Electronically Filed
12/2/2019 1:53 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

GALUST BERIAN a single individual; and, JULIA BERIAN, a single individual,	
Plaintiffs/Appellants,	**Docket Number 47122-2019**
	District Court Number: CV-2017-841
OVANES BERBERIAN and SOCORRO BERBERIAN, husband and wife,	**I.A.R. RULES, 11; 20; 34.1.**
Defendants/Respondents.	

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County
Honorable Stevan H. Thompson, District Judge, Presiding

Robin D. Dunn, Esq. #2903
DUNN LAW OFFICE, PLLC
P.O. Box 277
Rigby, Idaho 83442
(208) 745-9202
rdunn@dunnlawoffices.com

Lary Larsen, Esq. #2600
HOPKINS, RODEN,CROCKETT, PLLC
P.O. Box 51219,
Idaho Falls, Idaho 83405-1219
208.523-4445

Kent E. Whittington Esq., #2307
WHITTINGTON LAW OFFICE, CHTD.
1820 E. 17th St., Suite 340
P.O. Box 2781
Idaho Falls, Idaho 83403
(208) 529-8765

Email: whittk@ida.net

larylarson@hopkinsroden.com

Attorney for Appellants

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES:

CASES:

OTHER:

ARGUMENT

REPLY AND REBUTTAL

As stated in the opening brief, Galust Berian is the brother of Ovanes Berberian. Julia is the daughter of Galust and the niece of Ovanes. The two brothers are Russian artists and well known in the field of art. The two of them had an on-going relationship to help one another in various endeavors of both their artistic pursuits and in general life dealings. Obviously, that relationship halted.

It is alleged that the district judge did not fully consider the material issues of fact that existed; and, then, applied the incorrect analysis of the law as to the facts the court believed non-disputed. This matter was set for a jury trial.

One count for appellant remains plus the counter-claim of the respondent at the district court level. In the interests of judicial economy, it appears to make more sense to try the entire case at one time. Hence, this appeal to this court for direction.

INCORRECT FACTUAL ASSERTIONS BY RESPONDENTS

The respondent, in their brief, states many factual positions that are not in the record. Furthermore, there are cites to alleged facts but does not indicate that the same are disputed. Some of those non-existent or disputed facts are as follows:

1. **Respondents state "No landscaping was performed on the Ovanes' real property by Appellants". See Galust reply, R. Vol. I, pp. 197-199; par. 31-36. Clearly the respondents are in error and a material issue of fact exists. See verified**

complaint. R. Vol. I, pp. 16-17.

2. **On page 2-3 of respondents' brief, the author takes the liberty of using the word "theft" when the trailer had been given to Galust and the painting "The Approaching [Passing- sic] Storm" was placed in the possession of Galust. See, Sworn Complaint of Plaintiffs, R. Vol. I, pp. 11-14, Par. 5, 6, 19-20 (painting and trailer); R. Vol. I, pp. 193 par. 7-8 (painting); R. Vol. I, pp. 193-194, 199; Par. 9-14, 39, (trailer),**
3. **The painting "Approaching (Passing) Storm" was returned to Ovanes with Ovanes permission. R., Vol. I, pp. 194-195, 199, par 14, 15, 19, 23, 36. Galust was authorized by Ovanes to complete changes to the painting. (Sworn Complaint, R. Vol. 1, pp. 11-16, par. 5-6, 9 in particular.)**
4. **As explained and reiterated in the district court decision, no probable cause ever existed to charge Galust or his daughter with criminal complaints. See, page 5 of the respondent's brief which is unsupported by any facts. It should also be pointed out that the search warrant of the Galust home and out-buildings was in Madison County. The prosecutor in Jefferson County conducted the initial arrests and the ultimate dismissal, without probable cause, as explained in the opening brief of the appellants. The district court agrees stating: "It does not appear, however, that there is any evidence that the magistrate found that probable cause existed". (R. Vol. II, p. 249). Respondents take great liberties in interpreting the record before this court.**

Hereafter, the appellants will address the argument of the respondents in the order

present in respondents' brief.

REBUTTAL TO THE DISPARAGEMENT CLAIMS

The respondents address three arguments under defamation that have been factually denied by the appellants. Thus, there are material facts in dispute regardless of the legal theories or defenses presented.

First, it has been previously set forth in both the original brief and this brief that Galust Berian was in lawful possession of the painting called the "Approaching Storm" a/k/a the "Passing Storm". Ovanes Berberian placed this painting in the possession of Galust for "touch up" and/or changes. Both the verified complaint, R. pp. 10-21, and the sworn declaration/statement in opposition to summary judgment, R. Vol. II, pp. 192-200, Declaration of Berian, indicate that Ovanes placed the painting in the care, custody and control of Appellant, Galust.

Second, the trailer that was alleged to have been stolen by Galust was clearly registered in the name of Galust and was shown in a Google map on appellants property numerous years before the alleged theft. The verified complaint and the declaration in the paragraph cited above support this possession. Furthermore, the search warrants of the Madison County authorities turned up none of the alleged stolen items other than the trailer and pump which were explained.

Third, Appellants were always allowed on the real property of respondents. The same material facts are present in the verified complaint and in the declaration of appellants cited above. Material facts exist on all of these issues.

Respondents admit the first two elements of defamation from the cited case of *Elliot*

v. *Murdoch*, 161 Idaho 281, 385 P.3d 459 (2016). The respondents indicate the third element, or more correctly stated as an affirmative defense, of judicial privilege precludes appellants from prevailing on defamation.

Judicial privilege has been addressed in the original brief of the appellants. No court officer received any sworn statements to support judicial privilege. The respondents try to quote law that does not exist in Idaho by stating information given to "law enforcement officers, prosecutors, and judicial officers" (respondents brief at p. 11) support this position. That is not the state of the law in Idaho. The district court already indicated that there was no probable cause before a judicial officer (magistrate), cited previously.

Statements made to law enforcement and/or prosecutors are not under oath nor does such law exist in Idaho. In this case, there were no statements provided directly to prosecutors. The sworn statements of appellants contest the statements of the respondents and material facts are contested. Only a jury could determine the believability of and credibility of each party for trial purposes. The district judge had no authority at summary judgment proceedings to draw inferences for either party.

The cases cited by the respondents in support of their position, discussed hereafter, occurred in a judicial setting wherein the parties are under oath and subject to cross-examination. None of those events exist in the case at bar. Nothing has occurred in a judicial proceeding to examine the statements made by respondent, Ovanes. The district court cannot make "inferences" on the credibility of witnesses on contested factual assertions since this case is scheduled for a fact-finder, the jury. Material facts are in

dispute.1

Further, in the statements of respondent, Ovanes, he cannot say he viewed the events or has evidence of the events occurring wherein he makes the false statements. The statements he does make did not occur in a judicial or quasi-judicial setting. The respondents' citing of *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (Idaho 1953) and *Malmin v. Engler*, 124 Idaho 733, 864 P.2d 179 (Idaho App. 1993) are misplaced. Both involve attorneys making statements in the course of judicial proceedings. Suits were commenced for libel and the court granted dismissal based upon judicial privilege. These cases are inapplicable to the case at bar as none of the statements by Ovanes occurred in a judicial proceeding and none of the statements of Ovanes occurred to a judicial officer.

Absolute judicial privilege is non-applicable in the case at bar. Idaho has not adopted a privilege of false statements to a police officer.

INVASION OF PRIVACY

The respondent continues its/their attempt to rely upon judicial privilege when none of the false statements made by the respondent occurred in a court setting nor were the same conveyed to a judicial officer. No question exists that the appellants' home,

---

1 If a genuine issue of material fact remains unresolved, or if the record contains conflicting inferences and if reasonable minds might reach different conclusions from the facts and inferences presented, summary judgment should not be granted. *Sewell v. Neilsen, Monroe, Inc.* 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

-If an action will be tried by a court without a jury, a judge is not required to draw inferences in favor of a party opposing a motion for summary judgment. *Kaufman v. Fairchild,* 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991).

outbuildings, personal effects, cell phone and computer were either viewed or removed by police from Madison County. No charges were filed based upon the search warrant. No evidence was obtained from the search warrant to affirm the false allegations of respondent, Ovanes.

The case in Jefferson County was dismissed and the district court concurred that there was no finding of probable cause. Yet, the respondent indicates that the judicial privilege exception applies and cites cases from other jurisdictions for such a proposition. The respondent asks this court to extend the doctrine of judicial privilege to include law enforcement, probation, emergency responders or the like to be included in judicial privilege. The respondent attempts and urges this court to eviscerate defamation and privacy tort claims. Public policy does not support such a position as will be discussed herein.

The judicial privilege doctrine established in Idaho should not be extended. Many reasons exist for this rationale. First, a person making a statement to third parties such as law enforcement are not under oath, are not subject to cross-examination and are not subject to the rules and procedures of law that occur in court and/or quasi-judicial settings. Second, people are not always truthful in answering and responding to law enforcement. People oftentimes have ulterior motives and have a desire to injure or to harm other people through false allegations. A judicial setting has a higher likelihood of producing truth than a statement in a high stress situation. The judicial setting has some safeguards not found in society in general.

The appellant, Galust Berian, relies upon his name and reputation to a large degree

in selling his product. The art world is a sensitive field of income producing events. The good name and reputation of an artist is important in the art world. Galust, in his sworn declaration, discusses his loss of sleep, his health concerns, his need for ultimate honesty and good standing in his profession. R. Vol. II, pp. 192-200. Those statements have not been rebutted by the respondent. In fact, the respondent and his counsel, in statements and in briefing have indicated multiple times the word "theft" without any proof or evidence to support such a finding. Furthermore, there has been no judicial finding of theft or dishonesty, within the judicial system, towards either appellant. The respondent is "out-of-bounds" in their assertions and briefing.

Ovanes Berberian openly admits to accusing appellant, Galust, of theft and of trespass. He has openly made such allegations to the public. How did a search warrant that produced nothing and charges that were dismissed occur if Ovanes did not make statements to the public?

The allegation of theft of the painting the "Approaching Storm" a/k/a "The Passing Storm" was critical since it went to a public organization who commissioned this painting. The allegation of theft openly affected the livelihood of appellant, Galust.

In pages 13-17 are the respondents' reasoning from other jurisdictions and the desire of respondents to have this court to advance such a theory to Idaho law. The people of Idaho deserve better. A criminal investigation should be based upon sound facts and logic not upon the animosity of a hateful brother and uncle. To outright call someone a "thief" is per se slanderous if not based upon truth. No evidence exists to allege such facts in the case at bar. *Blacks Law Dictionary* on slander per se states: "Slanderous in itself;

such words as are deemed slanderous without proof of special damages. Generally, an utterance is deemed "slanderous per se" when publication (a) charges the commission of a crime; . . . (d) tends to injure a party in his trade, business, office or occupation".

Extreme or outrageous conduct by the respondent is set forth in the statements to the police and is reaffirmed in his affidavit in support of summary judgment. He does not deny the false statements. The respondent does not deny the atrocious statements he said about his brother and his niece.2

Respondents' theories all rest upon judicial privilege which does not exist in Idaho without an extension of the judicial privilege doctrine. Respondent keeps alleging that judicial privilege applies throughout its brief when neither an attorney was involved or the events occurred in a judicial or quasi-judicial setting.

The question for purposes of summary judgment is that the fact-finder must decide if the conduct that is published is "extreme and outrageous". As stated, in a jury trial, the fact-finder and sole determination of credibility is the jury. This district court weighed the conflicting factual versions and made inferences that were not in the district court province. A district court can make judicial inferences when there is no jury. See, *Kaufman, supra.* The district court is not to make inferences when it is not the "fact-finder".

The respondent indicates that eight (8) jurisdictions have expanded the rule on judicial privilege. Forty-two (42) jurisdictions have not expanded the rule. Perhaps it is for the reasons that public policy is being reduced as suggest earlier in this brief. The court

---

2 R. Vol. I, pp. 22-30; 60-120; 228-233;

room and hearings have rules of law that attempt to bring out the truth and reduce inuendo and falsehoods.

The arguments of respondent are misplaced when relying upon *Malmin* and upon *Richeson,* supra, which both involved attorneys making statements in a judicial setting. That reasoning does not apply to this case before this court.

In the claim for intentional infliction of emotional distress, it is clear that the acts of Ovanes were intentional. The weight to be given the extreme conduct of Ovanes and whether the emotional distress was severe is reserved for the fact-finder and not for a summary judgment proceeding. (See, R. Vol. I, p. 195). Were the acts of Ovanes extreme and outrageous and atrocious? Those inferences need to be determined by the jury. The district court is prohibited from making those findings in a summary judgment setting to then apply any affirmative defense. For the reasons stated, the affirmative defense of judicial privilege is not present in the case at bar nor is it the current state of Idaho law.

Extreme and outrageous conduct is a determination by the fact-finder. The respondent relies upon another jurisdiction for this statement. See, *Johnson v Johnson and Bell, Ltd., et al.*, 379 Ill. Dec. 626, 7 N.E.3d 52 (Ill. App. 1st Dist. 2014). The respondent cites no Idaho cases in support of its contentions. (The cite of respondent at the bottom of page 19 cannot be located. It must be an error.)

On page 20 of the respondents' brief, the author merely states his belief that no jury could reach the conclusion that the acts of respondent were outrageous, extreme, atrocious, etc. That is merely the opinion of an advocate that carries zero weight with a jury or fact-finder. On the other hand, the appellant makes such sworn statements and not

the attorneys. (See declaration of Galust Berian, R. Vol. I, p. 195-197, par. 25-31).

The "three circumstances" raised by respondent on page 20 of its brief are mere conjecture and not based upon any evidence or truth. As stated earlier, none of the alleged stolen items were ever tied to the appellants. No search warrant produced any other evidence of theft or any crime, which was located upon a very thorough search of the entire premises and outbuildings of Appellants. The extreme conduct of Ovanes is artificially made up to impugn his brother. Galust did not enter and remove the painting "the Approaching Storm" which is another fallacy and spin by the appellant in its/their brief at page 21. The declaration of Galust on this issue is very clear as is the verified complaint, both previously cited. Galust was to make changes as requested by his artist brother, Ovanes, to said painting. He was in possession of "the Approaching Storm" by permission from Ovanes.

The author for the respondent on the "three circumstances" makes great leaps that would not be supported in any courtroom without specific evidence. The naïve approach of appellant in this regard is intended to bias this tribunal. The return of the painting, "the Approaching Storm" was a planned event with the parties and was not secretive as alleged by respondent.

Clearly, without any evidence, respondent makes unfounded and meritless arguments at page 21 of the respondents' briefing. The accusations are insulting. The legal reasoning is meritless. Ovanes had numerous students, friends, acquaintances and others in his home on multiple occasions. (R. Vol. I, p. 194, par. 14). The respondent and the author make meritless contentions on the issue of theft and the overall credibility of

Galust.

On page 25, the respondent concedes as follows: " For the purposes of this appeal, the Defendants concede that genuine issues of fact exist in connection with the question whether there was a prosecution initiated by the defendants that resulted in favor of the plaintiffs, and which caused damages to the plaintiffs" Respondents then state that malice has not been shown. (But see, declaration of Galust Berian, R. Vol. I, p. 195-197, par. 25-31). Malice is generally a mental state which may be supported by objective actions.

In general, defendants are not convicted of crimes without evidence. Respondent states: " It must also have been apparent that it was highly unlikely that some totally unrelated and unidentified third thief had stolen the rest of Ovanes's paintings and frames at the same time Galust took "the Approaching Storm". Respondent is calling Galust a "thief" and that he "stole" items. No such proof exists and the statement is totally unfounded. Such statements in briefing to this court is/are improper.

The prosecutor in Jefferson County did not find probable cause. The police arrested Galust and his daughter, Julia. The Jefferson prosecutor dismissed the charges and no magistrate ever made a finding of probable cause. An arrest warrant requires a magistrate to make a finding of probable cause. The district court already indicated in his summary judgment decision no probable cause was ever found. (Summary Judgment decision of the district court, R. Vol. II., p. 249, first full paragraph).

CONTRACT CLAIMS

The respondent correctly states the law on the elements of the following:

1. **Express contract,**
2. **Implied in fact contract,**

3. **Implied in law contract,**
4. **Unjust Enrichment, and**
5. **Quantum merit.**

For all of the writings performed by the respondent on these legal theories and the elements thereof, it should mean nothing to this court. The respondent has made no cross-appeal to ask this court to make additional rulings for summary judgment.

The district court, in its summary judgment ruling, merely indicated that the "contract claims" were not within the statute of limitations period. The district court after pointing out the various limitation periods, stated: "Therefore, the Court holds that Count III of Galust and Julia's Complaint is barred by the applicable statutes of limitations and does not reach the question of whether Galust and Julia violated the Idaho Contractor's Registration Act".

Thus, the only question is there a material issue of fact that is disputed. The district court quoted the language from Galust's declaration which stated: ". . . were commenced within four years of the filing of the complaint herein."3 The court then states this is a vague statement and weighs the statement of Ovanes that the last work was the year 2010. These are material facts that are disputed. The district court weighs the words "within the last four years" to the statement of the "year 2010". The court, once again, oversteps its boundaries in a summary judgment proceeding. These two statements are clearly material disputed facts. The district court does not get to make the inferences that a jury would make upon these disputed facts. The court then grants summary judgment on the "contract claims" (the five theories advanced) based solely upon the statute of limitations

---

3 R. Vol. I, pp. 192-200, par. 32. See also, par. 33.

and no other reasons. The statements of both parties create a disputed material fact. The court could not apply the appropriate law to a disputed material fact in a summary judgment proceeding. The elements of the various "contract" claims were not reviewed by the district court and are not on appeal before this court.

As stated, the claim for conversion alleged by the plaintiff/appellant is still pending. As stated, the counter-claim of defendant/respondent is still pending.

FEES AND COSTS

The respondents have requested fees and costs yet urge this court to adopt new case law that heretofore has not existed in Idaho on the issue of judicial privilege. This case would be a case of first impression from the respondents' prospective.

Fees and costs should be awarded to the appellants. However, the case should first be remanded for trial, the outcome determined by the jury; and, then, the district court should be assigned the task of attorney fees based upon the American Rule which requires a statute or contract to be applicable before considering the factors of Rule 54, of the IRCP.

CONCLUSION

The respondent's brief does not set forth any arguments that would change or excuse the requests of the appellants in their opening brief. As such, the appellants request the relief requested in its opening brief.

Dated this 2nd day of December, 2019.

/s/ Robin D. Dunn
Robin D. Dunn
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December, 2019, a true and correct copy of the foregoing was delivered, via the E-filing system of I-court as set forth in the Idaho Appellate Rules to the following:

Robin D. Dunn, Esq. #2903
DUNN LAW OFFICE, PLLC
P.O. Box 277
Rigby, Idaho 83442
Telephone (208) 745-9202

rdunn@dunnlawoffices.com

Kent E. Whittington Esq., #2307
Whittington Law Office, Chtd.
1820 E. 17th St., Suite 340
P.O. Box 2781
Idaho Falls, Idaho 83403
Telephone: (208) 529-8765

whittk@ida.net

APPELLANTS

Lary Larsen, Esq. #2600
HOPKINS, RODEN,CROCKETT, PLLC
P.O. Box 51219,
Idaho Falls, Idaho 83405-1219
Telephone (208) 523-4445

larylarson@hopkinsroden.com

RESPONDENTS

/s/Robin D. Dunn
Robin D. Dunn, Esq. #2903
DUNN LAW OFFICES, PLLC