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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

ERIC POSEY,

Plaintiff - Respondent

v.

Idaho Supreme Court Case No.  
52072-2024

SUMMER BUSHNELL,

Defendant - Appellant.

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**APPELLANT'S REPLY BRIEF**

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**Appeal from the First Judicial District for Kootenai County**

**Honorable Ross Pittman, District Judge, Presiding**

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## INTRODUCTION

Respondent's Brief does not meaningfully confront the core legal issues in Appellants' opening brief. Respondent also does not rebut the district court's failure to rule on Appellants' requested jury instructions as required by I.R.C.P. 51(b)(e), nor does he address the constitutional consequences of issuing a verdict form that presumed liability and then immediately directed the jury to damages.

The trial court's voir dire framing - characterizing a juror's "religious or moral position" as presumptively incompatible with impartiality - was never justified under Rule 47(f), and Respondent does not attempt a substantive defense of it. These are structural errors affecting the fairness of the entire proceeding, not mere technicalities. The question "Are any of you willing to set aside this religious position and render a fair and impartial verdict here today?" is not consistent with Idaho law governing voir dire, even if it resembles common questioning in form. Such framing improperly suggests that certain constitutionally protected beliefs are inherently disqualifying, a premise unsupported by Idaho precedent and particularly relevant in this case.

On the First Amendment issues, Respondent misapplies *Gertz v. Welch* and its progeny.

Respondent's argument reduces the public-figure inquiry to whether the plaintiff is a celebrity or widely known, while ignoring that a limited-purpose public figure is one who voluntarily injects himself into a public controversy. This distortion sidesteps the core constitutional question: whether Respondent's own conduct placed him within the sphere of public debate.

A reply brief exists to clarify the issues, correct misstatements, and expose where the respondent has failed to offer a legally sufficient defense of the judgment. On each of the eleven issues

raised, Respondent's Brief fails to meet that burden. The errors below were not harmless; they collectively deprived Appellant of a fair trial, permitted damages without proof of causation or actual harm, invited a lump-sum award untethered to evidence, permitted punitive damages without the statutory foundation, and misapplied fundamental First Amendment doctrines.

For these reasons, and as further explained below, this Court should reverse the judgment and grant the relief requested in the opening brief.

## ARGUMENTS

### **I. Respondent Misstates the Legal Standard Governing Punitive Damages and Fails to Rebut the Absence of Any Actual Evidence of Harm.**

Respondent asserts that the district court acted within its discretion in submitting punitive damages to the jury and argues that Appellant has misread Idaho Code §6-1604. Respondent relies on older cases such as *Village of Peck v. Denison* and general statements that punitive damages may be awarded even where compensatory damages are minimal or presumed.

Respondent further argues that the standard of review is deferential under *Walston* and *Vendelin*, and that the Appellant failed to preserve errors. But Respondent never addresses—let alone applies—the statutory threshold that must be met before punitive damages may even be considered by a jury.

Idaho Code §6-1604 requires: 1) A judicial determination, 2) Based on clear and convincing evidence, 3) That the conduct was oppressive, fraudulent, malicious, or outrageous, 4) And this

determination must occur before punitive damages may be submitted to a jury. Respondent does not identify any point in the record where the district court made these required findings. Nor does he cite any evidence - let alone clear and convincing evidence - supporting oppressive, malicious, or outrageous conduct. The failure to establish these foundational facts renders the submission of punitive damages legally erroneous.

*“We again remind counsel that Idaho Appellate Rule 25 requires not merely assertions of error, but a discussion of the relevant legal standards and supporting authority.” Perry v. Magic Valley Regional Med. Ctr., 134 Idaho 46, 995 P.2d 816 (2000).*

Respondent’s reliance on *Village of Peck v. Denison, 92 Idaho 747 (1969)*, is especially misplaced. *Village of Peck* predates: 1) Idaho’s current punitive damages statute (I.C. §6-1604), 2) The clear and convincing standard, 3) The mandatory judicial gatekeeping function, and 4) the proportionality requirements recognized under the U.S. Constitution. Idaho courts no longer follow the pre-statute punitive damages framework. Respondent’s continued reliance on pre-statute precedent is legally unsound and fails to engage with the governing statutory text.

Respondent does not rebut the central fact that at trial, Respondent admitted his job loss - the largest component of his claimed injury - was not caused by Appellant. He testified that he was terminated because he “called a customer a racial slur,” not because of anything Appellant said or published. (Tr., pp.86-89, 115-116, 126) This admission is fatal to both compensatory and punitive damages. Nevertheless, the district court allowed the jury to consider damages and punitive damages premised on that job loss. Respondent’s brief ignores this fact and offers no argument that could establish causation where Respondent himself negated it. Punitive damages

must bear a reasonable relationship to actual harm. Respondent fails to identify any admissible evidence of harm caused by Appellant that could serve as a lawful basis for punitive damages. Respondent repeatedly asserts that punitive damages determinations are reviewed for abuse of discretion, citing *Walston* and *Vendelin*. This is correct as far as it goes, but Respondent omits the essential point: **A court abuses its discretion when it applies the wrong legal standard or fails to apply controlling statutory requirements.**

Here, the district court: 1) Did not make the findings required by Idaho Code §6-1604, 2) Did not require clear and convincing evidence, 3) Allowed punitive damages without any evidence of causation or actual loss, and 4) failed to apply the process by which the Appellant could have objected under I.R.C.P. 50 and 51(b). This is a textbook abuse of discretion under the *Lunneborg* framework. Respondent briefly references *Davis v. Blast Properties*, but omits Davis's explicit holding that punitive damages may not rest on speculation or on conduct that falls short of extreme wrongdoing. The submission of punitive damages in this case, with its omissions, was legally erroneous and requires reversal.

## **II. Respondent Fails to Address The District Court's Failure to Provide a Complete Punitive Damages Instruction.**

Respondent asserts that the district court acted within its discretion in giving a shortened version of I.D.J.I. 9.20 regarding punitive damages, but he never explains how that truncated version satisfied the statute, the constitution, or the pattern instruction itself. Respondent argues that Appellant's proposed expanded jury instruction was unnecessary, that the jury was adequately

informed of the applicable law, and that any omitted language was either redundant or discretionary. Respondent further claims Appellant waived objections by failing to preserve them or by failing to identify prejudice.

Respondent avoids the most critical point raised in Appellant's opening brief: **The district court omitted mandatory limiting principles essential to the constitutional validity of punitive damages.** They were not stylistic or optional. Idaho Jury Instructions 9.20 include the requirement that punitive damages bear: 1) A reasonable relationship to actual harm, 2) A reasonable relationship to the cause of the harm, 3) A reasonable relationship to the primary purpose of deterrence, and 4) Not punishment for its own sake. These limitations are grounded in both Idaho Code §6-1604 and U.S. Supreme Court cases such as *BMW v. Gore* and *State Farm v. Campbell*. Idaho courts have consistently emphasized this proportionality requirement to prevent arbitrary punitive awards. Respondent offers no answer to this omission.

Respondent repeatedly characterizes Appellant's requested instructions as "expanded," "unnecessary," or "duplicative." This is incorrect. Appellant requested the standard, complete version of I.D.J.I. 9.20, along with language directly supported by Idaho Code §6-1604, the Eighth Amendment, and Idaho precedent. What the district court gave was not the standard I.D.J.I. Instruction - it was a truncated version that omitted the proportionality requirement, the warning against passion or prejudice, the deterrence-not-punishment distinction, and the constitutional limitations on excessive punitive awards. Respondent does not address these omissions. Idaho precedent requires that jury instructions not mislead the jury, state the law correctly, and provide the jury with sufficient guidance to reach a lawful verdict. *See Perry v.*

*Magic Valley Reg'l Med. Ctr., Empire Lumber Co. v. Thermal Dynamics Towers, Inc., and Beardsley v. Idaho Forest Indus.*

By removing the proportionality and constitutional components, the instructions given did not reflect Idaho law or the statutory requirements imposed by Idaho Code §6-1604. Respondent does not cite a single case holding that a court may remove legally required components of I.D.J.I 9.20 without explanation. Respondent repeatedly asserts that the district court's instruction choices are reviewed for abuse of discretion. That is correct, but incomplete.

Discretion exists only within the boundaries of correct legal standards; a court has no discretion to omit required limiting language in a highly charged punitive-damages case and then shield that omission under the abuse-of-discretion label. Not every case can accept the omission of certain elements, and in this particular case these elements were arguably necessary due to the politically charged nature of the case. In this case the district court omitted legally required limitations on punitive damages, did not give the complete I.D.J.I 9.20, refused Appellant's request without explanation, and presented the jury with an instruction that lacked constitutional safeguards. That is not an exercise of discretion; it is legal error.

Appellant raised constitutional objections grounded in the Eighth Amendment's prohibition on excessive penalties and the Fourteenth Amendment's due process constraints. Respondent's brief is entirely silent on these constitutional arguments, effectively conceding them. This is significant because the Idaho Supreme Court has long recognized that punitive damages are constrained by due process even in civil cases. The omission of constitutional proportionality language made the punitive award vulnerable to being based on passion, prejudice, or improper

motive. Under Idaho law, that risk alone is sufficient to require reversal or at least remand for a new trial with proper instructions.

Respondent asserts that Appellant has not demonstrated prejudice. This ignores the record: 1) The instruction given lacked proportionality guidance, 2) Opposing counsel made inflammatory arguments in closing, 3) The jury awarded punitive damages significantly out of proportion to any proven harm, and 4) The plaintiff admitted Appellant did not cause his job loss. The absence of limiting language matters when, as here, the case was emotionally charged and opposing counsel encouraged the jury to punish the Appellant. Idaho law requires instructions that prevent a punitive award driven by passion or prejudice. The district court did the opposite. On this record, prejudice is not speculative; it is apparent from the face of the verdict. Respondent fails to justify the district court's refusal to give the full and correct version of I.D.J.I. 9.20.

### **III. Respondent Does Not Rebut the Trial Court's Violation of I.R.C.P. 51(b)(e) in Failing to Rule on Appellant's Requested Jury Instructions.**

Respondent contends that the district court properly instructed the jury, that Appellant's proposed instructions were unnecessary or incorrect, and that the court had no obligation to adopt Appellant's instructions verbatim. Respondent further states that Appellant failed to preserve her objections or failed to show prejudice from the omission of her proposed instructions.

Respondent relies primarily on general statements of deference to the trial court and on waiver principles derived from *Beebe v. North Idaho Day Surgery*. But Respondent fails to acknowledge that none of those principles apply unless the trial court first fulfills its mandatory duty to rule on

the proposed instructions. Respondent fails to address the central argument raised in Appellant's opening brief: Rule 51(b) imposes a mandatory duty on the district court to rule on requested jury instructions. The rule states that the court:

“Must inform counsel of its proposed action upon the requests prior to instructing the jury.”

The record shows that the Appellant submitted a comprehensive set of requested instructions (CR 1227-1295), yet the district court did not rule on most of them, either orally or in writing. Additionally, the court never articulated reasons for rejecting them - with several being ignored entirely and never incorporated. Respondent's brief offers no explanation - and cites no authority - suggesting that a trial court may simply ignore proposed instructions. Silence is not action, and it is not compliance with Rule 51(b).

Respondent's reliance on *Beebe v. North Idaho Day Surgery* is misplaced. *Beebe* concerns waiver of specific objections to instructions that were actually ruled upon and actually given. Here, the issue is the opposite - the court did not rule on Appellant's instructions, several were never addressed, and the district court prevented Appellant from making a contemporaneous objection on the record. Under Idaho law, a litigant cannot waive an objection to a ruling that the trial court never made. *Beebe* does not permit a court to avoid Rule 51(b) by doing nothing. *Beebe* does not immunize a court from failing to perform its mandatory duty under Rule 51(b).

Respondent asserts that Appellant's instructions were “incorrect,” “unnecessary,” or “duplicative” - yet provides no analysis, no reasoning, and identifies no instruction that allegedly misstated Idaho law. In fact, Appellant's proposed instructions included: 1) Defamation by

implication instructions, 2) Truth as a complete defense instruction (reflecting the “gist” doctrine), 3) Damages proportionality instruction, 4) Media Defendant instruction (based on *In re Wright*), 5) Public Figure actual malice instruction (based on *Gertz*), 6) Verdict form neutrality language required under Rule 49, and 7) Complete I.D.J.I. 9.20 and 9.20.5. Not one of these was ruled upon, discussed, or incorporated. Respondent never addresses the legal accuracy of these instructions, nor why the court was entitled to ignore them.

The excluded instructions affected the First Amendment framework, the standard of fault (negligence vs. actual malice), the availability and measure of damages, the constitutional standards for punitive damages, and the jury’s roadmap for deciding liability and damages. Respondent does not dispute that these are central issues. A district court’s failure to provide legally accurate instructions on issues of constitutional import is reversible error. *See Wiemer v. Rankin, McAdam v. McAdam, and Perry v. Magic Valley Reg’l Med. Ctr.*

Respondent repeatedly asserts, without analysis, that the final instructions “fairly and adequately” stated the law. This is insufficient for multiple reasons: 1) Appellant’s requested instructions covered issues the court never addressed, 2) Several final instructions were incomplete version of standard I.D.J.I instructions, 3) The verdict form presumed liability (see Argument IV), 4) The court removed limiting principles required by Idaho Code §6-1604, and 5) The court failed to instruct on actual malice, media defendant status, and public figure doctrine. Respondent’s conclusory statements do not cure these defects.

Respondent argues lack of prejudice but does not engage with the following record realities: 1) The jury was never instructed on how to identify a public controversy or a limited-purpose

public figure, 2) The jury was never instructed on truth as a complete defense, 3) The verdict form was biased and assumed wrongful conduct, and 4) The punitive damages instruction lacked legally required limitations. When instructions omit the law that is essential to a party's defense, **prejudice is assumed**. Appellant was deprived of the opportunity to have the jury accurately instructed on controlling legal principles. This failure constitutes reversible error.

#### **IV. Respondent Cannot Justify the Prejudicial Verdict Form, Which Assumed Liability and Violated I.R.C.P. 49**

Respondent contends that the verdict form used by the district court was proper under I.R.C.P. 49, that it did not mislead the jury, and that Appellant's objections were either unfounded or waived. Respondent argues, without analysis, that the form followed "standard structure," and that any modifications requested by Appellant were unnecessary. Respondent's brief never addresses the central defect in the verdict form. The form's initial question presupposed that Respondent had been injured and asked the jury to assign an amount of damages without first determining liability. Under Rule 49, the court must submit special verdict or interrogatories "in a form that will not mislead the jury." Idaho law requires verdict forms to: 1) Avoid assuming any element of the claim, 2) Present the liability question first, and 3) Prevent any implication that the court favors one outcome.

*"Verdict forms must be neutral and must not suggest to the jury the outcome the court believes is correct." Beardsley v. Idaho Forest Indus., 127 Idaho 404, 406 (1995)*

Respondent does not address this principle. Nor does he explain why the verdict form asked the jury to assign damages **as the first question**, before finding any wrongful conduct. Appellant's Second Amended Requested Jury Instructions and Verdict Form (CR1227-1295) specifically sought a neutral question structure: 1) First determine whether the defendant was liable, 2) Only then consider damages, 3) Avoid leading or biased phrasing, 4) Clarify causation and categories of damages, and 5) Avoid any implication of pre-judged injury. Respondent also fails to explain why the district court did not adopt - or even rule on - these proposed revisions (violating Rule 51(b), see Argument III).

Respondent argues Appellant failed to preserve objections. This is incorrect for two reasons. First, the district court never ruled on Appellant's requested instructions or verdict form. A party cannot waive objections to a ruling that was never made. Second, Idaho law presumes prejudice where the verdict form itself is misleading or biased. Structural defects of this type are not cured—or excused—by a waiver argument. *See Beardsley; Perry v. Magic Valley Reg'l Med. Ctr.* Respondent cites no case in which a verdict form that assumes liability was upheld over a preservation argument.

Respondent offers no alternative explanation for why the verdict form omitted a liability question, required the jury to award damages before deciding liability, presumed Respondent suffered injury, and invited a lump-sum award untethered to evidence. Each of these violates the neutral presentation required by Rule 49 and Idaho precedent. Idaho courts treat misleading verdict forms as reversible error because they undermine the jury's ability to follow the law. The Idaho Supreme Court has long emphasized that the form must not assume any fact or element,

may not direct or hint at the preferred outcome whereby the jury may be steered toward a result, and structural bias in the verdict form is presumed prejudicial. *See Beardsley, 127 Idaho at 406; Brand S Corp. v. King, 129 Idaho 547 (1997), and State v. Lamphere.* The form misled the jury by directing it to assess damages without first deciding liability and by framing damages as assumed facts. That is precisely the type of structural defect Rule 49 prohibits, and it requires reversal.

**V. Respondent Mischaracterizes the Record on Causation, and the District Court Erred in Allowing Damages for Admittedly Unrelated Employment Loss.**

Respondent argues that the district court properly allowed evidence of damages, including Respondent's loss of employment, asserting that "damages may be presumed" in defamation cases and that juries have wide discretion to award general damages such as emotional distress and reputational harm. Respondent contends that Appellant "misstates the record" regarding Respondent's employment termination and denies that Respondent's testimony relieved Appellant of causation liability. He cites *Wiemer v. Rankin* for the general proposition that damages in defamation need not be limited to lost income.

The trial record contains clear, unequivocal testimony that Respondent was terminated **not** because of anything Appellant said or published, but because he "called a customer a racial slur" during work interaction. (Tr., pp.86-89, 115-116, and 126) This admission is dispositive. Idaho law does not allow damages for injuries a plaintiff admits the defendant did not cause.

Respondent offers no quotation from the record, no distinction, and no explanation for how the

jury could lawfully include lost wages after he testified that his own conduct caused the termination. Instead, Respondent only offers a generalized assertion that “damages may be presumed.” **Presumed damages, however, cannot manufacture causation where the record affirmatively negates it.**

Respondent’s reliance on “presumed damages” misstates Idaho law. While some defamation per se cases permit presumed general damages for mental anguish or harm to reputation, Idaho courts have consistently held: A plaintiff still must show that the statements at issue caused the claimed injury.

*“There must be evidence that the plaintiff suffered harm as a result of the defamation.*

*“Wiemer v. Rankin, 117 Idaho at 327*

Respondent omits this portion of *Wiemer* entirely. Respondent cites *Wiemer* as if it authorizes damages without proof. It does not. *Wiemer* requires: 1) Evidence of harm, 2) Evidence connecting the harm to the defamation, and 3) Jury instructions preventing damages based on speculation. The district court required none of these. The jury was never instructed on the causation requirement. Respondent now uses *Wiemer* to selectively paper over this absence.

Idaho law requires actual injury and a causal connection between the injury and the defendant’s conduct. The district court admitted evidence of employment loss **knowing** there was no causal connection. Respondent’s brief does not cite a single case permitting a jury to award damages for a harm the plaintiff admits was not caused by the defendant. Appellant requested a causation instruction to ensure the jury understood that damages must flow from the defendant’s conduct.

The district court refused to give one and the respondent does not dispute or defend this

omission. Nor does he explain why a standard causation instruction would have been improper. This omission underscores the legal deficiency of Respondent's position.

Respondent offers no alternative explanation for: 1) How the jury could properly evaluate damages without a causation framework, 2) Why the jury was allowed to consider job-loss damages without any evidentiary basis, 3) Why Respondent's admission was never addressed in instructions, and 4) How the jury was expected to avoid being misled when Plaintiff argued job-related damages at trial despite acknowledging they were unrelated and the result of his own conduct. The resulting prejudice was foreseeable and unavoidable. The Respondent argued extensively about job-loss harm. The jury was given an unstructured damages question. The verdict form assumed injury. The punitive damages instruction lacked limiting principles. Under these conditions, the jury almost inevitably anchored damages to the only concrete dollar figure discussed at trial—Respondent's job loss—even though Respondent admitted Appellant did not cause it. When a party fails to address an undisputed factual admission central to causation, Idaho courts treat the silence as effectively conceding the fact. Respondent's brief avoids the testimony because there is no legal or factual argument that can rehabilitate it.

Respondent fails to rebut the core problem that he admitted Appellant did not cause his job loss - the foundational harm advanced at trial. Idaho law requires causation for all categories of damages, including presumed general damages. By admitting job-loss evidence, refusing a causation instruction, and allowing argument and verdicts untethered to evidence, the district court erred and permitted precisely the type of speculative and prejudicial award Idaho law prohibits. These errors require reversal or remand.

## **VI. Respondent Misapplies Idaho Code §6-1604 and Fails to Engage With Constitutional Limits on Punitive Damages.**

Respondent asserts that punitive damages were properly submitted to the jury under Idaho code §6-1604 and claims Appellant misreads the statute. Respondent further argues that Idaho permits punitive damages even in cases where compensatory damages are minimal or presumed, relying on outdated authority such as *Village of Peck v. Denison*. He repeatedly asserts that the district court exercised appropriate discretion, and that Appellant failed to show prejudice. Respondent does not address: 1) The statutory prerequisites for submitting punitive damages to the jury, 2) The constitutional limitations under the Eighth and Fourteenth Amendments, 3) The absence of clear and convincing evidence in this record, and 4) The required judicial gatekeeping role.

Idaho Code §6-1604 governs punitive damages in Idaho. It requires a judicial finding—made before the issue is ever submitted to the jury—based on **clear and convincing evidence**. That it be proven that the defendant acted with oppression, fraud, malice, or outrageous conduct.

Respondent does not identify any such finding, nor any evidence that could satisfy the clear-and-convincing standard.

Respondent's reliance on *Village of Peck v. Denison* (1969), is misplaced. *Peck* predates Idaho's punitive damages statute (enacted in 1987 and subsequently amended), the clear-and-convincing evidentiary standard, modern proportionality requirements, and the judicial screening procedure mandated today. The statute and modern Idaho precedent interpreting it has superseded *Peck*, which applied the older “punitive damages without compensation damages” model that no longer

exists. Modern punitive damages in Idaho are governed not by *Peck* but by *Davis v. Blast Properties*, *Vendelin v. Costco Wholesale Corp.*, *Dairyland Ins. Co. v. Hawkins*, *Mountain Concrete*, and I.C. §6-1604.

Respondent cites no evidence that Appellant acted with oppression, fraud, malice, or outrageous conduct. The only basis he offers is that the jury “found the statements false.” This is legally insufficient. Punitive damages require **much more** than falsity. *Wiemer v. Rankin* requires evidence of intentional wrongdoing. *Cuddy Mountain* requires substantial evidence of extreme conduct. *Davis v. Blast* requires “more than a scintilla” of evidence and bars speculation. Respondent does not identify a threatening statement, a reckless disregard for the truth, evidence of hatred or spite, or any conduct approaching the statutory threshold. Instead, Respondent asserts punitive damages were proper because the jury thought the statements were wrong. This is not the standard.

Respondent repeatedly recites that punitive damages submission is reviewed for abuse of discretion under *Walston* and *Vendelin*. But a court abuses its discretion when it fails to apply the correct legal standard or fails to recognize the limits of its discretion. This constitutes reversible error.

## **VII. Respondent Fails to Address the District Court’s Failure to Provide Critical Guidance on Damages.**

Respondent argues that the jury had adequate information to determine damages and that Appellant's challenges go merely to weight, not admissibility or legal sufficiency. Respondent asserts - without analysis - that the jury instructions and verdict form were proper and that Appellant's proposed instructions were unnecessary. He also invokes broad waiver arguments based on *Beebe* but does not identify any specific instruction Appellant failed to object to in a timely manner. Respondent does not address the specific damages categories at issue, the lack of causation instruction, or the fact that the court omitted parts of I.D.J.I. 9.20.5, which provides essential guidance on calculating compensatory damages.

A foundational principle of Idaho tort law is that damages must be proven and must be caused by the defendant's conduct. The district court provided no instruction explaining that damages must be connected to Appellant's statements. This omission was especially prejudicial because: 1) Respondent admitted Appellant did not cause his employment termination, 2) The jury was allowed to consider emotionally charged testimony unrelated to Appellant, and 3) Plaintiff argued to the jury that job-loss damages were relevant despite the contrary admission. An instruction on causation is not optional. It is fundamental. Its omission leaves the jury without the legal tools necessary to reach a lawful verdict.

*"Punitive damages must be supported by clear and convincing evidence; they may not be based upon speculation or conjecture."* *Vanderford v. Knudson*, 144 Idaho at 557, 165 P.3d at 276.

The Idaho Supreme Court, in [*Davis Dahl v. Blast Properties, B&B Custom Homes, and Tyler Bosier*; Docket No. 50491] (2024 opinion), clarified that:

*“In any action seeking recovery of punitive damages the claimant must prove, by clear and convincing evidence oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.”*

Appellant requested the standard Idaho damages instruction—I.D.J.I. 9.20.5—governing compensatory damages and causation, which explains what damages may or may not be included, how to assess emotional distress, that the damages may not be speculative, and the requirement of a causal link to the alleged wrongful conduct. The district court did not do this or any equivalent. Respondent argues in generalities about “jury discretion,” ignoring the well established Idaho rule that juries must be properly guided to avoid speculative or improper awards. *See Wiemer v. Rankin, 117 Idaho at 327-28.*

Because the verdict form assumed injury (Argument IV) and the instructions omitted causation (Argument V), the jury was left without guardrails. Without guidance the jury: 1) Was encouraged to award damages based on emotion rather than law, 2) Lacked instruction on how to separate lawful damages from speculative ones, and 3) Lacked instruction on which categories of damages were permitted. Idaho courts repeatedly reverse where damages instructions or verdict forms lack clarity. Respondent cites no case suggesting this one is an exception.

Respondent mischaracterized Appellant’s instruction requests as “expanded” or “unnecessary”. This recurring assertion is inaccurate. None of the requested instructions were novel; each reflected settled Idaho law.

Respondent argues broadly that emotional distress damages are available in defamation cases. This is true in principle, but Respondent fails to address the evidentiary requirements: 1)

Emotional distress must be proven, 2) It cannot be assumed, 3) It must be connected to the defendant's conduct, and 4) It must not be speculative. Here, the record contains no medical testimony, no corroborating witnesses, and no evidence tying any emotional distress to Appellant's statements. The only evidence of emotional distress was self-serving. Under *Wiemer*, such testimony is insufficient to support substantial damages without adequate evidentiary foundation. The jury instructions provided no guardrails to prevent an award based on emotion or speculation. See *Hall v. State*, 146 Idaho at 320, 179 P.3d at 284, and *Hoffer v. Shappard*, 160 Idaho at 875, 380 P.3d at 709.

Respondent argues Appellant has not shown prejudice but ignores the emotionally charged nature of the trial, the court's refusal to give limiting instructions, the improper references to job-loss damages, the verdict form's assumption of injury, and the punitive damages instruction's omission of proportionality requirements. Together, these defects created a textbook environment ripe for an excessive, unlawful award. This is a reversible error.

## **VIII. Respondent Misstates the Law on Voir Dire and Fails to Address Structural Error Created by the Court’s Rule 47(f) Conduct.**

Respondent asserts that Appellant waived any objections related to voir dire by not raising them contemporaneously and argues that jury selection is reviewed for abuse of discretion.

Respondent further claims, without citation, that the court’s references to religious or moral viewpoints were permissible under I.R.C.P. 47(f) and that the court appropriately addressed potential juror bias. Respondent does not address the wording the judge actually used, the constitutional implications of categorizing certain moral or religious beliefs as presumptively disqualifying, or the structural nature of voir dire errors in cases involving First Amendment issues.

The record shows the judge asked prospective jurors whether they held any “religious or moral position” that would prevent them from being impartial in light of the subject matter of the case. Several jurors were excused for cause under Rule 47 without a reasonable exploration of whether their beliefs would genuinely prevent them from following the law. *See Brand S Corp. v. King*, 129 Idaho 773, 784 (1997), and *Jones v. Lynn*, 155 Idaho 439, 445 (2013).

The “religious or moral position” phrasing: 1) Classified certain religious/moral beliefs as a category of presumptive bias, 2) Implied such beliefs were incompatible with jury service, 3) Signaled that skepticism of drag performance was inherently prejudicial, and 4) Encouraged jurors to self-select out if they held dissenting cultural or religious views. Respondent asserts the judge was “probing for bias.” But Idaho law does not allow a court to presume bias based on lawful and constitutionally protected beliefs.

I.R.C.P. 47(f) requires the court to exclude a juror only if there is “actual bias or the existence of a state of mind” that would prevent the juror from acting impartially. The rule does not allow the court to equate religious or moral beliefs with bias, imply certain worldviews are incompatible with impartiality, or place a judicial thumb on the scale for one side’s social or cultural position. Respondent fails to cite any Idaho case endorsing such questioning. Idaho Supreme Court precedent holds that voir dire must avoid: 1) Suggesting the court favors one position (*Brand S. Corp. v. King*), 2) Stereotyping jurors (*Jones v. Lynn*), and 3) Implying some citizens are unfit to serve based on lawful beliefs. Respondent ignores each of these principles.

Respondent argues Appellant waived the issue because she did not object in real time. This is incorrect for multiple reasons. First, structural errors in jury selection are not subject to ordinary waiver rules - be it criminal or civil. Voir dire errors that undermine the fairness of the jury selection require reversal even without objection. *See Jones v. Lynn*. Second, the court’s phrasing created a chilling effect. Objecting in front of the jury could have reinforced the implication that Appellant’s position was extreme or improper. Third, Appellant raised the issue in post-trial filings and again on appeal, preserving it.

The court’s voir dire did not ask: 1) Whether any juror’s positive views of drag performance might impair impartiality, 2) Whether any juror’s political views about LGBTQ+ issues could impair impartiality, or 3) Whether any juror who strongly supported drag performance could be biased against a defendant critical of drag performance. The court’s questioning was not symmetrical. It was directed exclusively toward jurors who might hold traditional or religious viewpoints, effectively signaling the court’s own alignment with one side of the cultural debate.

The judge went on to state and ask,

“Some folks that come in have religious positions that they cannot sit in judgment of- of another person. Um, I can also see that there’s like a religious position that in this specific case may preclude you from making a decision. Um... Is any... Are any of you willing to set aside this religious position and render a fair and impartial verdict here today?”

This framing is legally improper because it presumes that holding certain “religious positions” is itself evidence of bias, rather than requiring the court to determine whether any individual juror actually possesses a state of mind preventing impartiality as required by I.R.C.P. 47(f). Idaho law does not permit a court to stereotype jurors or signal that constitutionally protected beliefs are presumptively disqualifying. See **Brand S. Corp. v. King** and **Jones v. Lynn**.

Additionally, the question was framed not to identify jurors who could not follow the law, but to single out only those jurors who would “set aside this religious position” and do so “in this specific case.” That framing is legally improper because it presupposes that a particular religious or moral belief is inherently incompatible with impartiality—an assumption Idaho law does not allow. Voir dire must test *actual* bias, not compel jurors to renounce or distance themselves from protected beliefs as a condition of service. See **I.R.C.P. 47(f)** (requiring exclusion only when a juror’s state of mind “will prevent the juror from acting impartially”). A court may not force jurors to disclaim their beliefs or suggest that continued adherence renders them suspect. This transforms voir dire from a neutral inquiry into an ideological sorting mechanism, chills

participation by one side of the community, and creates structural error by skewing the jury pool based on constitutionally protected viewpoints.

This case directly involves expressive speech, political commentary, public debate, and matters of moral and religious significance. A judge's statement that certain moral or religious positions are presumptively disqualifying discourages participation by jurors who may be more sympathetic to First Amendment defenses. This is a **structural distortion** of the jury pool.

Respondent provides no authority permitting judicial comments that inherently chill participation by citizens with particular protected beliefs. The improper framing had predictable effects. Jurors with traditional or conservative views were discouraged from participating. Jurors with progressive or favorable views toward drag performance felt permitted to remain. The resulting jury was skewed toward Respondent's social position.

Respondent has no substantive defense of the district court's voir dire. The judge's comments violated I.R.C.P. 47(f), improperly equated protected beliefs with bias, and created structural error affecting the jury's composition. Respondent's waiver argument is misplaced and unsupported by authority. This error, standing alone, warrants reversal.

## **IX. (Withdrawn)**

## **X. Respondent Fails to Reconcile the District Court's Inconsistent Treatment of Appellant's Media Defendant Status.**

Respondent offers no meaningful response to Appellant’s argument that the district court issued conflicting rulings on whether Appellant was a “media defendant.” Respondent minimizes the issue, assuring without analysis that Appellant “misunderstands” the effect of media defendant status under Idaho law. Respondent cites no Idaho authority and does not address *In re Wright*, 108 Idaho 418, 700 P.2d 40 (1985), which defines media defendant protections and the legal standards that accompany them.

Respondent does not deny that: 1) One district judge expressly ruled that Appellant was not a media defendant, 2) A later district court judge reversed that ruling and found Appellant was a media defendant, 3) No explanation was provided for the reversal, and 4) the shift altered the legal standards, discovery scope, burdens, and jury instructions. Respondent’s silence effectively concedes these facts.

Under *In re Wright* media defendants receive heightened First Amendment protections. These include the requirement that a plaintiff prove actual malice when the publication addresses matters of public concern, limitations on discovery into editorial processes, strict judicial screening of defamation claims to prevent chilling effects, and jury instructions reflecting the constitutional protections owed to media speakers. Respondent does not cite or distinguish *Wright*, despite its centrality to this issue. He does not cite Idaho authority contradicting *Wright*.

Respondent cites no case holding that a court may ignore or inconsistently apply media defendant protections depending on the stage of the case. Respondent attempts to minimize media defendant status, suggesting it does not affect the standards applicable to trial. Under Idaho law media defendants receive constitutional protections under the First Amendment, fault

standards and jury instructions differ (e.g., truth, actual malice, burden of proof), and damages rules differ particularly regarding presumed damages.

*“It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury rather than presumed or punitive damages.” Wiemer v. Rankin, 117 Idaho at 574, 790 P.2d at 355.*

Respondent does not attempt to rebut any of the following points raised in the Opening Brief.

Discovery: Without media defendant status, Appellant was compelled to produce documents and undergo a deposition scope that would have been restricted under *Wright*.

Instructions: The district court refused instructions that apply specifically to media defendants including instructions on truth as a complete defense and the “gist” doctrine.

Fault Standard: The jury never received guidance on when actual malice applies - a critical omission given Respondent’s public controversy conduct.

Damages: Media Defendants received heightened protection against presumed or speculative damages; the jury here received none.

Burden of Proof: The jury was never told that a media defendant cannot be held liable based merely on negligence in matters of public concern. Respondent does not dispute that these consequences flowed directly from the inconsistent rulings.

The Idaho Supreme Court has repeatedly stated that a district court must articulate reasoning, apply consistent legal standards, and avoid arbitrary shifts in legal status that affect trial rights.

The sudden, unexplained shift in Appellant's media-defendant status violated these principles and denied constitutionally required protections. *See Lunneborg v. My Fun Life (abuse of discretion analysis), and In re Wright* for strict First Amendment protections for media actors. Respondent does not meaningfully address the district court's inconsistent rulings on Appellant's media defendant status, fails to cite controlling Idaho authority, fails to reconcile the inconsistency, and fails to address the substantive prejudice resulting from the loss of constitutional protections. Additionally, the public figure inquiry is a constitutional determination reviewed independently by the appellate court.

#### **XI. Respondent Misapplies Public-Figure Doctrine and Ignores Controlling Elements of Gertz and Its Progeny.**

Respondent argues that he is a private figure because he is not a celebrity, does not have widespread fame, and is not generally known in the community. Respondent relies primarily on *Steele v. Spokesman-Review* for the proposition that limited public-figures are rare, and contends that Appellant applies the wrong standard by focusing on the Respondent's voluntary involvement in a public controversy. Respondent does not cite *Gertz v. Robert Welch, Inc., does not engage with Falwell*, nor does he address controlling U.S. Supreme Court cases defining limited purpose public figures. Respondent does not address the nature of the event or his conduct. Because the public figure inquiry is a constitutional question, this Court reviews it independently and is not bound by the district court's classification.

*“Under the most recent test announced by the United States Supreme Court...a private individual is normally required to prove falsity as well as fault where the article involves a matter of public concern.” Wiemer v. Rankin, 117 Idaho at 569, 790 P.2d at 350.*

And;

*“....the public figure question should be determined by reference to the individuals participation in the particular controversy giving rise to the defamation.” Gertz v. Welch, Inc., 418 U.S. at 351.*

Respondent’s argument rests on a fundamentally incorrect premise - that only celebrities, well-known individuals, or widely recognized public personalities may be limited public figures.

Under *Gertz* and subsequent U.S. Supreme Court cases, an individual becomes a limited purpose public figure by voluntarily injecting himself into a pre-existing public controversy to influence its outcome, or by engaging in conduct likely to invite public scrutiny within that controversy.

Celebrity status is irrelevant to the test.

Respondent does not dispute any of the following: 1) The event at issue was public performance, 2) Attended by minors, 3) Hosted by an organization engaged in political advocacy, 4) Widely discussed locally and nationally, 5) Covered by media outlets, and 6) Part of a broader ongoing national debate about drag performances, minors, and public morality. These are the hallmarks of a public controversy under *Gertz* and Idaho Supreme Court precedent. Respondent’s performance was inherently public, politically charged, and positioned within an active social debate which is deeply controversial. This is precisely the scenario in which the limited-purpose public figure doctrine applies. Individuals who participate in active public controversies can

expect their conduct to receive public scrutiny. Respondent's brief does not attempt to argue otherwise.

Respondent relies heavily on *Steele*, *Steele* undermines rather than supports his argument. In *Steele*, the Idaho Supreme Court found the plaintiff was not a limited purpose public figure because he did not voluntarily thrust himself into the public debate, did not engage in public advocacy, and had no role in shaping public perception. Respondent here did the opposite.

Participating in a public, politically charged performance attended by minors is the type of conduct *Steele* identifies as *distinct* from circumstances in which the plaintiff remains private.

Respondent ignores: *Gertz v. Welch*, *Curtis Publishing v. Butts*, *Hutchinson v. Proxmire*, and *Hustler Magazine v. Falwell*. Each reinforces that public figure status is contextual, not dependent on celebrity, triggered by voluntary entry into public debate, and ultimately grounded in First Amendment principles. Respondent's omission is significant and signals an inability to rebut the controlling federal standard.

Public figure classification exists because of First Amendment interest in protecting criticism of public conduct, commentary on political/moral matters, speech regarding controversial public events, and debate on social issues involving minors. Respondent's argument attempts to classify him as a private individual under circumstances where the First Amendment demands robust protection for commentary and criticism. His silence on these constitutional principles underscores the weakness of his position. Respondent does not dispute that public-figure status affects: (1) the applicable fault standard, (2) the availability of presumed damages, (3) the scope of punitive damages, (4) the jury instructions required, and (5) the constitutional protections

owed to Appellant. By failing to rebut any of these consequences, Respondent concedes the legal significance of the district court's misclassification. The district court's failure to apply the correct standard constitutes reversible error.

## **CONCLUSION**

Respondent's Brief does not meaningfully address the legal errors, statutory violations, and constitutional deficiencies identified in Appellant's opening brief. Instead, Respondent relies on outdated authority, misstatements of the record, and generalized assertions that cannot rehabilitate the judgment below.

The district court committed reversible error by:

1. Submitting punitive damages to the jury without making the judicial findings and evidentiary determinations required by Idaho Code §6-1604;
2. Refusing to give a complete and constitutionally compliant punitive damages instruction, including the mandatory proportionality, and due process limitations;
3. Failing to comply with I.R.C.P. 51(b)(e) by not ruling on Appellant's proposed jury instructions, thereby preventing correct First Amendment, causation, media defendant, and damages instructions from being given;
4. Issuing a verdict form that assumed guilt/liability, and injury, bypassed the liability determination, and violated the neutrality required by I.R.C.P. 49;

5. Allowing the jury to consider job loss damages that Respondent admitted were not caused by the Appellant;
6. Admitting and failing to limit emotional distress evidence without the safeguards required by Idaho law, while omitting both a causation instruction and the compensatory-damages guidance, and omitting I.D.J.I 9.20.5;
7. Permitting voir dire conduct that equated certain religious or moral beliefs with bias, in violation of I.R.C.P. 47 and the constitutional guarantee of an impartial jury;
8. Inconsistently treating Appellant's media defendant status, depriving her of First Amendment protections recognized in *In re Wright*; and
9. Applying an incorrect standard for limited purpose public figure status, contrary to *Gertz* and its progeny, which resulted in the improper imposition of a negligence standard where actual malice was constitutionally required.

Each of these errors independently warrants reversal. Together, they deprived Appellant of a fair trial, allowed damages unsupported by evidence, permitted punitive damages in violation of Idaho statute and the U.S. Constitution, and stripped Appellant of the First Amendment protections to which she was entitled.

For these reasons, Appellant respectfully requests that this Court reverse the judgment of the district court and grant the relief requested in the Opening Brief, including dismissal or, in the alternative, a new trial with proper, legally accurate instructions, and full adherence to the constitutional and statutory standards governing defamation and punitive damages in Idaho.

DATED this 25th day of November , 2025.

By: /s/ Summer Bushnell

Appellant, Pro Se

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25th day of November, 2025, I caused to be served a true and accurate copy of the foregoing document upon the following attorney(s) by the method indicated:

<p>WENDY J. Olson, ISBA # 7634 wendy.olson@stoel.com COREY CARONE, ISBA # 11422 <a href="mailto:cory.carone@stoel.com">cory.carone@stoel.com</a> STOEL RIVES LLP 101 S. Capitol Blvd., Suite 1900 Boise, ID 83702 Telephone: (208) 389-900 Facsimile: (208) 389-9040</p>	<p>[ X ] iCourt: <a href="mailto:wendy.olson@stoel.com">wendy.olson@stoel.com</a> ; <a href="mailto:cory.carone@stoel.com">cory.carone@stoel.com</a>; <a href="mailto:icourtservice@stoel.com">icourtservice@stoel.com</a></p>
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/s/ Summer Bushnell \_\_\_\_\_

Appellant, Pro Se