

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

Supreme Court Docket No. 52072-2024

---

ERIC POSEY,

*Respondent,*

v.

SUMMER BUSHNELL,

*Appellant.*

---

**RESPONDENT'S BRIEF**

---

Appeal from the First Judicial District for Kootenai County  
Case No. CV28-22-5860  
The Honorable Ross Pittman, District Judge

---

*For Respondent:*

WENDY J. OLSON, Bar No. 7634  
wendy.olson@stoel.com  
CORY M. CARONE, Bar No. 11422  
cory.carone@stoel.com  
BRADLEY R. PROWANT, Bar No. 12335  
bradley.prowant@stoel.com  
STOEL RIVES LLP  
101 S. Capitol Boulevard, Suite 1900  
Boise, ID 83702

*For Appellant:*

SUMMER BUSHNELL  
summer.jas@icloud.com  
Pro Se  
5006 E Portside Ct.  
Post Falls, ID 83854

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE.....	1
I. NATURE OF THE CASE .....	1
II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS .....	1
A. Factual Background .....	1
B. Procedural Background.....	5
III. ISSUES ON APPEAL .....	6
IV. STANDARDS OF REVIEW .....	7
V. ARGUMENT.....	9
A. This Court Should Dismiss Appellant’s Appeal for Failing to Raise the Issues Below, with Possibly One Exception.....	9
B. This Appeal Should Be Dismissed Because Appellant’s Opening Brief Fails to Articulate and Apply the Applicable Standard of Review and Fails to Provide Adequate Authority, Argument, and Citations to the Record .....	10
C. The District Court Did Not Err. ....	14
1. Evidence of Compensable Damages Is Not Required for a Jury to Consider Awarding Punitive Damages on a Defamation Claim .....	14
2. The District Court Gave Jury Instructions Requested by Appellant, and Appellant Did Not Object to the Special Verdict Form.....	17
a. Appellant Did Not Offer an Expanded Jury Instruction on Punitive Damages that the District Court Denied.....	17
b. Appellant Failed to Specifically and Distinctly Argue Claims of Error with Regard to the Jury Instructions and Verdict Form.....	18
c. Appellant Waived the Right to Claim Error Regarding Omitted Jury Instruction or the Final Verdict Form by Failing to Raise the Issue at Trial .....	20

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
3. The District Court Did Not Err in Allowing Testimony on Compensatory Damages. ....	21
4. The District Court Did Not Err in Its Application of the Idaho Punitive Damage Statute.....	23
5. The District Court Did Not Err by Not Giving an Instruction Appellant Did Not Request.....	24
6. The District Court’s Voir Dire Ensured a Fair and Impartial Jury. ....	25
7. The District Court Did Not Issue Conflicting Rulings on Whether Ms. Bushnell Qualified as a Media Defendant .....	27
8. The District Court Did Not Err in Determining Mr. Posey Is Not a Limited Public Figure .....	29
9. Appellant Is No Longer Pursuing an Appeal on the Issue of Whether the District Court Properly Labeled Her as a Hostile Witness.....	32
CONCLUSION.....	32

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>AgStar Fin. Servs., ACA v. Nw. Sand &amp; Gravel, Inc.</i> , 161 Idaho 801, 391 P.3d 1271 (2017).....	12
<i>Beebe v. N. Idaho Day Surgery, LLC</i> , 171 Idaho 779, 526 P.3d 650 (2023), <i>reh 'g denied</i> (Apr. 10, 2023) .....	8, 17, 20
<i>Blankenship v. Weidner</i> , 120 Idaho 234, 815 P.2d 432 (1991).....	20
<i>Boren v. Gadwa</i> , No. 50604-2023, 2024 WL 4997108 (Idaho Dec. 6, 2024).....	16
<i>Clark v. Spokesman-Rev.</i> , 144 Idaho 427, 163 P.3d 216 (2007).....	28
<i>Davis v. Blast Properties, Inc.</i> , 174 Idaho 37, 551 P.3d 706 (2024).....	16, 17
<i>Eagle Springs Homeowners Ass 'n v. Rodina</i> , 165 Idaho 862, 454 P.3d 504 (2019).....	9
<i>Elliott v. Murdock</i> , 161 Idaho 281, 385 P.3d 459 (2016).....	30
<i>Fed. Home Loan Mortg. Corp. v. Butcher</i> , 157 Idaho 577, 338 P.3d 556 (2014).....	13
<i>Gem State Ins. Co. v. Hutchison</i> , 145 Idaho 10, 175 P.3d 172 (2007).....	12
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	29
<i>Gestner v. Divine</i> , 171 Idaho 159, 519 P.3d 439 (2022).....	9
<i>Hansen v. Roberts</i> , 154 Idaho 469, 299 P.3d 781 (2013).....	18
<i>Harris v. Alessi</i> , 141 Idaho 901, 120 P.3d 289 (Ct. App. 2005).....	26

## TABLE OF AUTHORITIES

(continued)

	Page
<i>Inv. Recovery Fund, LLC v. Hopkins</i> , 167 Idaho 42, 467 P.3d 406 (2020).....	17
<i>Jones v. Lynn</i> , 169 Idaho 545, 498 P.3d 1174 (2021).....	27
<i>Lowell v. Hum. Dynamics &amp; Diagnostics, PLLC</i> , 172 Idaho 417, 533 P.3d 1008 (2023).....	13
<i>Michalk v. Michalk</i> , 148 Idaho 224, 220 P.3d 580 (2009).....	13
<i>Midtown Ventures, LLC v. Capone as Tr. to Thomas &amp; Teresa Capone Living Tr.</i> , 173 Idaho 172, 539 P.3d 992 (2023).....	13
<i>Morris ex rel. Morris v. Thomson</i> , 130 Idaho 138, 937 P.2d 1212 (1997).....	8, 25
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	31
<i>Nelson v. Nelson</i> , 144 Idaho 710, 170 P.3d 375 (2007).....	9
<i>Obenchain v. McAlvain Constr., Inc.</i> , 143 Idaho 56, 137 P.3d 443 (2006).....	9
<i>Perry v. Magic Valley Reg'l Med. Ctr.</i> , 134 Idaho 46, 995 P.2d 816 (2000).....	8, 21
<i>Plasse v. Reid</i> , 172 Idaho 53, 529 P.3d 718 (2023), <i>reh'g denied</i> (June 8, 2023) .....	19
<i>Somes v. Starnes</i> , No. 52160, 2025 WL 1933403 (Idaho Ct. App. July 15, 2025) .....	10, 11
<i>St. Luke's Reg'l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cnty.</i> , 146 Idaho 753, 203 P.3d 683 (2009).....	8, 23
<i>State v. Blake</i> , 133 Idaho 237, 985 P.2d 117 (1999).....	20
<i>State v. Byrum</i> , 167 Idaho 735, 476 P.3d 402 (Ct. App. 2020).....	10, 11

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>State v. Gonzalez</i> , 165 Idaho 95, 439 P.3d 1267 (2019).....	9, 10
<i>State v. Luke</i> , 134 Idaho 294, 1 P.3d 795 (2000).....	8, 25
<i>State v. Yager</i> , 139 Idaho 680, 85 P.3d 656 (2004).....	26
<i>Steele v. Spokesman-Rev.</i> , 138 Idaho 249, 61 P.3d 606 (2002).....	29
<i>Stewart v. Sun Valley Co.</i> , 140 Idaho 381, 94 P.3d 686 (2004).....	19
<i>Suits v. Nix</i> , 141 Idaho 706, 117 P.3d 120 (2005).....	13
<i>Taylor v. AIA Servs. Corp.</i> , 151 Idaho 552, 261 P.3d 829 (2011).....	32
<i>Thomson v. Olsen</i> , 147 Idaho 99, 205 P.3d 1235 (2009).....	8, 25
<i>Van Hook v. State</i> , 170 Idaho 24, 506 P.3d 887 (2022).....	13
<i>Vendelin v. Costco Wholesale Corp.</i> , 140 Idaho 416, 95 P.3d 34 (2004).....	7, 14, 23
<i>Verity v. USA Today</i> , 164 Idaho 832, 436 P.3d 653 (2019).....	9, 29, 31
<i>Village of Peck v. Denison</i> , 92 Idaho 747, 450 P.2d 310 (1969).....	15
<i>Vreeken v. Lockwood Eng'g, B.V.</i> , 148 Idaho 89, 218 P.3d 1150 (2009).....	8, 21
<i>Walston v. Monumental Life Ins. Co.</i> , 129 Idaho 211, 923 P.2d 456 (1996).....	7, 11, 14
<i>Wiemer v. Rankin</i> , 117 Idaho 566, 790 P.2d 347 (1990).....	15, 29, 31

**TABLE OF AUTHORITIES**  
(continued)

**Page**

*Yellowstone Log Homes, LLC v. City of Rigby*,  
173 Idaho 288, 540 P.3d 990 (2023).....9, 29

**Statutes**

I.C. § 6-1604 .....5, 23, 24  
I.C. § 6-1604(1).....15  
I.C. § 6-1604(3).....23, 24  
I.C. § 16-1604 .....23

**Rules**

I.R.C.P. 47.....13, 25  
I.R.C.P. 47(a) .....26  
I.R.C.P. 47(c) .....26  
I.R.C.P. 47(f).....26  
I.R.C.P. 51(f).....20  
I.R.C.P. 51(i)(iii).....20  
I.R.C.P. 61.....32

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

Defendant-Appellant Summer Bushnell (“Appellant” or “Ms. Bushnell”) appeals from a jury verdict finding she defamed Plaintiff-Respondent Eric Posey (“Mr. Posey”) and awarding him \$1.176 million in compensatory and punitive damages for her false statements that he exposed himself in front of children at Pride in the Park in Coeur d’Alene, Idaho on June 11, 2022. The District Court entered judgment accordingly. This appeal involves the District Court’s proper jury instructions, verdict form, evidentiary rulings, and legal determinations that Plaintiff-Respondent Mr. Posey was not a public figure. This Court should affirm the District Court’s rulings and judgment.

### **II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS**

#### **A. Factual Background**

On June 11 and 12, 2022, Ms. Bushnell posted on various social media platforms videos and commentary falsely stating that Mr. Posey committed a crime by flashing his genitals to minors when he performed in a drag show at Pride in the Park. (Tr. 228:2-6; 238:11-25; 242:3-10; 441:18-444:12.) She also told persons with whom she was communicating on Facebook Messenger and other social media platforms that she could see Mr. Posey’s penis, both testicles, or both his penis and both testicles. (Tr. 532:15-533:13; 536:13-23; 541:6-18; 550:11-551:8.) She admitted those statements were false (Tr. 533:23-534:6; 536:24-537:8; 541:19-23; 551:9-16) and, at trial, testified that, at most, all she ever saw, even as early as June 11, 2022, was the faint outline of a single testicle (Tr. 502:8-16; 588:15-19). Videos of Mr. Posey’s performance showed that even that

statement is indisputably false. (Tr. 304:11-305:8; 307:7-234; 311:12-16.) In addition, Mr. Posey's undisputed testimony about the steps he took to prepare to perform and photos of the five layers of costuming he had on over his taped genital area proved that it was impossible for anyone to see his genitals. (Tr. 273:19-296:12.)

Although Ms. Bushnell's statements were false, she repeatedly urged people on social media to report Mr. Posey to the police and demand that he be prosecuted and put in jail. (Tr. 238:21-239:7; 473:17-474:3.) Ms. Bushnell posted her video and made her statements although she did not attend the Pride in the Park event where Mr. Posey performed in drag, and none of the dozens of people who watched the performance made any such allegation. (Tr. 224:16-19; 458:18-20.) Ms. Bushnell's June 11, 2022, social media statement was based on an unedited video she watched that had been shared with her by a social media acquaintance, Jeremy Lokken. (Tr. 460:19-461:9; 478:20-479:4.) It showed only Ms. Bushnell speaking and promising to post a video to prove her allegation. (Tr. 440:19-441:5; 460:10-18.) On June 12, 2022, Ms. Bushnell posted a video that Mr. Lokken edited. (Tr. 441:6-10; 467:6-468:12.) The video blurred Mr. Posey's entire crotch area, implying that the blurring covered exposed genitals. (Tr. 468:9-12; 488:12-22; 499:7-500:4.) The video also changed from Mr. Posey's actual full-speed performance to an extremely slowed down and zoomed in video with ominous music at the time Mr. Posey performed the move in which Ms. Bushnell falsely alleged exposure. (Tr. 489:3-490:25.) The blurred, edited video showed children in the crowd reacting, which Ms. Bushnell admitted could not be from Mr. Lokken's video of Mr. Posey's performance but was edited in to imply that the children had seen Mr. Posey expose his genitals. (Tr. 491:1-25; 492:5-496:7.)

Ms. Bushnell's false statements and her insistence that others on social media complain to the police resulted in a criminal investigation of Mr. Posey. (Tr. 228:7-13; 400:18-401:16.) Mr. Posey was able to provide the police with a video clearly showing no exposure. (Tr. 334:12-337:15.) The Coeur d'Alene Prosecuting Attorney's Office declined prosecution on June 30, 2022, and issued a press release stating that the unedited video did not show any exposure. (Tr. 406:4-410:2.) That did not deter Ms. Bushnell. Ms. Bushnell continued to make her false statements even after the Coeur d'Alene Prosecuting Attorney's Office declined prosecution. (Tr. 543:6-10.) She learned that Mr. Posey was receiving death threats and being harassed at work but continued making false statements that he had fully exposed his genitals to children. (Tr. 545:5-16.)

Ms. Bushnell is an avowed opponent of drag shows. (Tr. 455:13-22.) Prior to June 11, she sent emails to various sponsors of Pride in the Park urging them to withdraw their sponsorships. (Tr. 446:20-447:6.) This case and Mr. Posey's claims were not about drag shows, however. Ms. Bushnell specifically stated that Mr. Posey exposed his genitals to children. (Tr. 228:2-6; 231:1-10; 331:20-332:3.) The heading on one of her posts asked, "Why isn't this man in jail?" (Tr. 468:13-16.) She left the false statements about Mr. Posey and the blurred video implying he exposed his genitals on her Facebook page and other social media through trial. (Tr. 356:18-24.)

Ms. Bushnell's false statements turned Mr. Posey's life upside down. Her false allegations were repeated not just on the social media platforms she posted them on, but also on Coeur d'Alene area television stations and newspapers, and television stations and social media pages throughout the world. (Tr. 238:11-242:10.) Mr. Posey experienced harassment at his job and was fired after he reacted to one of his harassers. (Tr. 348:10-351:2.) He did not know who he could trust or not

trust. He did not know for more than two weeks whether he would be jailed and lose his liberty. (Tr. 228:22-229:2; 233:11-17; 338:5-13; 412:23-413:14.) As part of his agreement to appear in Pride in the Park, Mr. Posey had also agreed to perform at an event later in Pride month called Pride on the Runway. (Tr. 339:11-23.) Because of the negative publicity created by Ms. Bushnell's false statements, that event was moved from its original location. Mr. Posey attempted to perform but left the stage. (Tr. 339:24-342:9.) He was having anxiety attacks and feared that Ms. Bushnell was in the audience. (Tr. 341:15-342:9.)

Mr. Posey retreated into a very private existence, and he disguised his public movements out of fear of Ms. Bushnell or any of her followers. (Tr. 353:11-354:11.) He had trouble finding mental health treatment for his mental health issues (Tr. 343:15-344:11; 345:11-346:8), had difficulties at his job (Tr. 347:18-349:6), and obtained an emotional support animal (Tr. 353:11-354:11). He began working in an office setting where his coworkers knew who he was and what he was going through but where he rarely had to interact with the public. (Tr. 690:6-17.) Mr. Posey's boss and his close friends testified about the impact Ms. Bushnell's defamatory statements had on Mr. Posey, and how he seemed much more anxious and less able to interact in groups of people, up to and through the trial. (Tr. 228:22-230:1; 232:23-233:10; 236:8-22; 237:3-14; 692:2-16; 712:4-14; 714:10-717:15.) A licensed professional counselor provided crisis counseling services to Mr. Posey on June 22 and 24, not quite two weeks after Ms. Bushnell made her false statements. (Tr. 423:20-25; 426:2-427:17.) She testified that Mr. Posey "was in visible distress" and that he had some "physiological hyperarousal and cognitive hyperarousal, so he was speaking

very pressured, almost – or rapid, almost pressured.” (Tr. 427:21-24.) She testified that Mr. Posey was “tearful at times” and “hypervigilant or restless.” (Tr. 427:24-25.)

## **B. Procedural Background**

Mr. Posey filed his Complaint on September 26, 2022, bringing a claim of defamation and a claim of defamation by implication against Ms. Bushnell based on her false statements that he exposed his genitals to children when he performed at Pride in the Park and, based on the edited video she posted, blurring his crotch area to suggest that he had fully exposed his genitals to children when he performed at Pride in the Park. (CR 22-32.)

The parties brought cross motions for summary judgment. In a December 22, 2023, Order, the District Court denied both motions (CR 840-854), but in doing so made important rulings, including that, as a matter of law, Mr. Posey was not a public figure or a limited public figure (CR 848-850).

On January 3, 2024, the District Court granted Mr. Posey’s motion to amend his Complaint to seek punitive damages as provided by Idaho Code § 6-1604 (CR 919-922), and on January 10, 2024, Mr. Posey filed his amended Complaint (CR 923-934).

Both parties submitted proposed jury instructions on the elements of Mr. Posey’s defamation claims, on damages, and on punitive damages. (CR 956-1093.) Ms. Bushnell’s counsel submitted amended sets of jury instructions. (CR 1102-1168, 1227-1295.) At the close of evidence, the District Court determined that there was sufficient evidence to submit Mr. Posey’s punitive damages claim to the jury. (Tr. 784:9-14.) Over Mr. Posey’s objection (Tr. 785:2-790:2), the District Court instructed the jury that to award punitive damages, it had to find both actual malice

and that the statutory standard for punitive damages had been met. (Tr. 791:12-792:18; 817:1-819:7.) Defense counsel agreed with that approach and the District Court's proposed instructions. (Tr. 793:10-795:23.)

The jury deliberated for only a few hours. It unanimously returned a verdict in Mr. Posey's favor, awarding him \$926,000 in compensatory damages and \$250,000 in punitive damages. (Tr. 884:1-887:5.)

### **III. ISSUES ON APPEAL**

Mr. Posey reframes the issues on appeal as follows:

- A. Whether the appeal should be dismissed as to Appellant's Issues 1-8 and 10 because Appellant failed to preserve these issues for appeal.
- B. Whether the appeal should be dismissed because Appellant's Opening Brief fails to articulate and apply the applicable standard of review and fails to provide adequate authority, argument, and citations to the record.
- C. If this Court does not dismiss the appeal for failure to preserve issues or for failure to articulate and apply the standard of review:
  1. Whether the District Court erred in allowing the jury to make a finding on punitive damages where she argues there was no evidence of loss of income;
  2. Whether the District Court erred by giving jury instructions requested by Appellant regarding punitive damages, and Appellant did not object to the special verdict form (Appellant's Issues 2-4);
  3. Whether the District Court erred in allowing testimony on damages;

4. Whether the District Court erred in its application of the Idaho punitive damages statute;
5. Whether the District Court erred by not giving a jury instruction regarding damages that Appellant did not request;
6. Whether the District Court's voir dire ensured a fair and impartial jury;
7. Whether the District Court issued conflicting rulings on whether Ms. Bushnell qualified as a media defendant; and
8. Whether the District Court erred in determining Mr. Posey is not a limited public figure.<sup>1</sup>

#### **IV. STANDARDS OF REVIEW**

“The decision of a trial court to allow the jury to consider punitive damages rests within the discretion of the trial court.” *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 220, 923 P.2d 456, 465 (1996). “The standard of review for punitive damages is to determine if the trial court abused its discretion in allowing the jury to consider punitive damages.” *Id.* “This Court has interpreted the abuse of discretion standard in the context of punitive damages as whether there was substantial evidence to support submitting the issue to the jury.” *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 430, 95 P.3d 34, 48 (2004).

“Whether a jury instruction is correct 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

---

<sup>1</sup> Appellant is no longer pursuing an appeal on the issue of whether the District Court properly labeled her as a hostile or adverse witness during direct examination by Mr. Posey's counsel.

been given, is whether there is evidence at trial to support the instruction.” *Beebe v. N. Idaho Day Surgery, LLC*, 171 Idaho 779, 784, 526 P.3d 650, 655 (2023) (citation modified), *reh’g denied* (Apr. 10, 2023). “This Court’s review of issues relating to jury instructions is limited to a determination of whether the instructions, as a whole, fairly and adequately present the issues and state the law. When the instructions, taken as a whole, do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error.” *Id.* (citation modified).

A district court’s evidentiary rulings are reviewed under the abuse of discretion standard. *Vreeken v. Lockwood Eng’g, B.V.*, 148 Idaho 89, 106, 218 P.3d 1150, 1167 (2009). “These include challenges to a trial court’s decision to admit or exclude documentary and/or testimonial evidence.” *Id.* “Error is disregarded unless the ruling is a manifest abuse of the trial court’s discretion and affects a substantial right of the party.” *Perry v. Magic Valley Reg’l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000).

“This Court freely reviews the interpretation of a statute and its application to the facts.” *St. Luke’s Reg’l Med. Ctr., Ltd. v. Bd. of Comm’rs of Ada Cnty.*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009). “The primary function of the Court is to determine and give effect to the legislative intent.” *Id.*

The District Court’s selection of jurors is reviewed for an abuse of discretion. *Thomson v. Olsen*, 147 Idaho 99, 102, 205 P.3d 1235, 1238 (2009); *State v. Luke*, 134 Idaho 294, 298, 1 P.3d 795, 799 (2000) (citing *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 141, 937 P.2d 1212, 1215 (1997)).

“Determining whether an individual is a public figure or official presents a question of law.” *Verity v. USA Today*, 164 Idaho 832, 842, 436 P.3d 653, 663 (2019). “This Court applies a de novo standard of review to questions of law.” *Yellowstone Log Homes, LLC v. City of Rigby*, 173 Idaho 288, 293, 540 P.3d 990, 995 (2023) (citation omitted).

## V. ARGUMENT

This Court should dismiss Ms. Bushnell’s appeal for failure to preserve the issues she raised on appeal and for failure to include required components of an appeal, including the applicable standard of review, adequate authority, and citations to the record, leaving Mr. Posey to guess as to which facts she contends support her appeal and as to what standard she is asking this Court to review her appeal by. If this Court does consider the merits of Ms. Bushnell’s appeal, it should affirm the District Court in all respects. The District Court did not err.

### A. This Court Should Dismiss Appellant’s Appeal for Failing to Raise the Issues Below, with Possibly One Exception.

“Appellate court review is limited to the evidence, theories and arguments that were presented below.” *Nelson v. Nelson*, 144 Idaho 710, 714, 170 P.3d 375, 379 (2007) (quoting *Obenchain v. McAlvain Constr., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006)). “This Court ‘will not hold that a trial court erred in making a decision on an issue or a party’s position on an issue that it did not have the opportunity to address.’” *Gestner v. Divine*, 171 Idaho 159, 174, 519 P.3d 439, 454 (2022) (quoting *State v. Gonzalez*, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019)). Rather, “[t]o be properly preserved for appellate review, ‘both the issue and the party’s position on the issue must be raised before the trial court[.]’” *Eagle Springs Homeowners Ass’n v. Rodina*,

165 Idaho 862, 869, 454 P.3d 504, 511 (2019) (quoting *Gonzalez*, 165 Idaho at 99, 439 P.3d at 1271).

As set forth below with respect to each issue on appeal, *see infra* at 15, 18, 20-22, 24, 27, 28, with the possible exception of whether Mr. Posey is a limited public figure, Appellant did not raise before the District Court the issues she now presents to this Court. Thus, they were not preserved and this Court should not consider them.

**B. This Appeal Should Be Dismissed Because Appellant’s Opening Brief Fails to Articulate and Apply the Applicable Standard of Review and Fails to Provide Adequate Authority, Argument, and Citations to the Record.**

This Court need not reach the merits of Appellant’s arguments on appeal for a second reason. Fatally, Appellant’s Opening Brief lacks the key threshold components that every appellant must include in their opening brief to warrant this Court’s consideration of their substantive arguments on appeal. For the reasons set forth below, this Court should dismiss this appeal outright.

The first of Appellant’s several fatal omissions is her failure to even *articulate*, much less apply, the appropriate standard of review. It is well-established that an appellant’s opening brief “must articulate the appropriate standard of review because an appellant must address the matters this Court considers when evaluating the appellant’s claims of error.” *Somes v. Starnes*, No. 52160, 2025 WL 1933403, at \*2 (Idaho Ct. App. July 15, 2025) (citing *State v. Byrum*, 167 Idaho 735, 739, 476 P.3d 402, 406 (Ct. App. 2020)). “Failure to articulate or provide analysis relating to the relevant standard of review makes the appellant’s argument conclusory, which is fatally deficient

to the appellant's case. Failure to include the correct standard of review on appeal results in a waiver of claims on appeal." *Id.* (citing *Byrum*, 167 Idaho at 739-40, 476 P.3d at 406-07).

Appellant's Opening Brief does not separately articulate the applicable standard of review in its own section or in the argument section of her brief. (*See* Appellant's Opening Brief ("App. Opening Br.") at 8-25.) At most, passing reference is made to a "de novo" standard of review in Appellant's first issue on appeal (*id.* at 8), whether the District Court erred in submitting punitive damages to the jury. But this is insufficient under Idaho's appellate rules. It is also the wrong standard of review. *Walston*, 129 Idaho at 220, 923 P.2d at 465 ("The standard of review for punitive damages is to determine if the trial court abused its discretion in allowing the jury to consider punitive damages."). Appellant's failure to articulate and apply the appropriate standard of review in her Opening Brief forfeits her issues on appeal altogether. *See, e.g., Somes*, 2025 WL 1933403, at \*2 (appellant waived issues on appeal by simply stating "the district court erred" and omitting a standard of review section nor articulating same in argument section of his opening brief). Appellant does not even refer to any applicable standard of review, whether de novo or abuse of discretion, in any other portion of her brief.

Even if Appellant had articulated and applied the appropriate standard of review, she otherwise waived consideration of her arguments for failure to support her argument with proper argument or authority. *See* I.A.R. 35(a)(6). To succeed on appeal, an appellant's opening brief must not only present facts, but must provide the legal authority—whether statutes, case law, or other authority—that supports the position it advocates. Appellants must then apply those facts to the legal authority in order to justify a favorable ruling from the appellate court. "A party waives

an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.” *AgStar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 161 Idaho 801, 815-16, 391 P.3d 1271, 1285-86 (2017) (quoting *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007)); *see also* I.A.R. 35(a)(6).

Appellant’s Opening Brief purports to set out 11 issues on appeal, one of which she concedes she is no longer pursuing—whether the District Court erred in allowing her to be treated as a hostile or adverse witness. (App. Opening Br. at 21.) In support of her arguments on the remaining 10 issues, she cites only seven cases. (*Id.* at 8-11, 13-17, 22-25.) Where she cites statutes and rules, she does not apply them. For example, Appellant twice argues that the District Court committed error by allowing damages (compensatory and punitive) although Mr. Posey could show no direct financial loss from losing his job or losing other employment. (*Id.* at 8-9, 16.) Yet she cites no case law that stands for this proposition.

On other occasions she simply cites or purports to cite to a rule or proposition but does not provide any case law or other support for her application of it. (*Id.* at 10-11 (arguing without case law support that the District Court erred by failing to give an expanded instruction on punitive damages); 12-13 (arguing without case law support that the District Court erred by ignoring her second amended jury instructions and verdict form); 13-14 (arguing without case law support that the District Court erred in the verdict form used by the jury); 16-18 (arguing without case law support that the District Court erred in its application of Idaho’s punitive damages statute); 18-19 (arguing without case law support that the District Court erred in failing to provide adequate jury

guidance on damages); 19-21 (arguing without case law support that the District Court did not enforce Idaho Rule of Civil Procedure 47 properly).)

That Appellant appears pro se before this Court does not excuse her from complying with the basic requirements of appeal. “Pro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules.” *Lowell v. Hum. Dynamics & Diagnostics, PLLC*, 172 Idaho 417, 420, 533 P.3d 1008, 1011 (2023) (quoting *Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009)). In assessing Appellant’s claims on appeal, this Court should not deviate from its practice of requiring pro se litigants to abide by the same rules and expectations of parties represented by counsel. *See, e.g., id.* (affording appellant no special treatment due to pro se status in concluding that appellant waived argument by failing to present argument or authority supporting his contentions); *Van Hook v. State*, 170 Idaho 24, 28-29, 506 P.3d 887, 891-92 (2022) (affording appellant no special treatment due to pro se status in concluding that appellant failed to preserve issue for appeal); *Fed. Home Loan Mortg. Corp. v. Butcher*, 157 Idaho 577, 580-81, 338 P.3d 556, 559-60 (2014) (same).

Finally, Appellant cannot cure these deficiencies in her reply brief because “this Court will not consider arguments raised for the first time in the appellant’s reply brief.” *Midtown Ventures, LLC v. Capone as Tr. to Thomas & Teresa Capone Living Tr.*, 173 Idaho 172, 180, 539 P.3d 992, 1000 (2023) (quoting *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)). “A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent’s brief.” *Id.* at 180-81, 539 P.3d at 1000-01 (quoting *Suitts*, 141 Idaho at 708, 117 P.3d

at 122). To the extent that Appellant attempts to cure these deficiencies in her reply brief, this Court should consider those arguments waived.

**C. The District Court Did Not Err.**

Even if this Court determines that Appellant preserved issues now raised on appeal and has set forth and applied a standard of review, this Court should reject her appeal and affirm the District Court. The District Court properly allowed the jury to consider evidence of punitive damages, properly instructed the jury regarding punitive damages, properly found that Mr. Posey had presented evidence of compensatory damages, properly conducted voir dire, found for Appellant that she was a media defendant, lessening her burden at trial, and properly found that Mr. Posey was not a public figure. On the merits, this Court should affirm the District Court in all respects.

**1. Evidence of Compensable Damages Is Not Required for a Jury to Consider Awarding Punitive Damages on a Defamation Claim.**

“The decision of a trial court to allow the jury to consider punitive damages rests within the discretion of the trial court.” *Walston*, 129 Idaho at 220, 923 P.2d at 465. “The standard of review for punitive damages is to determine if the trial court abused its discretion in allowing the jury to consider punitive damages.” *Id.* “This Court has interpreted the abuse of discretion standard in the context of punitive damages as whether there was substantial evidence to support submitting the issue to the jury.” *Vendelin*, 140 Idaho at 430, 95 P.3d at 48.

Appellant argues proof of “actual loss of income or other compensable damages” was required before punitive damages could be considered by the jury. (App. Opening Br. at 8.) Appellant incorrectly articulates the standard for allowing a jury to consider punitive damages and fails to make reference to the controlling statutory authority. Punitive damages may be considered

when a claim “prove[s], by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” I.C. § 6-1604(1). “The absence of a showing of actual damages need not bar an award of punitive damages, for such a showing is not a talismanic necessity.” *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969). Whether Mr. Posey proved compensable damages—he did—is irrelevant to whether he could recover punitive damages for Appellant’s malicious conduct.

Appellant is further misguided in suggesting that a particular kind of damage (e.g., loss of income) serves as a prerequisite to an award of punitive damages. The District Court correctly noted this by explaining the scope of compensatory damages in denying Appellant’s Motion for a Directed Verdict:

“And actual injury is not limited to out-of-pocket loss. Indeed, more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury; although, there need be no evidence which assigns an actual dollar value to the injury.”

(Tr. 762:2-13 (paraphrasing *Wiemer v. Rankin*, 117 Idaho 566, 574, 790 P.2d 347, 355 (1990)).)

Significantly, on her motion for directed verdict, Appellant’s counsel did not make the objection she is making now. He argued only that there had been no evidence of damages, not that damages were a prerequisite for punitive damages. (Tr. 761:19-22.)

Even though not required for punitive damages, Mr. Posey submitted substantial evidence of damages caused by Appellant’s harmful, deliberate, and willful conduct. (*See, e.g.*, Tr. 341:17-

342:23 (testifying to panic attack at subsequent performance); 343:15-344:11 (testifying to trouble finding mental health help); 345:11-346:8 (testifying about mental health issues); 347:18-349:6 (testifying to difficulties at job); 349:15-351:2 (testifying about termination from job); 351:3-18 (testifying about having to move homes); 353:11-354:11 (testifying about obtaining an emotional support animal); 357:6-22 (testifying how his life changed after Appellant's defamation.) Moreover, Appellant's defamatory statements falsely accused Mr. Posey of committing a crime. Appellant's defamatory statements therefore qualified as defamation per se and actual injury could be presumed without evidence. *See Boren v. Gadwa*, No. 50604-2023, 2024 WL 4997108, at \*6 (Idaho Dec. 6, 2024) ("Statements that rise to the level of defamation per se do not require proving special damages." (citation omitted)). Even were compensable damages a prerequisite to punitive damages, Mr. Posey proved damages caused by Appellant's defamatory statements.

Appellant fails to cite any Idaho precedent that compensable damages for defamation must be proven before a jury can consider punitive damages. Appellant's reliance on *Davis v. Blast Properties, Inc.*, 174 Idaho 37, 551 P.3d 706 (2024), is misplaced. In *Davis*, this Court considered what quantum of evidence must be submitted to a district court when a party moves *to amend* its complaint to add punitive damages. 174 Idaho at 39, 551 P.3d at 708. This Court did not opine on the quantum of actual damages evidence required at trial to allow submitting punitive damages to a jury. Moreover, *Davis*'s reference to substantial evidence described the standard for a district court to allow a party leave to amend a complaint to include punitive damages. *Id.* at 42, 551 P.3d at 711. This Court then explained that substantial evidence in the context of a district court determining whether to allow amendment of a complaint to include punitive damages means the

same thing as it does in ruling on a motion for a directed verdict. *Id.* at 43, 551 P.3d at 712 (quoting *Inv. Recovery Fund, LLC v. Hopkins*, 167 Idaho 42, 49, 467 P.3d 406, 413 (2020)). Contrary to Appellant’s argument, *Davis* does not apply here.<sup>2</sup>

**2. The District Court Gave Jury Instructions Requested by Appellant, and Appellant Did Not Object to the Special Verdict Form.**

“Whether a jury instruction is correct 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.” *Beebe*, 171 Idaho at 784, 526 P.3d at 655 (citation modified). “This Court’s review of issues relating to jury instructions is limited to a determination of whether the instructions, as a whole, fairly and adequately present the issues and state the law. When the instructions, taken as a whole, do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error.” *Id.* (citation modified).

**a. Appellant Did Not Offer an Expanded Jury Instruction on Punitive Damages that the District Court Denied.**

The District Court gave the jury the punitive damages instructions requested by Appellant. (*Compare* CR 1285-1288 with CR 1377-1380; Tr. 817:25-819:7.) However, Appellant argues she requested expanded punitive damages instructions in Defendant’s Second Amended Requested Jury Instructions and Verdict Form. (App. Opening Br. at 11 (citing CR 1227-1295).) Appellant incorrectly states those requested instructions were filed on May 20, 2024, but the court stamp

---

<sup>2</sup> Appellant provides a quote that punitive damages are “parasitic to actual damages.” (App. Opening Br. at 9.) However, neither of the cases cited by Appellant contains this quote. The undersigned could not locate an Idaho case that makes this statement as quoted by Appellant. Most Idaho case law that uses the term “parasitic” in relation to damages is referencing the economic loss doctrine, not punitive damages.

shows those requested instructions were filed on May 22, 2024—on the third day of trial. (CR 1227.) Appellant then asserts the temporal impossibility that the District Court refused to give those instructions at a hearing the morning of the first day of trial—May 20, 2024. (App. Opening Br. at 11 (citing CR 1184-1188).) Given this temporal impossibility and the fact that the trial gave the instructions requested by Appellant, it is unclear what decision of the District Court Appellant is appealing.

To be clear, at the May 20, 2024, pretrial hearing, the District Court refused to give a biased statement of the case jury instruction submitted by Appellant at 11:24 p.m. on May 19, 2020 (i.e., the night before trial began). (CR 1102-1106; Tr. 31:16-33:4.) That statement did not discuss punitive damages. (CR 1105-1106.) The District Court declined to give the instruction because Appellant submitted it untimely. (CR 1187; Tr. 32:23-33:1.) This decision fell within the discretion of the District Court. *See Hansen v. Roberts*, 154 Idaho 469, 472, 299 P.3d 781, 784 (2013) (finding enforcement of pretrial deadlines within the District Court’s discretion). Appellant has not offered any argument or citation to the record showing that the jury instructions given on punitive damages were unsupported by the evidence, were other than as requested by Appellant, or were otherwise improper. Nor does she show that this issue was properly presented to the District Court.

**b. Appellant Failed to Specifically and Distinctly Argue Claims of Error with Regard to the Jury Instructions and Verdict Form.**

Appellant’s third and fourth issues on appeal relate to the District Court’s decisions regarding the Jury Instructions and Verdict Form generally. (App. Opening Br. at 12-14.) Appellant broadly asserts that the District Court erred by failing to include requested jury

instructions and failing to incorporate “requested neutral language” in the verdict form. However, Appellant fails to identify which instructions she believes were excluded or improper and fails to identify which jury questions in the verdict form were not sufficiently neutral. Instead, she refers generally to her entire Second Amended Requested Jury Instructions and Verdict Form as well as the District Court’s Final Jury Instructions and General Verdict Form, seemingly expecting the reviewing court to identify the alleged errors on its own. (*Id.* at 12-13.)

The Idaho Supreme Court has consistently held that “error is never presumed on appeal” and it is not the responsibility of the appellate court to comb through the record in search of error. *See, e.g., Stewart v. Sun Valley Co.*, 140 Idaho 381, 384, 94 P.3d 686, 689 (2004) (“The broad assertion of error is basically an invitation to search the record for error, which this Court will not accept.”); *see also Plasse v. Reid*, 172 Idaho 53, 63, 529 P.3d 718, 728 (2023) (“Reid failed to identify which CFS reports he contends the magistrate court erred in failing to admit ... this Court is not obliged to ‘scour the record for error’ and we will not do so here.” (citation omitted)), *reh’g denied* (June 8, 2023). The burden of showing reversible error falls on Appellant and she has failed to meet her burden. *Stewart*, 140 Idaho at 384, 94 P.3d at 689.

Adding to the confusion is the fact that several of Appellant’s proposed jury instructions and verdict questions are the same as, or closely mirror, the instructions and questions ultimately adopted by the District Court. (*Compare* CR 1249 *with* CR 1366; CR 1255 *with* CR 1377; CR 1293 *with* CR 1357.) This overlap makes it particularly difficult to determine what Appellant contends was error. Without clearly identifying the complained of instructions or verdict form questions, Appellant has not met her burden of showing reversible error. Indeed, Appellant cannot

establish reversible error based on jury instructions or verdict questions that are materially identical to those she herself proposed. *Blankenship v. Weidner*, 120 Idaho 234, 236, 815 P.2d 432, 434 (1991) (“[P]laintiffs are precluded from claiming on appeal that the court erred in giving the instruction which they had proposed.”); *see also Beebe*, 171 Idaho at 789, 526 P.3d at 660 (“The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to give or not give an instruction from later challenging that decision on appeal.” (quoting *State v. Blake*, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999))).

**c. Appellant Waived the Right to Claim Error Regarding Omitted Jury Instruction or the Final Verdict Form by Failing to Raise the Issue at Trial.**

Notwithstanding the foregoing, Appellant nonetheless waived the right to challenge the District Court’s General Verdict Form and alleged omitted jury instructions by failing to raise any objections to those issues at trial. “All objections to instructions proposed by the court, and any objections to the giving or the failure to give an instruction, and the court’s ruling on the objection, must be made a part of the record.” I.R.C.P. 51(f). “No party may assign as error the giving of or failure to give an instruction unless the party objects before the jury deliberates, stating distinctly the instruction to which that party objects and the grounds of the objection.” I.R.C.P. 51(i)(iii).

Appellant asserts that the District Court omitted certain unidentified jury instructions and that the Final Verdict Form lacked sufficient neutrality. However, Appellant did not object to the Final Verdict Form at trial. Indeed, when discussing the jury questions in the Final Verdict Form, her attorney told the District Court: “Your Honor, these look good to me.” (Tr. 810:4-12.) Further, it is unclear which specific jury instructions Appellant now claims were improperly excluded. The

record shows that Appellant’s counsel did not object to the jury instructions as a whole (Tr: 783:1-811:25), and, as set forth above, some of Appellant’s proposed instructions were included in the final set given to the jury. *See supra* at 17, 19.

Accordingly, because Appellant failed to object at trial and did not clearly identify the alleged errors, she has waived the right to raise these issues on appeal.

**3. The District Court Did Not Err in Allowing Testimony on Compensatory Damages.**

“This Court reviews challenges to a trial court’s evidentiary rulings under the abuse of discretion standard.” *Vreeken*, 148 Idaho at 106, 218 P.3d at 1167 (citation omitted). “These include challenges to a trial court’s decision to admit or exclude documentary and/or testimonial evidence.” *Id.* “Error is disregarded unless the ruling is a manifest abuse of the trial court’s discretion and affects a substantial right of the party.” *Perry*, 134 Idaho at 51, 995 P.2d at 821.

Appellant argues that Mr. Posey admitted Appellant did not cause Mr. Posey’s termination from employment. (App. Opening Br. at 15-16.) Appellant misstates the record. Mr. Posey directly attributed his actions that led to his termination to Appellant’s defamatory conduct and the aftermath it caused.

Q And then did she use a racial slur?

A You can fill in the blanks, yes.

Q What did you do when that happened?

A I was tired. And as I have stated prior, I will state again, I cracked. I took the \$20 bill and I

wrote the derogatory statement that that woman said to me on it with the word “money” after it, because I was tired of being dragged

through this community for something that I did not even have any control over.

Q And so, Mr. Posey, in your view, did the allegations that you had exposed yourself in public eventually lead to your termination of your job at Walmart?

A Yes, Ms. Olson, because I was fine before all of this.

(Tr. 350:13-351:2.)

Appellant claims she objected to this testimony multiple times through a motion in limine and a directed verdict motion. (App. Opening Br. at 16.) Again, Appellant misstates the record. There is no motion in limine to this effect by Appellant in the Clerk's Record, and Appellant's directed verdict motion was premised on a perceived lack of "any damages being presented to the jury." (Tr. 761:19-22.) However, the District Court correctly denied Appellant's motion because Mr. Posey provided evidence of damages. (Tr. 761:23-762:19.)

Appellant further argues—without citation to any legal authority—that Mr. Posey should not have been allowed to present testimony on *any* damages because Appellant perceived Mr. Posey's testimony as an admission that his employment termination could not be attributed to Appellant's defamatory conduct. (App. Opening Br. at 15-16.) There is no legal basis for this argument. Appellant provides no Idaho authority that testimony on defamation damages in one regard prevents testimony on damages in another regard. Appellant failed to object when Mr. Posey offered additional damages testimony at trial after his claimed admission, and Appellant failed to object to the jury verdict form in this regard. (Tr. 806:19-809:9; 810:3-812:8.) Thus, Appellant is wrong about the law and did not preserve the objection she now asserts.

Finally, Appellant speculates that the jury's damages award could only be explained by awarding lost income to Mr. Posey. But the jury verdict form did not limit damages to lost income and nothing in the record supports Appellant's conjecture as to how the jury decided damages. (CR 1357-1358.) There is evidence that Appellant did in fact cause Mr. Posey to lose income, *see supra* at 16, 21-22, and regardless, there is ample evidence in the record for the jury to have concluded that Appellant damaged Mr. Posey without consideration of lost income. Appellant provides no basis for this Court to find the District Court erred.

**4. The District Court Did Not Err in Its Application of the Idaho Punitive Damage Statute.**

“This Court freely reviews the interpretation of a statute and its application to the facts.” *St. Luke's Reg'l Med. Ctr., Ltd.*, 146 Idaho at 755, 203 P.3d at 685. “The primary function of the Court is to determine and give effect to the legislative intent.” *Id.* As set forth in Section C (1) above, the standard of review for punitive damages is to determine if the District Court abused its discretion in allowing the jury to consider punitive damages. *Vendelin*, 140 Idaho at 430, 95 P.3d at 48.

Taking another shot at the District Court's punitive damages jury instructions, Appellant argues the District Court should have instructed on the specific statutory provisions in Idaho Code § 6-1604.<sup>3</sup> (App. Opening Br. at 16-18.) Appellant misunderstands how Section 6-1604 is applied. It would have been procedurally improper for the District Court to instruct the jury on the details of Section 6-1604. I.C. § 6-1604(3) (“If a case is tried to a jury, the jury shall not be informed of

---

<sup>3</sup> Appellant erroneously cites to Idaho Code § 16-1604.

this limitation.”). The District Court controlled determinations of law, such as the punitive damages statutes. The District Court correctly provided punitive damages instructions to the jury. Indeed, the District Court provided the instructions requested by Appellant. Any correction to the jury award required by Section 6-1604 would have been performed after the jury rendered its verdict and outside the presence of the jury. However, the jury’s verdict did not warrant such modification because the award of punitive damages did not “exceed the greater of two hundred fifty thousand dollars (\$250,000) or an amount which is three (3) times the compensatory damages.” I.C. § 6-1604(3); (CR 1357-1358). Moreover, Appellant failed to make any objection to the jury’s damages award at the time of the verdict or by subsequent motion. The District Court did not err when it entered judgment according to the jury verdict. (*See* CR 1388-1389.)

**5. The District Court Did Not Err by Not Giving an Instruction Appellant Did Not Request.**

The District Court did not err as a matter of law by not giving Idaho Civil Jury Instruction 9.20.5. Contrary to her assertion in her Opening Brief (App. Opening Br. at 18), she did not ever request it. Appellant submitted three iterations of requested jury instructions and never requested Jury Instruction 9.20.5.<sup>4</sup> (CR 1032-1089, 1102-1163, 1227-1290.) There is no discussion in the record of Jury Instruction 9.20.5. Appellant never offered or objected to omission of Jury Instruction 9.20.5.

---

<sup>4</sup> Appellant cites to “R., 144” as the source for her request for “an instruction consistent with IDJI 9.20.5.” (App. Opening Br. at 18.) It is not clear what this is referencing. Neither the transcript at page 144 nor the Clerk’s Record at page 144 related to Jury Instruction 9.20.5.

Likewise, Appellant misstates the law. Appellant claims there is a “statutory requirement that punitive damages must bear a reasonable relation to the actual harm and deterrence objectives.” (App. Opening Br. at 18.) Appellant continues, consistent with Appellant’s second issue on appeal, that the District Court failed to give the requested instructions in Jury Instruction 9.20 to properly calibrate the jury. But, as already discussed, the District Court *did* give Appellant’s requested instructions on punitive damages. *See supra* at 17. In doing so, the District Court *did* instruct the jury that punitive damages “must bear a reasonable relation to the actual harm ... and to the primary objective of deterrence.” (CR 1377; Tr. 818:2-8.) Absent a reason to conclude otherwise, it must be assumed the jury considered this instruction when awarding Mr. Posey punitive damages. The District Court did not err in its guidance to the jury on punitive damages.

**6. The District Court’s Voir Dire Ensured a Fair and Impartial Jury.**

The District Court’s selection of jurors is reviewed for an abuse of discretion. *Thomson*, 147 Idaho at 102, 205 P.3d at 1238; *Luke*, 134 Idaho at 298, 1 P.3d at 799 (citing *Morris*, 130 Idaho at 141, 937 P.2d at 1215).

Appellant argues that the District Court violated Idaho Rule of Civil Procedure 47 by asking prospective jurors if they had strong religious or moral views and, if they responded affirmatively, whether they were “willing to set aside this religious position and render a fair and impartial verdict.” (App. Opening Br. at 20-21 (citing Tr. 146).) Appellant argues that, “[b]y its very formulation, the inquiry signaled that one category of belief—religious conviction—was presumptively incompatible with jury service unless affirmatively repudiated.” (*Id.* at 21.) Appellant misstates the rule and misunderstands the record.

Appellant's references to subsections (a), (c), and (f) provide no support for her argument. Subsections (a), (c), and (f) do not address voir dire conducted by the District Court. Subsection (a) addresses use of a jury questionnaire, I.R.C.P. 47(a), which did not occur here. Nor does Appellant assert that it did. Subsection (c) addresses the oath administered to prospective jurors, I.R.C.P. 47(c), which undoubtedly did occur here. (Tr. 44:12-22.) Subsection (f) addresses the procedure for and scope of voir dire. It does not address voir dire conducted expressly by the District Court, of which the Appellant complains.

Moreover, the District Court in no way signaled that religious conviction was presumptively incompatible with jury service unless affirmatively repudiated. The decision whether a juror can render a fair and impartial verdict is directed to the sound discretion of the trial court. *State v. Yager*, 139 Idaho 680, 688, 85 P.3d 656, 664 (2004). "It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict." *Harris v. Alessi*, 141 Idaho 901, 906, 120 P.3d 289, 294 (Ct. App. 2005) (citation omitted).

Here, the District Court properly inquired into potential bias relevant to the issues in the case and then asked each juror if the juror could set aside such bias and render a fair and impartial verdict. Those who did not respond that they could be fair and impartial were excused. Appellant's counsel did not object. (*See, e.g.*, Tr. 52:16-53:18; 65:20-66:10; 140:11-141:16.) The District Court did not abuse its discretion. Appellant's arguments that the judgment should be reversed on this ground should be rejected.

Finally, as with other issues she now raises on appeal, Appellant did not raise this issue below. It is waived. *See, e.g., Jones v. Lynn*, 169 Idaho 545, 552, 498 P.3d 1174, 1181 (2021) (to preserve an issue for appellate review, a party must raise both the issue and the party’s position on the issue before the trial court).

**7. The District Court Did Not Issue Conflicting Rulings on Whether Ms. Bushnell Qualified as a Media Defendant.**

Appellant argues that “before Judge Myers [sic], Bushnell was deemed to not be a ‘media defendant’” but subsequently “before Judge Pittman ... that classification was reversed/rejected.” (App. Opening Br. at 22.) Appellant misrepresents the record. The judges who handled this case did not issue conflicting rulings on whether Appellant qualified as a media defendant. Indeed, Appellant did not raise the issue of a “media defendant” until trial. On December 22, 2023, Judge (now Justice) Meyer issued an order denying Appellant’s motion for summary judgment that argued Mr. Posey should be considered a limited public figure; Justice Meyer held Mr. Posey is not a limited public figure. (CR 847-852.) On the eve of trial, Appellant sought “another bite at the apple” and, in the guise of jury instructions, moved Judge Pittman to find Mr. Posey a limited public figure. (CR 1010-1028.) At that time, Appellant—*for the first time*—claimed her defamatory publication involved a matter of public concern and she should be considered a media defendant. (*Id.*) At the final pretrial hearing on May 17, 2024, Judge Pittman refused to disturb Judge Meyer’s ruling on Mr. Posey as a limited public figure (CR 1100), but, in a hearing immediately before trial commenced on May 20, 2024, Judge Pittman found the defamatory publication involved a matter of public concern and Appellant qualified as a media defendant (CR

1186). Contrary to Appellant's argument, Judge Pittman articulated the basis for his decision and that he was not disturbing Judge Meyer's earlier ruling. (*Id.*) Therefore, the District Court did not issue inconsistent rulings. To the extent this is a question of law reviewed de novo, the District Court did not err.

Based on this misconception of the procedural posture and substantive decision, Appellant claims prejudice. Appellant's claim of prejudice is baseless. Appellant failed to seek a definitive ruling on her status as a media defendant prior to trial. Appellant cannot create her own prejudice through dilatory or careless litigation strategy decisions. Indeed, as recognized by the District Court, Appellant's late motion to obtain media defendant status prejudiced Mr. Posey because it imposed the additional obligation to prove falsity to succeed on his defamation claim. (CR 1186); *Clark v. Spokesman-Rev.*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007) (requiring proof of falsity if the defamatory statement is a matter of public concern and involves a media defendant).

The District Court offered Mr. Posey an opportunity to move for a continuance of the trial, but Mr. Posey declined and proceeded to trial with the new burden. (CR 1186.) Thus, Appellant's classification as media defendant status granted her additional protection that she would not have otherwise had. Appellant prepared her defense with the assumption that Mr. Posey would not have to prove falsity and then, fortuitously, received the benefit of an elevated burden on the first day of trial. Appellant cannot credibly claim to have been prejudiced by this shift. Nor did she raise any issue regarding this shift at trial.

**8. The District Court Did Not Err in Determining Mr. Posey Is Not a Limited Public Figure.**

“Determining whether an individual is a public figure or official presents a question of law.” *Verity*, 164 Idaho at 842, 436 P.3d at 663. “This Court applies a de novo standard of review to questions of law.” *Yellowstone Log Homes, LLC*, 173 Idaho at 293, 540 P.3d at 995 (citation omitted). “Appellate review of a district court’s ruling on a motion for summary judgment is the same as that required of the district judge when ruling on the motion.” *Steele v. Spokesman-Rev.*, 138 Idaho 249, 251, 61 P.3d 606, 608 (2002).

The District Court correctly held Mr. Posey is not a limited public figure. A person is a public figure when that individual has “such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” or the “individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Verity*, 164 Idaho at 843, 436 P.3d at 664 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)). To ascertain whether and to what extent a person is a public figure, this Court has articulated two tests. First, a person is a public figure if that “person occupies a position of such persuasive power and influence that he could be deemed one of that small group of individuals who are public figures for all purposes.” *Wiemer*, 117 Idaho at 570, 790 P.2d at 351 (citation modified). Second, a person is a limited public figure if “the person has thrust himself to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Id.* (citation modified). In deciding whether a person is a limited public figure, a court should consider “the nature and extent of the individual’s participation in the particular controversy

giving rise to the defamation.” *Elliott v. Murdock*, 161 Idaho 281, 288, 385 P.3d 459, 466 (2016) (citation modified).

The District Court applied this test and reached the correct conclusion that Mr. Posey was not a limited public figure. The District Court relied on the facts that Mr. Posey had not performed in a drag show for years prior to the 2022 Pride in the Park. (CR 850.) And then, he only performed on three brief occasions at Pride in the Park. (*Id.*) Those facts were substantiated by Mr. Posey’s testimony at trial. (Tr. 258:25-260:24; 261:25-263:6; 301:2-303:15.)

Appellant does not offer a single citation to the record to show that Mr. Posey “thrust himself to the forefront of a particular public controversy;” Appellant does not define what the “public controversy” may have been. Nor did Mr. Posey attempt to “influence the resolution of the issues involved.” Appellant summarily concludes that Mr. Posey was a limited public figure without a single record or legal citation to support Appellant’s contention. Appellant does not point to any evidence that Mr. Posey had “continuous involvement and vocal participation” in whatever the particular controversy or issues were that led Appellant to make her defamatory statements. *Elliott*, 161 Idaho at 288, 385 P.3d at 466.

Rather, as correctly observed by the District Court, Mr. Posey’s notoriety came solely from Appellant’s defamatory comments, which demolished Mr. Posey’s life as he knew it. In finding Mr. Posey did not qualify as a limited public figure, Judge Meyer noted that “[t]he purpose of recognizing the difference between a private individual and a public figure is that a private individual does not have a way to ‘fight back’ against allegedly defamatory allegations in the same way a public figure does.” (CR 849.) Indeed, Mr. Posey testified at trial about his inability to fight

Appellant's defamatory statements. (Tr. 337:12-358:8.) Mr. Posey is not a limited public figure under Idaho law.

Finally, Appellant offers demonstrably false speculation that requiring a showing of actual malice<sup>5</sup> would have changed the jury's verdict. Appellant argues the heightened standard would have prevented the jury from finding Appellant liable "without proof that Bushnell knowingly published false statements." (App. Opening Br. at 25.) However, the jury did find that Appellant knowingly published false statements. Because the District Court held Appellant's defamatory statements involved a matter of public concern and Appellant qualified as a media defendant, the jury had to—and did—find Appellant's defamatory statements to be false to find liability. Additionally, the District Court instructed the jury that to award punitive damages it must find Appellant acted with actual malice.<sup>6</sup> (Tr. 818:9-12.) The District Court further instructed the jury that Appellant acted with actual malice existed if Appellant "knew the defamatory statement was false or acted with a reckless disregard for its truth." (Tr. 818:19-22.) The jury did award punitive damages and thus the jury found Mr. Posey presented clear and convincing evidence that Appellant made the defamatory statements with a reckless disregard for the truth—the same finding that would have been required had Mr. Posey been deemed a limited public figure. Given these findings by the jury, the result of the trial would not have changed had the (incorrect) actual malice standard

---

<sup>5</sup> "If the plaintiff is a public figure or public official, he cannot recover for a defamatory falsehood unless he proves that the statement was made with actual malice." *Verity*, 164 Idaho at 841, 436 P.3d at 662 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

<sup>6</sup> *Wiemer*, 117 Idaho at 574, 790 P.2d at 355 (requiring actual malice to recover punitive damages on a defamation claim).

applied to the elements of defamation and any error in not finding Mr. Posey a limited public figure would not warrant reversal. *See* I.R.C.P. 61 (“Unless justice requires otherwise, no ... error by the court or a party, is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order.”); *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 559, 261 P.3d 829, 836 (2011) (“If an error did not affect a party’s substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal.”) (citation and brackets omitted).

**9. Appellant Is No Longer Pursuing an Appeal on the Issue of Whether the District Court Properly Labeled Her as a Hostile Witness.**

Although Appellant includes the issue of the District Court labeling her as a hostile witness in her list of issues on appeal, she expressly withdrew that argument and no longer contends that the District Court erred in making that designation. (App. Opening Br. at 21.) Therefore, this Court need not consider this issue on appeal as it has not been adequately raised.

**CONCLUSION**

For the reasons set forth above, this Court should affirm the judgment in this case in all respects.

DATED: October 14, 2025

STOEL RIVES LLP

/s/ Wendy J. Olson

Wendy J. Olson  
Cory M. Carone  
Bradley R. Prowant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 14, 2025, a copy of the foregoing **RESPONDENT'S BRIEF** was served on the following via email and U.S. Mail:

Summer Bushnell  
5006 E. Portside Ct.  
Post Falls, ID 83854  
*Summer.jas@icloud.com*