trial. Based upon the law, and the facts, the Trial Court properly concluded that the absolute litigation privilege did not apply (R. p. 168-170). The Trial Court's factual and legal analysis as set forth in the Order on Defendants Motion for New Trial relative to the conclusion that Salla was not entitled to a jury instruction on absolute immunity is hereby incorporated herein by this reference.

2. The Court Properly Declined to Instruct the Jury on the Bad Faith and Malice Requirements of Qualified Privilege.

A. Standard of Review - Jury Instructions

1. *Mackay v. Four Rivers Packing Co., 151 Idaho 388, 257 P.3d 755 (Idaho 2011)*

> The propriety of jury instructions is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given is whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." ***Clark v. Klein, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002)*** (internal citations omitted). This Court reviews jury instructions as a whole to determine whether the instructions fairly and adequately present the issues and state the law. ***Silver Creek***

> ***Computers, Inc. v. Petra, Inc., 136 Idaho 879, 882, 42 P.3d 672, 675 (2002)***. Even where an instruction is erroneous, the error is not reversible unless the jury instructions taken as a whole mislead or prejudice a party. Id. Likewise, a special verdict form does not constitute reversible error unless it incorrectly instructed the jury as to the law or its form was confusing. ***VFP VC v. Dakota Co., 141 Idaho 326, 332, 109 P.3d 714, 720 (2005) (citing Le'Gall v. Lewis Cnty., 129 Idaho 182, 185, 923 P.2d 427, 430 (1996))***.
>
> On appeal from a judgment entered on a jury verdict, this Court will not set aside the verdict if it is supported by substantial and competent evidence." ***Stoddard v. Nelson, 99 Idaho 293, 296, 581 P.2d 339, 342 (1978)***. The evidence supporting the jury's verdict may be contradicted, but the verdict will be upheld if it is " of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper." ***Mann v. Safeway Stores, Inc., 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974)***. This Court will not second guess the jury's determinations as to the weight of the evidence and witness credibility. ***McKim v. Horner, 143 Idaho 568, 572, 149 P.3d 843, 847 (2006)***.

As set forth below, it is incumbent upon Salla to provide this Court with an adequate record to review the actions of the Trial Court. Salla has failed in that regard. Missing from the record on appeal is a complete trial transcript. In addition, missing from the record is a transcript of the oral objections and arguments made by Salla to Siercke's proposed jury instructions as well as the Trial Court's reasoning in ruling upon Salla's objections. The oral objections made on the record, the arguments in support thereof and the Trial Court's deliberative process and ruling upon the same are alluded to in the Order on Defendants Motion for New Trial (R. p. 165 and 166). It is the province of this Court, when reviewing whether a jury was properly instructed, to determine whether there was evidence at trial to support the instruction, and whether the instruction is a correct statement of the law. Without an actual trial transcript containing the entirety of all of the witness testimony, and a transcript of the objections,

arguments and ruling relative to the jury instructions, this Court is left without an adequate record to conclude that the Trial Court's jury instructions were in error. As set forth below, error shall not be presumed. Instead, missing portions of the record are to be presumed to support the action of the Trial Court. Therefore, Salla's appeal of this issue fails as a matter of law.

B. No Qualified Privilege

1. *Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102 (Idaho 1974)*

> We recognize that there exists a conditional or qualified privilege which protects the publisher of defamatory material from liability if the publication is made to one who shares a common interest, as for example, a business relationship. ***See, e. g., Walker & Associates, Inc. v. Remie Jussaud & Assoc., 7 Wash.App. 70, 497 P.2d 949 (1972); Abrahamsen v. Mountain States Telephone & Tel. Co., 494 P.2d 1287 (Colo.1972); Stationers Corporation v. Dun & Bradstreet, Inc., supra; Restatement of Torts § 596 (1938)***. However, this and other qualified privileges may be lost through abuse. One form of such abuse is the publication of the defamatory material with express malice. ***Walker & Associates, Inc. v. Remie Jaussaud & Assoc., supra, 497 P.2d at 951; Abrahamsen v Mountain States Telephone & Tel. Co., supra, 494 P.2d at 1289. See also Coopersmith v. Williams, 171 Colo. 511, 468 P.2d 739, 741 (1970); Stationers Corporation v. Dun & Bradstreet, Inc., supra, 42 Cal.Rptr. 449, 398 P.2d at 789***. 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. ***See e. g., Walker & Associates, Inc. v. Remie Jaussaud & Assoc., supra, 497 P.2d at 951; Getchell v. Auto Bar Systems Northwest, Inc., 73 Wash.2d 831, 440 P.2d 843, 847 (1968)***.
>
> 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. ***Abrahamsen v. Mountain States Telephone & Tel. Co., supra, 494 P.2d at 1289; Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico, 79 N.M. 293, 442 P.2d 783, 785 (1968)***. In this case, the district court determined that, on the basis of International's business connections with Pinder, the occasion was privileged and so instructed the jury. On the other hand, the question of whether the

> publication was actuated by express malice, and the privilege thereby nullified, is a question for the jury, ***Browder v. Cook, 59 F.Supp. 225, 231 (D.Idaho 1944); Abrahamsen v. Mountain States Telephone & Tel. Co., supra, 494 P.2d at 1289; Getchell v. Auto Bar Systems Northwest, Inc., supra, 440 P.2d at 847***. The court may take the question of malice from the jury only if there is no evidence of malice and the undisputed facts admit only one conclusion. ***Coopersmith v. Williams, supra; Mohona-Jojanto, Inc., N.S.L. v. Bank of New Mexico, supra. See also Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970); Fairbanks Publishing Company v. Francisco, 390 P.2d 784 (Alasks 1964)***.
>
> In the instant case, we find that there was competent evidence in the testimony of Pinder and Barlow from which the jury could have inferred that the defamatory statements were published with express malice. Therefore, for the district court to take the issue from the jury by means of a directed verdict or judgment notwithstanding the verdict would have been error.

In her written objection filed prior to trial, Salla did not object to Siercke's jury instructions on the grounds that she was entitled to a qualified privilege instruction, nor did Salla submit a proposed jury instruction on qualified privilege. (R. P. 92-97). There is nothing in the record on appeal to indicate that Salla lodged an oral objection to Siercke's jury instructions on the grounds that she was entitled to a qualified privilege instruction. In the Motion for New Trial, Salla did not assert that she was entitled to a qualified privilege jury instruction (R. p. 156-164).

In ***Sanchez v. Arave, 120 Idaho 321, 815 P.2d 1061 (1991)***, this Court stated:

> The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. ***E.g., Kinsela v. State, Dep't of Finance, 117 Idaho 632, 634, 790 P.2d 1388, 1390 (1990)***. Recently we applied the rule to dismiss the appeal in a case where the state asked us to rule on an issue that was not raised in the trial court. ***State v. Martin, 119 Idaho 577, 808 P.2d 1322 (1991)***.
>
> The rationale for this rule was first stated by the Supreme Court of the Territory of Idaho in 1867:

> It is for the protection of inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance. ***Smith v. Sterling, 1 Idaho 128, 131 (1867)***.

Salla's claim on appeal that the Trial Court improperly failed to instruct the jury on qualified privilege fails as a matter of law due to the Salla's failure to raise the issue below, and Salla's failure to provide a sufficient record for this Court's review.

Furthermore, if this Court considers this issue on appeal despite and Salla's failure to raise the issue below, and Salla's failure to develop a sufficient record on appeal, Salla was not entitled to a jury instruction on qualified privilege.

There is no evidence in the record before this Court to support the conclusion that Salla was entitled to claim qualified privilege. Even if such facts were in the record, a qualified privilege may be lost if the defamatory statements were made with express malice. Express malice can be inferred from the circumstances.

In Siercke's Complaint he alleged that Salla had intentionally and knowingly fabricated allegations against him claiming that he had physically abused her in the presence of their minor children. Siercke also alleged in the Complaint that as a result of the intentional and knowing false statements made by Salla, Siercke was arrested and charged with a criminal offense and was prohibited from communicating with his minor children for approximately five months during which time Salla engaged in parental alienation. Siercke's testimony confirmed and supported of the allegations contained within the Complaint relative to defamation, including but not limited to the

malicious nature of the same (Tr. P. 57, Ln. 15-25; Tr. P. 58, Ln. 1-25; Tr. P. 59, Ln. 1-25; Tr. P. 60, Ln. 1-25; Tr. P. 67, Ln. 1-25; Tr. P. 88, Ln. 1-16; Tr. P. 75, Ln. 19-25; Tr. P. 76, Ln. 1-25; Tr. P. 77, Ln. 1-25; Tr. P. 94, Ln. 24-25 and Tr. P. 95, Ln. 1-25). There is ample evidence in the record to support the loss of a qualified privilege through express malice.

3. The Court Properly Instructed the Jury on Defamation Per Se.

A. Standard of Review - Jury Instructions

1. *Mackay v. Four Rivers Packing Co., 151 Idaho 388, 257 P.3d 755 (Idaho 2011)*

The propriety of jury instructions is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given is whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." ***Clark v. Klein, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002)*** (internal citations omitted). This Court reviews jury instructions as a whole to determine whether the instructions fairly and adequately present the issues and state the law. ***Silver Creek Computers, Inc. v. Petra, Inc., 136 Idaho 879, 882, 42 P.3d 672, 675 (2002)***. Even where an instruction is erroneous, the error is not reversible unless the jury instructions taken as a whole mislead or prejudice a party. Id. Likewise, a special verdict form does not constitute reversible error unless it incorrectly instructed the jury as to the law or its form was confusing. ***VFP VC v. Dakota Co., 141 Idaho 326, 332, 109 P.3d 714, 720 (2005) (citing Le'Gall v. Lewis Cnty., 129 Idaho 182, 185, 923 P.2d 427, 430 (1996))***.

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B. Slander Per Se:

1. *Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102 (Idaho 1974)*

> 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, 388 P.2d 779, 780 (1963); W. L. Prosser, Handbook of the Law of Torts § 112 (4th ed. 1971); Restatement of Torts § 571 (1938)***. Another of the four categories consists of utterances which '(ascribe) to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, (or) profession * * *.' ***Restatement of Torts § 573 (1938)***.

2. *Sadid v. Vailas, 943 F.Supp.2d 1125 (2013) United States District Court, D. Idaho*

Idaho follows the common law rule allowing plaintiffs to receive an award of general damages without proof of special damages in defamation per se cases. ***See, e.g., Barlow v. Int'l Harvester, Inc., 95 Idaho 881, 522 P.2d 1102, 1117 (1974)***. Statements are per se defamatory if they impute to the plaintiff 1) a criminal offense; 2) a loathsome disease; 3) a matter incompatible with his trade, business, profession, or office; or 4) serious sexual misconduct. ***Yoakum v. Hartford Fire Ins. 1135*1135 Co., 129 Idaho 171, 923 P.2d 416, 425 (1996)***. If an allegedly defamatory statement does not fall within one of these categories, a plaintiff must allege and prove that some special harm resulted from the utterance. ***Id***."

If the alleged statements are "plain and unambiguous," then the Court determines as a matter of law whether the statements constitute libel per se. ***See Weeks v. M P Publ'ns, 95 Idaho 634, 516 P.2d 193, 195 (1973)***. If, on the other hand, the statements use language that is not plain and unambiguous, then whether the statements are per se defamatory is a factual question for the jury. ***Id***...As one court has explained, "[w]ith regard to false accusations of a crime, `the words need not carry upon their face a direct imputation of crime.'" ***Longbehn v. Schoenrock, 727 N.W.2d 153, 158 (Minn.Ct.App.2007)*** (citation omitted). Instead, "`[i]t is sufficient if the words spoken, in their ordinary acceptance, would naturally and presumably be understood, in the connection and under the circumstances in which they are used, to impute a charge of crime.'" ***Id. at 159*** (citation omitted)...If the plaintiff has, in fact, alleged that defendant accused him of a crime, he has alleged per se defamation and he will not need to prove special damages. ***Cf. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1226 (7th Cir.1993***) (if defendants allege that plaintiffs made statements which impute that the defendants have committed crimes, then the defendants adequately plead defamation per se)."

Even if this Court elects to consider this issue on appeal, the Trial Court properly instructed the jury on Slander Per Se. The essence of this case is quite simple. Siercke alleged that Salla's allegations that he physically abused her or intentionally and knowingly false and undertaken for improper motives. As a result of and is allegations, Siercke was arrested, charged and prosecuted for a criminal offense and as a result of a No Contact Order entered in the criminal case, Siercke had no contact with his two minor children for a period of approximately five months. In the Order on Defendants Motion for New Trial, the Trial Court succinctly summarized the evidence supporting the Trial Court giving Jury Instruction No. 6 (R. p. 170-171). The Trial Court's factual and legal analysis on this issue as set forth in the Order on Defendants Motion for New Trial is hereby incorporated herein by this reference. The testimony of Deputy Ballman was that Salla had informed him that Siercke had physically assaulted her and that her earring was ripped out (Tr. P. 207, Ln. 19-21), that there was blood coming from her earlobes (Tr. P. 218, Ln. 5-6), that Salla denied that she had an audio recording of the alleged incident (Tr. P. 218, Ln. 17-18) and that Siercke was arrested for domestic battery with traumatic injury in the presence of a child (Tr. P. 226, Ln. 16-18).

Idaho Code §18-918(2)(a) states: Any household member who in committing a battery, as defined in section 18-903, Idaho Code, inflicts a traumatic injury upon any other household member is guilty of a felony.

Veronica Semko testified that Salla told her in 2016 that Siercke had grabbed her, pulled her hair, caught her earring and there was blood (Augmented Tr. P. 9, Ln. 13-23).

Salla's false statements regarding Siercke's allegedly physical abuse were unambiguous and were sufficient to impute that Siercke had committed a criminal offense against her. Therefore, the Trial Court properly instructed the jury on Slander Per Se.

4. The Court Properly Denied the Motion for New Trial

A. General Standard of Review

1. *Hughes v. State, Idaho Dept. of Law Enforcement, 129 Idaho 558, 929 P.2d 120 (Idaho 1996)*

> When considering an appeal from a district court's ruling on a motion for new trial, this Court applies the abuse of discretion standard. ***Bott v. Idaho State Building Authority, 122 Idaho 471, 835 P.2d 1282 (1992)***. This Court consistently has recognized the district court's wide discretion to grant or refuse to grant a new trial, and, on appeal, this Court will not disturb a district court ruling, absent a showing of manifest abuse of that discretion. ***First Realty & Investment Co. v. Rubert, 100 Idaho 493, 600 P.2d 1149 (1979)***. Although this Court necessarily must review the evidence, it primarily focuses on the process by which the district court reached its decision, not on the result of the district court's decision. ***Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986)***. Thus, the sequence of this Court's inquiry is: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason.

As set forth below, it is incumbent upon Salla to provide this Court with an adequate record to review the actions of the Trial Court. Salla has failed in that regard. Missing from the record on appeal is a complete trial transcript. In addition, missing from the record is a transcript of the oral objections and arguments made by Salla to Siercke's proposed jury instructions as well as the Trial Court's reasoning in ruling upon Salla's objections. The oral objections made on the record, the arguments in support

thereof and the Trial Court's deliberative process and ruling upon the same are alluded to in the Order on Defendants Motion for New Trial (R. p. 165 and 166). It is the province of this Court, when reviewing the decision on a Motion for New Trial to review the entirety of the evidence. Without an actual trial transcript containing the entirety of all of the witness testimony, this Court is left without an adequate record to conclude that the Trial Court's denial of the Motion for New Trial was in error. As set forth below, error shall not be presumed. Instead, missing portions of the record are to be presumed to support the action of the Trial Court. Therefore, Salla's appeal of this issue fails as a matter of law.

B. 59(a)(1)(H) - Error in Law

1. *Hoffer v. Shappard, 160 Idaho 868, 380 P.3d 681 (Idaho 2016)*

> A trial court has broad discretion in ruling on a motion for a new trial." ***Blizzard v. Lundeby, 156 Idaho 204, 206, 322 P.3d 286, 288 (2014)***. When considering a challenge to a discretionary decision by the trial court, we consider: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Id. (quoting ***Burggraf v. Chaffin, 121 Idaho 171, 173, 823 P.2d 775, 777 (1991))***. " The trial court is in a far better position to weigh the demeanor, credibility, and testimony of witnesses, and the persuasiveness of all the evidence. Appellate review is necessarily more limited." ***Quick v. Crane, 111 Idaho 759, 770, 727 P.2d 1187, 1198 (1986)***. " Although this Court necessarily must review the evidence, it primarily focuses on the process by which the district court reached its decision, not on the result of the district court's decision." ***Karlson v. Harris, 140 Idaho 561, 568, 97 P.3d 428, 435 (2004)***. This Court reviews jury instructions to determine " whether the instructions as a whole fairly and adequately presented the issues and stated the law." ***Schmechel v. Dillé, 148 Idaho 176, 187, 219 P.3d 1192, 1203 (2009)***. " Whether the jury instructions fairly and adequately present the issues and state the applicable law is a question of law over which this Court exercises free review." ***Perry v. Magic Valley Reg'l Med. Ctr., 134***

Idaho 46, 51, 995 P.2d 816, 821 (2000). " Reversible error occurs if an instruction misleads the jury or prejudices a party." ***Id***.

Even if this Court elects to consider this issue despite Salla's failure to provide a sufficient record on appeal, the Trial Court did not commit error in denying the Motion for New Trial.

As the Trial Court articulated in the Order on Defendants Motion for New Trial, the Motion was deficient on its face in some regards, and was contrary to the facts developed at trial in other regards. Because Salla failed to indicate which subsection of Rule 59 the Motion was brought under, the Trial Court was left to conclude that the Motion was brought pursuant to ***Rule 59(a)(1)(H)*** of the Idaho Rules Of Civil Procedure - Error in Law. The Motion essentially allege that Salla at absolute immunity and that Jury Instructions 6, 7, 8 and 9 were improperly given.

The Trial Court properly found that Salla did not have absolute immunity. The Trial Court found that Salla had not preserved her right to object to Jury Instructions 7 and 8 because Salla had not objected to them previously. The Trial Court found that Jury Instruction 6 was properly given. The analysis of the facts and the law as articulated by the Trial Court in the Order on Defendants Motion for New Trial is hereby incorporated herein by this reference.

5. Salla has Provided an Insufficient Record on Appeal

A. *Turcott v. Estate of Bates, 165 Idaho 183, 443 P.3d 197 (Idaho 2019)*

It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error." ***Greenfield v. Smith, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017) (quoting Belk v. Martin, 136 Idaho 652, 661, 39 P.3d 592, 601***

> ***(2001)***). Rather, "the missing portions of that record are to be presumed to support the action of the trial court." ***Rutter v. McLaughlin, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980); see also Talbot v. Desert View Care Ctr., 156 Idaho 517, 520, 328 P.3d 497, 500 (2014)*** (where appellant did not include a transcript as part of the record on appeal Court did not presume error in the findings of fact.)...We conclude that the record is sufficient to allow for appellate review because the district court issued a written memorandum decision and order that was included in the record. However, without a transcript of the proceedings below, any findings of fact in that decision will be presumed to support the action of the trial court. ***Rutter, 101 Idaho at 293, 612 P.2d at 136.***

As argued above, Salla's failure to provide this Court with the entire record of the proceedings at the Trial Court level, including but not limited to, an entire transcript of all witness testimony, renders the record on appeal insufficient, or presumes that the missing portions of the record support the action of the Trial Court.

6. Siercke is Entitled to an Award of Attorney Fees and Costs

Siercke requests that the Court award him the reasonable attorney fees and costs he has incurred in the above-entitled matter pursuant to ***Idaho Appellate Rule 41*** and ***Idaho Code § 12-121***.

Siercke's claim for attorney fees under ***Idaho Code § 12-121*** is based upon the fact that Salla's appeal of the District Court's decisions were brought and pursued frivolously, unreasonably, without foundation and without a sufficient record on appeal. The law related to all of Salla's claims on appeal, and the facts of this case, all demonstrate that Salla's appeal is frivolous, unreasonable and without foundation.

F.

CONCLUSION

Salla has failed to provide a sufficient record on appeal, she is not eligible to assert an absolute privilege, the facts of the case did not warrant a jury instruction on qualified privilege, the Trial Court properly instructed the jury and did not err when it denied Salla's Motion for New Trial. It is therefore respectfully requested that this Court affirm the jury verdict and judgment in Siercke's favor and award Siercke his reasonable attorney fees and costs incurred herein.

DATED this 21st day of April, 2020.

IAN D. SMITH
Attorney for Siercke

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2020, I caused a true and correct copy of the foregoing document to be served by the method as indicated below, and addressed to the following:

K. Jill Bolton
Attorney at Law

reception@kjboltonlaw.com

IAN D. SMITH
Attorney at Law