IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 52831

KRIS TAYLOR,	
Plaintiff-Appellant,	**Boise, August 2026 Term**
v.	**Opinion Filed: September 25, 2026**
PATRICK DAVIS, an individual and MERRILL & MERRILL, an Idaho Professional Service Corporation,	**Melanie Gagnepain, Clerk**
Defendants-Respondents.	

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, Bannock County. Rick Carnaroli, District Judge.

The district court's judgment is vacated, and the case is remanded.

Fisher & Hudson PLLC, Boise, for Appellant. Vaughn Fisher argued.

Anderson Julian & Hull LLP, Boise, for Respondents. John J. Mass V argued.

BEVAN, Chief Justice.

This appeal addresses what constitutes defamation per se. In 2022, Patrick Davis, an attorney, gave an interview to EastIdahoNews.com ("East Idaho News"), commenting on the circumstances that led to criminal charges against his client, Kevin Ball, and the civil dispute between Ball and his business partner, Kris Taylor. Taylor subsequently sued Davis, Davis' former law firm, and Ball for defamation and defamation per se based on the statements Davis made in the interview. The matter proceeded to a jury trial solely on the defamation per se claims against Davis and his former law firm. Taylor requested a jury instruction defining defamation per se to include statements imputing conduct incompatible with a plaintiff's lawful business, trade, or profession. The district court declined to deliver that instruction, concluding that it was inconsistent with Idaho law, and instead instructed the jury that defamation per se only applied where a plaintiff can show a false statement imputing conduct punishable by imprisonment or a crime of moral turpitude. Using that definition, the jury returned a verdict finding that none of the statements Davis made constituted defamation per se. Taylor moved for a new trial, arguing that the district court incorrectly instructed the jury on the law of defamation per se. The district court denied that motion.

On appeal, Taylor raises a single issue, contending that the district court erred in refusing to instruct the jury that defamation per se could include statements that impute conduct incompatible with a person's lawful business, trade, or profession. We reverse the district court's decision, vacate the judgment, and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

This case has its roots in a sod business co-owned by Kris Taylor, the Appellant, and Kevin Ball, a non-party who plays a central role in this case. Taylor is a businessman who owns and operates numerous farms, commercial developments, and restaurants in the Idaho Falls area. Ball is a local farmer in the Idaho Falls area. In 2014, Taylor acquired an ownership interest in Alpha Sod, Inc. ("Alpha Sod"), a business founded and owned by Ball. Together, Taylor and Ball grew Alpha Sod into a successful enterprise. Taylor was responsible for managing business and administrative matters, and Ball oversaw the agricultural and operational side of Alpha Sod.

By early 2019, the relationship between the men soured, culminating in a meeting where Taylor and others accused Ball of embezzling company funds and funneling them to an undisclosed business bank account at Chase Bank. Relevant here, Taylor invited Jayce Howell, a local businessperson with no interest in Alpha Sod, and Dan Packard, a forensic accountant employed by Taylor's go-to accounting firm, to participate in the meeting. Taylor and Ball disagree as to exactly how the meeting unfolded, but there is no dispute that it ended with Ball signing a confession admitting to embezzling around $100,000. Shortly after the meeting, Taylor and the other Alpha Sod board members voted to remove Ball as an officer of Alpha Sod, although he retained a 35% stake in the company.

The fallout from this meeting led to extensive civil and criminal litigation. On January 31, 2019, Alpha Sod sued Ball, raising several claims related to Ball's alleged misappropriation of company money into the Chase account (the "Alpha Sod litigation"). Then, in May 2020, the Bonneville County Prosecutor filed a criminal complaint against Ball, charging him with grand theft for the alleged embezzlement. Eventually, Ball hired Davis, the respondent in this appeal, to represent him in both his criminal case and to pursue derivative and third-party claims in the Alpha Sod litigation.

Ball filed a "First Amended Derivative Complaint and Kevin Ball's Amended Counterclaim and Third-Party Complaint" in the Alpha Sod litigation, raising twenty-four causes of action both on his behalf and derivatively on behalf of Alpha Sod against Taylor, other officers of Alpha Sod, successor entities, and Taylor's business entities. Material to this appeal, Davis notes that Ball's Complaint alleged the following:

> 38. Messrs. Taylor, Smith, Jacobson, and Jorgensen ("the Conspirators") formed an agreement to accuse Mr. Ball of a crime in order to frighten and pressure him into confessing to embezzling his own money, as part of a larger agreement to eventually defraud Mr. Ball of his entire interest in Alpha Sod, Inc.
>
> . . . .
>
> 66. On or around January 3, 2019, Mr. Taylor and Jayce Howell, an investor who is involved in several of Mr. Taylor's other business ventures, ambushed Mr. Ball over alleged misappropriation of [Alpha Sod] funds relating to a Chase Bank account Mr. Taylor claims Mr. Ball hid from him.
>
> 67. On information and belief, Brice Jorgensen, the accountant for Alpha Sod, actively and intentionally poisoned Mr. Ball's relationship with Mr. Taylor such that Mr. Taylor suspected Mr. Ball of financial misconduct.
>
> 68. Messrs. Jorgensen and Taylor accused Mr. Ball of embezzlement and threatened him with criminal prosecution if he did not confess to embezzling funds from Alpha Sod, while also attempting to extort Mr. Ball into conveying his mother's real property to them, in violation of 18 U.S.C.A. § 1951.
>
> 69. Mr. Ball asked Mr. Taylor and Mr. Jorgensen for access to the Chase account data in order to provide an explanation for the expenses paid out of the account; however, both Mr. Taylor and Mr. Jorgensen denied Mr. Ball access to the account data, and Mr. Ball ultimately signed a confession of wrongdoing under duress and threats that Mr. Ball would be arrested immediately and prosecuted with criminal charges. Mr. Ball did not embezzle any funds and the confession is a farce.

The Alpha Sod litigation attracted public attention, with multiple media outlets reporting on the dispute, including the criminal charges filed against Ball. In June 2022, the State voluntarily dismissed those charges. Following the dismissal, Davis gave an interview to East Idaho News to, in his words, "re-set the narrative that had been publicly advanced against [Ball]."

During that interview, Davis made four statements that Taylor alleges were defamatory:

- **<u>Statement A:</u>** "So both -- in both cases, they ambushed the guy. So in [Ball]'s case, Kris Taylor comes to him in 2014 and says, 'Hey, you are a good sod farmer. Let me make you a business. I'll handle the business. You do the sod,' right."
- **<u>Statement B:</u>** "Because, let me tell you what happened. What happened was -- and this is an organized grift. Okay? There is a group of dudes in the Idaho Falls area who do this where they will partner up with somebody who they, you know, see as unsophisticated, and they will embroil them in criminal proceedings to bilk them out of their interest in a company. It has happened before."
- **<u>Statement C:</u>** "Yeah. Jonathan Wells Whitney. Same thing -- I mean, same basic thing. They accused him of defrauding a business and embezzling money, and when it comes down, all they did was ruin his life and screw him out of his interest in the business. That's what they are trying to do to [Ball]."
- **<u>Statement D:</u>** "So [Taylor] wanted her to doctor the books so that those reflected his agricultural vehicles, right, so they didn't get nailed for exceeding the mileage and not keeping their logbooks correctly."

East Idaho News published an article containing excerpts of Davis' interview on August 16, 2022. Of the allegedly defamatory statements made to East Idaho News, only "Statement B" and parts of "Statement A" above appeared in the news article. Although the article alluded to Ball's "business partner," it did not mention Taylor by name. Likewise, Davis maintained that Jayce Howell and Dan Packard were the "group of dudes" he referred to in the interview.

B. Procedural Background

Taylor sued Davis, the law firm he worked for, Merrill & Merrill, and Ball for defamation and defamation per se on August 23, 2023, based on the statements Davis made to East Idaho News. Taylor did not plead any special damages as part of his complaint. As a result, the district court granted Davis' motion for summary judgment on Taylor's defamation claims. The parties also stipulated to dismiss Ball from the lawsuit shortly before trial. Accordingly, the matter proceeded to a jury trial solely on Taylor's defamation per se claim against Davis and Merrill & Merrill (collectively "Davis").

During the jury trial, Taylor requested a jury instruction on the definition of defamation per se that included statements that impugn a person's fitness to conduct a lawful business, trade, or profession. Specifically, Taylor asked the district court to instruct the jury that "[i]f any of the statements made by Mr. Davis imputed to Mr. Taylor unfitness for the proper conduct of his lawful business, trade, or profession then Mr. Taylor is not required to prove any damages as injury to Mr. Taylor's personal and business reputation, humiliation, and embarrassment is presumed."

The district court declined to give Taylor's proposed instruction. In denying Taylor's request, the district court interpreted this Court's decision in *Siercke v. Siercke*, 167 Idaho 709, 476 P.3d 376 (2020), as narrowing the categories of defamation per se recognized under Idaho law. Based on that interpretation, the district court instructed the jury as follows:

> To demonstrate a right to relief in an action for defamation per se, a plaintiff must establish that the defendant:
>
> (1) communicated false information of and concerning the plaintiff to others; and
>
> (2) the statement imputed criminal conduct to the plaintiff which, if committed in the place of publication, would be punishable by imprisonment in a state or federal institution or would be regarded by public opinion as involving a crime of moral turpitude.
>
> Moral turpitude is, in general, shameful wickedness so extreme a departure from ordinary standards of honesty, good morals, justice or ethics as to be shocking to the moral sense of the community.

The jury returned a verdict in Davis' favor, finding that none of the statements described above were defamatory per se.

Taylor subsequently moved for a new trial, contending that the district court erred by refusing to instruct the jury on defamation per se based on statements imputing unfitness in one's business, trade, or profession. The district court denied the motion, adhering to its earlier reasoning and concluding that this Court's recent decision in *Boren v. Gadwa*, 176 Idaho 489, 578 P.3d 861 (2024), confirmed its interpretation.

The district court entered a judgment on March 4, 2025. Taylor timely appealed.

II. Issues on Appeal

1. Whether the appeal is moot.
2. Whether the district court provided an erroneous jury instruction on defamation per se.
3. Whether Davis is entitled to attorney fees under Idaho Code section 12-121.

III. Standard of Review

"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." *Lands v. Sunset Manor, LP*, 173 Idaho 658, 665, 546 P.3d 670, 677 (2024) (citation modified) (quoting *Secol v. Fall River Med., P.L.L.C.*, 168 Idaho 339, 355, 483 P.3d 396, 412 (2021)). In determining whether a jury instruction should have been given, we consider whether the evidence presented at trial supports the instruction and whether the proposed instruction correctly states the law. *Ballard v. Kerr*, 160 Idaho 674, 702, 378 P.3d 464, 492 (2016). Even when an instruction is erroneous, however, reversal is warranted only if the instructions, viewed as a whole, misled or prejudiced a party. *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755, 758 (2011). Accordingly, when the instructions, taken as a whole, do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error. *Id.*

IV. ANALYSIS

Taylor's sole issue on appeal is whether the district court committed reversible error by declining to instruct the jury on defamation per se based on statements imputing unfitness in one's business, trade, or profession. Davis raises several arguments in response. First, he argues that the district court correctly instructed the jury and, even if it did not, Taylor has failed to establish prejudice from any instructional error. Second, he argues this appeal is moot because the jury verdict in the Alpha Sod litigation establishes the truth of his statements to East Idaho News. Finally, Davis makes a request for attorney fees under Idaho Code section 12-121. Because mootness presents a threshold question of justiciability, we address that issue first.

A. The appeal is not moot.

Davis argues that this appeal is moot because the jury verdict in the Alpha Sod litigation, that was resolved partially in his client Ball's favor, establishes that Davis' statements to the East Idaho News were true. From that premise, Davis contends that a remand for a new trial could afford Taylor no relief because Taylor cannot establish that Davis' statements were false. Davis' argument, however, depends on this Court taking judicial notice of records from the separate Alpha Sod litigation, Bonneville County Case No. CV10-19-0655, and determining that the verdict in that case conclusively establishes the truth of the statements at issue here. We decline to do so.

Davis provides neither authority nor meaningful argument explaining why judicial notice of that verdict is appropriate. His request consists of a single sentence: "This Court can take judicial notice of that verdict," without citation to authority or further analysis. Such an assertion is insufficient to establish that judicial notice is proper. *See Ross v. Dorsey*, 154 Idaho 836, 844-46, 303 P.3d 195, 204-05 (2013) ("This Court has long held that it will not consider issues cited on appeal that are not supported by propositions of law, authority or argument.") (citation modified)). Thus, "even if 'an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court.'" *Id.* at 845, 303 P.3d at 204 (quoting *Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010)). Accordingly, we decline to consider Davis' mootness argument.

B. The district court committed prejudicial error by declining to instruct the jury that statements imputing unfitness in the conduct of one's business, trade or profession may constitute defamation per se in Idaho.

Taylor argues that the district court committed reversible error by refusing to give his proffered jury instruction that statements imputing unfitness in the conduct of one's business, trade or profession may constitute defamation per se in Idaho. Taylor wanted the court to instruct the jury that statements imputing "to Mr. Taylor unfitness for the proper conduct of his lawful business, trade, or profession" constitute defamation per se. Davis responds that the jury instructions correctly stated Idaho law because (1) this Court has never clearly recognized this category of defamation per se; (2) the cases suggesting otherwise were wrongly decided; and (3) this Court's more recent defamation decisions have abrogated those earlier cases. Davis alternatively argues that, even if there was error, it was not prejudicial because the jury found that Davis was not liable for defamation. For the reasons explained below, we hold that Idaho law recognizes statements imputing unfitness in one's business, trade, or profession as a category of defamation per se and that the district court prejudicially erred by failing to instruct the jury accordingly.

1. Idaho recognizes that statements imputing unfitness in the conduct of one's business, trade, or profession are actionable as a category of defamation per se.

Taylor argues that the district court erred by concluding that an instruction on statements imputing unfitness in the conduct of one's business, trade, or profession, as a category of defamation per se, would not accurately state Idaho law. He primarily relies on two cases—*Barlow v. International Harvester Co.*, 95 Idaho 881, 522 P.2d 1102 (1974), and *Yoakum v. Hartford Fire Insurance Co.*, 129 Idaho 171, 923 P.2d 416 (1996)—to make the point that Idaho recognizes that statements imputing unfitness in the conduct of one's business, trade, or profession are actionable as a category of defamation per se. Taylor uses the phrase "adversely affecting . . . business" as shorthand for this category of defamation per se. We view the category more narrowly. The "business-unfitness" category of defamation per se does not encompass every statement that may adversely affect a person's business, trade, or profession; rather, it concerns statements that impute unfitness for the proper conduct of that business, trade, or profession. To explain why the district court erred, we first trace the development of defamation per se in Idaho and clarify the scope of this business-unfitness category, which our prior decisions have described in varying terms. We then apply that framework to Taylor's proposed instruction and the district court's rejection of it.

i. Defamation per se in Idaho.

"Traditionally, a defamation action allows a plaintiff to recover for a defendant's false statements that harm the plaintiff's reputation." *Verity v. USA Today*, 164 Idaho 832, 841, 436 P.3d 653, 662 (2019). "To prevail on a defamation claim in Idaho, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) the information was defamatory; and (3) the plaintiff was damaged because of the communication." *Id.* Thus, defamation protects a relational interest—the plaintiff's reputation in the eyes of others. *See* 50 Am. Jur. 2d *Libel and Slander* § 2. Certain statements are considered defamatory per se because their character is such that harm to reputation is presumed. *See Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 890, 522 P.2d 1102, 1111 (1974), *abrogated on other grounds by*, *Siercke v. Siercke*, 167 Idaho 709, 476 P.3d 376 (2020). When a statement constitutes defamation per se, the plaintiff need not prove special damages. *Siercke*, 167 Idaho at 718, 476 P.3d at 385. We have historically recognized four categories of statements that may qualify as defamation per se. *Barlow*, 95 Idaho at 890, 522 P.2d at 1111.

Those four categories encompass statements attributing to the plaintiff (1) criminal conduct; (2) "a loathsome disease"; (3) "a matter incompatible with his trade, business, profession, or office"; or (4) "serious sexual misconduct." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 180, 923 P.2d 416, 425 (1996) (citing *Barlow*, 95 Idaho at 890, 522 P.2d at 1111). Because the third category is at issue here, we begin with *Barlow* and *Yoakum* to examine the origin of the "incompatible with" formulation and clarify the scope of the principle it describes.

First, this Court in *Barlow* both described and applied the business-unfitness category of defamation per se. *See* 95 Idaho at 890–91, 522 P.2d at 1111–12. In that case, Barlow owned Upper Valley Equipment Co. ("Upper Valley"), a retailer of International Harvester brand farm equipment. *Id.* at 886–87, 522 P.2d at 1107–08. Barlow depended on his business partner, Pinder, to provide working capital for the operation of Upper Valley. *Id.* Pinder cut Barlow off and Barlow sued International Harvester after discovering that its employees made phone calls to Pinder claiming that Barlow was a thief who should be criminally prosecuted, and that Upper Valley had "no management or accounting" and was "not operating as a business entity." *Id.* at 887–88, 522 P.2d at 1108–09. The jury found in Barlow's favor on the defamation claims and International Harvester appealed, arguing that the employees' statements to Pinder were not defamation per se. *Id.* at 888, 890, 522 P.2d at 1109, 1111. This Court affirmed. *Id.* at 891–92, 522 P.2d at 1112–13.

Relying in part on the First Restatement of Torts, the *Barlow* Court described two of the four categories of statements constituting defamation per se. *Id.* at 890, 522 P.2d at 1111. Relevant here, the second category encompassed statements ascribing to another "conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, [or] profession." *Id.* (alteration in original) (quoting Restatement of Torts § 573 (1938)). This Court concluded that statements asserting that Upper Valley lacked management or accounting and was not a legitimate business entity fell within the category and declined to vacate the jury's verdict awarding damages. *Id.* at 891, 522 P.2d at 1112.

Next, in *Yoakum*, this Court reaffirmed *Barlow*'s description of the categories of defamation per se but did not undertake an extended analysis of the business-unfitness category. 129 Idaho at 180, 923 P.2d at 425. There, the Yoakums brought a wrongful death action against the City of McCall after their minor son died in an accident involving a city-owned vehicle. *Id.* at 174, 923 P.2d at 419. After settling that action, the Yoakums sued the city's insurer for, among other things, defamation arising from the insurer's investigation of their claim. *Id.* The Yoakums alleged that an insurance investigator made defamatory statements suggesting that "Mr. Yoakum had told people that he was going to retire on the insurance proceeds from the suit against McCall." *Id.* The district court granted summary judgment to the insurer after concluding that the statements did not constitute defamation per se and that the Yoakums had neither pleaded nor proven damages. *Id.* at 175, 923 P.2d at 420.

On appeal, this Court agreed with the district court that the insurance investigator's statements did not fall within any of the recognized categories of defamation per se. *Id.* at 180, 923 P.2d at 425. In doing so, this Court described the four categories as encompassing "statements which impute to the plaintiff either a criminal offense, a loathsome disease, a matter incompatible with his trade, business, profession, or office, or serious sexual misconduct." *Id.* (citing *Barlow*, 95 Idaho at 890, 522 P.2d at 1111). Thus, while *Yoakum* did not undertake an extended analysis of the business-unfitness category, it reaffirmed that category as one of the four types of defamation per se recognized under Idaho law.

Davis attempts to distinguish *Barlow* and *Yoakum*, but we are unpersuaded by his arguments. Davis correctly observes that *Yoakum* attributed *Barlow*'s recognition of the four categories of defamation per se to the Restatement (Second) of Torts, even though *Barlow* relied on the First Restatement of Torts. *See Barlow*, 95 Idaho at 890, 522 P.2d at 1111. Indeed, *Barlow* was decided in 1974, three years before the Restatement (Second) of Torts was published. From this error, Davis argues that *Yoakum* mistakenly assumed that Idaho had adopted the Restatement (Second) categories and that its description of the four categories therefore lacks precedential force. He further contends that *Yoakum* did not itself adopt the Restatement (Second) categories. Although Davis correctly identifies the error in *Yoakum*'s reference to the Restatement (Second), his argument assigns that error greater significance than it warrants. The relevant question is not which edition of the Restatement *Yoakum* identified, but whether the business-unfitness category recognized in *Barlow* remained part of Idaho law and, if so, the scope of that category.

Yoakum's erroneous reference to the Restatement (Second) does not undermine *Barlow*'s recognition of the business-unfitness category. *Barlow* expressly recognized that category more than two decades before *Yoakum* and grounded it in authorities existing at the time, including the First Restatement. Moreover, the Restatement (Second), once adopted in 1977, continued to recognize the same general category. Thus, *Yoakum*'s error concerned the source to which it attributed the rule, not the existence of the rule itself. Indeed, *Yoakum* reaffirmed that "[d]efamatory utterances are actionable without allegation and proof of special damages if they fall within one of four categories," including statements imputing "a matter [conduct, characteristics, or a condition] incompatible with [the plaintiff's] trade, business, profession, or office[.]" 129 Idaho at 180, 923 P.2d at 425.

The similarity between the two Restatements further demonstrates why *Yoakum*'s mistaken attribution does not undermine its recognition of the business-unfitness category. The First Restatement imposed liability for statements ascribing "to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, [or] profession . . . ." Restatement of Torts § 573 (1938). The Second Restatement retained the same essential principle, describing the category as statements ascribing "conduct, characteristics or a condition that would adversely affect [another's] fitness for the proper conduct of his lawful business, trade or profession. . . .” Restatement (Second) of Torts § 573 (1977). Thus, both formulations focus on whether the defamatory statement bears on the plaintiff’s fitness for the proper conduct of a business, trade, or profession. The relevant question here is not whether Idaho has expressly adopted section 573 of the Restatement (Second), but whether Idaho law continues to recognize the business-unfitness category identified in *Barlow* and reaffirmed in *Yoakum*. We hold that it does.

We answer the question affirmatively because Idaho adopted the four categories of defamation per se in 1974 in *Barlow*, and citing the Second Restatement of Torts, reiterated that result in *Yoakum* in 1996. *See Yoakum*, 129 Idaho at 180, 923 P.2d at 425 (citing the Restatement (Second) of Torts §§ 570–574 (1977) (section 570 identifying the four categories and each of the remaining sections representing one of those four categories of defamation per se)).

Davis does not explain why *Yoakum*’s mistaken reference to the Restatement (Second) affects the substance of its analysis. The First and Second Restatements articulate substantially the same business-unfitness principle. As described above, both formulations focus on whether the statement bears on the plaintiff’s fitness for the proper conduct of a business, trade, or profession.

ii. <u>The business-unfitness category of defamation has not been abrogated.</u>

Davis next argues that the business-unfitness category recognized in *Barlow* and reaffirmed in *Yoakum* has been abrogated by this Court’s subsequent decisions, particularly *Siercke v. Siercke*, 167 Idaho 709, 476 P.3d 376 (2020). Taylor responds that the district court misapplied *Siercke* because neither that decision nor our other recent defamation cases addressed, much less abrogated, the business-unfitness category. We agree with Taylor.

Siercke addressed only the criminal-imputation category of defamation per se. *See* 167 Idaho at 719–20, 476 P.3d at 386–87. The case arose from a domestic violence incident between a husband and wife. *Id.* at 711–12, 476 P.3d at 378–79. After the husband was arrested on suspicion of felony domestic battery but charged with misdemeanor domestic battery, he sued his ex-wife for defamation per se based on statements she made to law enforcement and a school counselor concerning the incident. *Id.* at 712–13, 476 P.3d at 379–80. The district court instructed the jury on defamation per se without specifying whether the criminal conduct imputed by the defamatory statement must constitute a felony. *Id.* at 713, 717–18, 476 P.3d at 380, 384–85. The jury returned a verdict for the husband, and the ex-wife appealed. *Id.* at 713, 476 P.3d at 380. Her challenge to the defamation per se instruction presented a narrow question: whether the criminal-imputation category requires a statement imputing felony conduct. *Id.* at 718, 476 P.3d at 385.

This Court agreed with the wife and clarified the test governing the criminal-imputation category of defamation per se. *Id.* at 718–20, 476 P.3d at 385–87. In doing so, this Court discussed *Barlow* at length, but only the portion addressing the criminal-imputation category. *See id.* at 718–19, 476 P.3d at 385–86. This Court explained that *Barlow* treated a statement as defamatory per se if it imputed "conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute and of such kind as to involve infamous punishment (death or imprisonment) or moral turpitude conveying the idea of major social disgrace." *Id.* at 718, 476 P.3d at 385 (quoting *Barlow*, 95 Idaho at 890, 522 P.2d at 1111).

This Court then clarified that subsequent changes in Idaho criminal procedure had rendered portions of *Barlow*'s formulation of the criminal-imputation category antiquated and redundant. *Id.* at 719, 476 P.3d at 386. For that reason, this Court adopted the "clearer, more contemporary approach" reflected in the Restatement (Second) of Torts. *Id.* Under that formulation, a statement imputing criminal conduct constitutes defamation per se if the crime is either "(a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude." *Id.* at 719–20, 476 P.3d at 386–87 (quoting Restatement (Second) of Torts § 571 (1977)).

Siercke did not purport to reconsider the four categories of defamation per se recognized in *Barlow* and *Yoakum*. Nor did it suggest that its adoption of the Restatement (Second) formulation for the criminal-imputation category abrogated the remaining categories. Rather, *Siercke* addressed a specific problem with *Barlow*'s formulation of the criminal-imputation category and modified the test governing that category accordingly. *See id.* at 717–20, 476 P.3d at 384–87. This Court confined its analysis to the criminal-imputation category because that was the only category at issue. *See id.* at 717–18, 476 P.3d at 384–85. Our silence concerning the other categories cannot reasonably be understood as implicitly abrogating them. Accordingly, the district court erred to the extent it relied on *Siercke* to conclude that the business-unfitness category was no longer recognized under Idaho law.[1]

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[1] Although not binding on this Court, several federal decisions applying Idaho law after *Siercke* have continued to identify the traditional four categories of defamation per se. *See Harper v. U.S. Dep't of the Interior*, 571 F. Supp. 3d 1147, 1172 (D. Idaho 2021), *rev'd on other grounds sub nom. Harper v. Nedd*, 71 F.4th 1181 (9th Cir. 2023) (listing the four categories of defamation per se); *Stevens v. Lee*, No. 2:22-cv-00529, 2024 WL 729960, at *5 n.4 (D. Idaho

Davis also relies on *Irish v. Hall*, 163 Idaho 603, 416 P.3d 975 (2018), and *Boren v. Gadwa*, 176 Idaho 489, 578 P.3d 861 (2024), to support his argument that the business-unfitness category is no longer part of Idaho law. He points out that neither decision discussed that category when addressing defamation per se and contends that their silence demonstrates that *Barlow* has been abrogated. As with *Siercke*, however, that argument assumes that this Court implicitly abrogates precedent whenever a subsequent decision addressing a different issue does not discuss it. We disagree.

In *Irish*, the mayor of the City of Harrison, Wanda Irish, along with her husband, sued two residents for defamation after they changed the name of their home Wi-Fi network to "[D]ennis & [W]anda Irish stocking u2." 163 Idaho at 605, 416 P.3d at 977 (alterations in original). The Wi-Fi name arose from an ongoing dispute between the mayor and the residents. *Id.* The district court granted the residents' motion for a directed verdict, concluding that the Wi-Fi name was not defamatory because it constituted opinion, exaggeration, or hyperbole. *Id.* at 606, 416 P.3d at 978. This Court reversed, concluding that reasonable minds could construe the Wi-Fi name as a factual assertion that the Irishes had committed the crime of stalking. *Id.* at 609–10, 416 P.3d at 981–82. Because first-degree stalking is a felony, this Court concluded that a jury could find the statement defamatory per se under the criminal-imputation category. *Id.* at 610, 416 P.3d at 982 (citing *Barlow*, 95 Idaho at 890, 522 P.2d at 1111). The business-unfitness category was neither raised nor implicated in *Irish*, and this Court had no occasion to address its continued viability.

Similarly, in *Boren*, a rancher sued several individuals whom he alleged had formed an "opposition group" to spread a false narrative concerning his application for a conditional use permit. 176 Idaho at ___, 578 P.3d at 867. The rancher asserted claims for defamation and defamation per se against members of the alleged opposition group. *Id.* The district court dismissed most of those claims based on several affirmative defenses, including the litigation privilege, qualified litigation privilege, and the First Amendment right to petition. *Id.* at ___, 578 P.3d at 867–68, 870. In doing so, the district court "bypassed whether [the rancher] properly pleaded the elements of his defamation claims." *Id.* at ___, 578 P.3d at 870.

Feb. 22, 2024) (citing *Yoakum*, 129 Idaho at 180, 923 P.2d at 425) (same); *Scofield v. Guillard*, No. 3:22-cv-00521, 2024 WL 2862295, at *6 (D. Idaho Jun. 6, 2024) (same); *Johnson v. Greene*, No. 1:24-cv-00316, 2025 WL 2508381, at *3 (D. Idaho Sept. 2, 2025) (same).

On appeal, this Court held that the district court erred in dismissing most of the rancher's defamation and defamation per se claims. *Id.* at ___, 578 P.3d at 870, 872–73. This Court first considered whether the rancher had adequately pleaded those claims because, if he had not, there would have been no need to reach the affirmative defenses on which the district court relied. *Id.* at ___, 578 P.3d at 870–71. In addressing the defamation per se claims, this Court cited *Siercke* and stated that a plaintiff must establish that the defendant communicated information concerning the plaintiff to others and that the statement imputed criminal conduct punishable by imprisonment or involving moral turpitude. *Id.* at ___, 578 P.3d at 871 (citing *Siercke*, 167 Idaho at 719–20, 476 P.3d at 386–87). This Court concluded that the rancher had adequately pleaded defamation per se because most of the statements identified in the complaint "impute[d] criminal conduct . . . , which could result in imprisonment." *Id.* at ___, 578 P.3d at 872. This Court did not discuss the other categories of defamation per se recognized in *Barlow* and *Yoakum*. *See id.* at ___, 578 P.3d at 870–74.

Read in context, *Boren*'s discussion of the criminal-imputation category did not implicitly abrogate the other recognized categories of defamation per se. Although *Boren* stated the criminal-imputation test in general terms, the only category implicated by the allegedly defamatory statements in that case was criminal imputation. The statements at issue in *Boren* imputed criminal conduct, so this Court applied the criminal-imputation test from *Siercke* to determine whether the plaintiff had adequately pleaded defamation per se. *See id.* at ___, 578 P.3d at 871–72. Thus, neither *Boren* nor *Irish* presented any occasion to consider the business-unfitness category, or the other categories recognized in *Barlow* and *Yoakum*. Accordingly, neither *Siercke*, *Irish*, nor *Boren* abrogated the business-unfitness category. We therefore hold that the business-unfitness category recognized in *Barlow* and reaffirmed in *Yoakum* remains part of Idaho law today.

iii. <u>The business-unfitness category of defamation per se has a narrow application.</u>

Although we conclude that the business-unfitness category remains part of Idaho law, we must clarify its scope. Taylor reads the category broadly, suggesting that it encompasses any "false statements associated with [a plaintiff's] business reputation." Davis responds that such a formulation would substantially expand defamation per se because the ordinary law of defamation already protects against false statements that injure a person's business reputation. We agree with

Davis that Taylor's formulation is too broad. Not every defamatory statement that adversely affects a person's business or professional reputation constitutes defamation per se.

As explained above, *Barlow* recognized as defamatory per se statements ascribing to another "conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, or profession." 95 Idaho at 890, 522 P.2d at 1111 (citation modified). The Restatement (Second) expresses the principle more precisely, describing statements that ascribe to another "conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession . . . ." Restatement (Second) of Torts § 573 (1977). These formulations share an important limitation: the defamatory statement must bear on the plaintiff's *fitness* for the proper conduct of the plaintiff's business, trade, or profession. It is not enough that the statement tends to injure the plaintiff's reputation and, as a consequence, adversely affects the plaintiff's business.

Therefore, we clarify that the business-unfitness category has a more limited application. A statement need not impute dishonesty, immorality, or other culpable conduct to fall within the category; a statement impugning the plaintiff's skill, competence, or other qualification may suffice. But there must be a nexus between the defamatory imputation and the plaintiff's fitness for the "proper conduct" of the "particular" business, trade, or profession. General disparagement of the plaintiff's character does not constitute defamation per se under this category merely because it adversely affects the plaintiff's business reputation. Rather, to constitute defamation per se, the defamatory statement must impute a characteristic, condition, or conduct that bears specifically on the plaintiff's fitness to perform the occupation at issue. *See* 2 Rodney A. Smolla, *Law of Defamation* § 7:16 (2d ed. 2026); Dan B. Dobbs et al., *The Law of Torts* § 534 (2d ed. 2026).

This nexus requirement means that not every statement tending to injure a person's professional reputation constitutes defamation per se. *See, e.g.*, *Hancock v. Variyam*, 400 S.W.3d 59, 67 (Tex. 2013); *see also* Restatement (Second) of Torts § 573 cmt. e (1977). General disparagement of a person's character is insufficient unless the quality disparaged bears particular significance to the person's fitness to conduct the business, trade, or profession. *See* Restatement (Second) of Torts § 573 cmt. e. For example, a false statement that a novelist habitually abuses alcohol may damage the novelist's reputation, but ordinarily says little about the novelist's fitness to write. *See* 2 Smolla, *supra*, § 7:16. The same accusation concerning a physician, however, may bear directly on the physician's fitness to practice medicine. *See Amick v. Montross*, 220 N.W. 51, 56 (Iowa 1928) (a statement accusing a physician of drunkenness is actionable as slander per se). The relevant inquiry is therefore not simply whether the defamatory statement may harm the plaintiff professionally, but whether the conduct, characteristic, or condition it imputes bears specifically on the plaintiff's fitness for the proper conduct of the business, trade, or profession. That will be the question for the jury to answer on remand.

2. The district court's error prejudiced Taylor.

As explained above, the district court's analysis of the business-unfitness category of defamation per se was erroneous. However, that error only warrants a new trial if Taylor establishes that it was prejudicial. Taylor argues that the error prejudiced him because the instructions given effectively foreclosed the jury from finding defamation per se based on statements bearing on his fitness for the proper conduct of his business. Had the jury been properly instructed, he contends, it could have found Davis' statements defamatory per se and presumed damages. Davis responds that including the business-unfitness category would not have changed the verdict because Taylor failed to prove injury. He also argues that because the special verdict form does not reveal the basis for the jury's verdict, the verdict should be sustained on any theory supported by the record. Taylor replies that the erroneous instruction necessarily affected the framework within which the jury considered his defamation per se claims. We agree with Taylor.

Generally, an erroneous jury instruction does not warrant a new trial unless the appellant establishes both prejudice and that the error affected the jury's conclusion. *Ballard v. Kerr*, 160 Idaho 674, 702, 378 P.3d 464, 492 (2016) (quoting *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 724, 291 P.3d 399, 407 (2012)). An instructional error is "prejudicial when it could have affected or did affect the outcome of the trial." *Beebe v. N. Idaho Day Surgery, LLC*, 171 Idaho 779, 788, 526 P.3d 650, 659 (2023) (quoting *Garcia v. Windley*, 144 Idaho 539, 543, 164 P.3d 819, 823 (2007)).

Here, the instructional error prejudiced Taylor because it could have impacted the jury's verdict as to at least one of the statements he alleged constituted defamation per se. The jury was instructed to consider whether any of the following four statements were defamatory per se:[2]

> **Statement A**: "They ambushed the guy. There's a group of dudes in Idaho Falls [sic] area who do this where they'll partner up with somebody who they see as

[2] The statements as described in the jury instructions vary slightly from what Davis actually said to the East Idaho News reporter as reflected in the record.

> unsophisticated, and they'll embroil them in criminal proceedings to bilk them out of their interest in a company. It has happened before[.]"
>
> **<u>Statement B</u>**: "Let me tell you what happened. What happened was, and this is an organized grift, there's a group of dudes in the Idaho Falls area who do this. Where they'll partner up with somebody who they see as unsophisticated, and they'll embroil them in criminal proceedings to bilk them out of their interest in a company. It has happened before."
>
> **<u>Statement C</u>**: "John Wells Whitney. Same thing. I mean same basic thing. They accused him of defrauding a business and embezzling money. And when it comes down all they did was ruin his life and screw him out of his interest in the business. That's what they are trying to do to [Ball]. In both cases they ambushed the guys. So in [Ball]'s case, Kris Taylor comes to him in 2014 and says hey, you're a good sod farmer, let me make you a business. I'll handle the business and you do the sod. Right. So that's what he did."
>
> **<u>Statement D</u>**: "So [Taylor] wanted her to doctor the books so that those reflected his agricultural vehicles so they don't get nailed for exceeding the mileage and not keeping their log books correctly."

The prejudice becomes apparent when the instruction given to the jury is considered. The district court instructed the jury that, to establish defamation per se, Taylor was required to prove that the alleged statements communicated false information that imputed criminal conduct to him. The instruction did not inform the jury that statements bearing on Taylor's fitness for the proper conduct of his business could also constitute defamation per se:

> To demonstrate a right to relief in an action for defamation per se, a plaintiff must establish that the defendant:
>
> (1) communicated false information of and concerning the plaintiff to others; and
>
> (2) the statement imputed criminal conduct to the plaintiff which, if committed in the place of publication, would be punishable by imprisonment in a state or federal institution or would be regarded by public opinion as involving a crime of moral turpitude.
>
> Moral turpitude is, in general, shameful wickedness so extreme a departure from ordinary standards of honesty, good morals, justice or ethics as to be shocking to the moral sense of the community.

Thus, under the instruction given, the jury could find a statement defamatory per se only if it imputed criminal conduct to Taylor. The instruction provided no basis for the jury to find defamation per se based on a statement bearing on Taylor's fitness for the proper conduct of his business.

We conclude that including the business-unfitness category in the jury instructions could have affected the outcome of the trial, particularly with respect to Statement D. In that statement, Davis asserted that Taylor pressured an employee to "doctor the books" of one of his businesses to avoid regulatory consequences associated with the business' vehicles. That accusation does more than disparage Taylor's general character. It imputes dishonest conduct in Taylor's management of the business' records and regulatory compliance and, therefore, bears directly on his fitness for the proper conduct of that business. The accusation is analogous to the statements in *Barlow* that a business had "no accounting," "no management," and was "not operating as a business entity." 95 Idaho at 891, 522 P.2d at 1112. There, this Court concluded that the statements established a prima facie case of defamation per se under the business-unfitness category. *Id.* Had the jury been properly instructed on that category here, it could have found, at a minimum, Statement D was defamatory per se. Because the instructional error could have affected the jury's verdict, Taylor has established prejudice.

Davis' arguments to the contrary are unpersuasive. He first argues that Taylor could not have been prejudiced because an instruction on defamation per se concerns only damages, not liability. According to Davis, the jury found that none of the statements were defamatory, so an instruction concerning presumed damages could not have affected the verdict. But that is not what the special verdict establishes. The special verdict asked whether any of the statements constituted defamation per se as defined by the district court's instructions. As explained above, those instructions permitted the jury to find defamation per se only if a statement imputed criminal conduct punishable by imprisonment or involving moral turpitude. Thus, the jury's negative answer establishes only that it found none of the statements defamatory per se under the definition it was given. It does not establish that the jury found the statements nondefamatory under a properly instructed business-unfitness theory. Had the jury been instructed on that category, it could have reached a different conclusion as to liability.

Davis similarly argues that "the jury necessarily determined that [Taylor] failed to prove damages" and that this "factual determination forecloses any contention that a presumption of damages should apply to change that outcome . . . ." Again, the special verdict does not support Davis' premise. The jury did not expressly find that Taylor failed to prove injury. Rather, it found that none of the four statements constituted defamation per se under the definition provided by the district court. Moreover, when a statement constitutes defamation per se, the plaintiff need not prove special damages. *Siercke v. Siercke*, 167 Idaho 709, 718, 476 P.3d 376, 385 (2020). Thus, Taylor's failure to obtain an award of damages under the erroneous instruction does not establish that the omission of a category under which damages may be presumed was harmless.

Finally, Davis, relying on two cases, *Fitzgerald v. Walker*, 121 Idaho 589, 826 P.2d 1301 (1992), and *Rockefeller v. Grabow*, 139 Idaho 538, 82 P.3d 450 (2003), argues that this Court "will uphold a general jury verdict if there is any theory upon which it can be based." These cases do not establish that principle in the context presented here. *Fitzgerald* involved a challenge to the sufficiency of the evidence supporting a jury verdict. *See* 121 Idaho at 591–92, 826 P.2d at 1303–04. *Rockefeller* likewise did not address whether an erroneous jury instruction was harmless because a verdict might have rested on some other ground. *See* 139 Idaho at 541–42, 82 P.3d at 453–54. Neither case establishes that a verdict must be affirmed when the jury was not instructed on a legally viable theory supported by the evidence.

Our decision in *Brown v. Hardin*, 31 Idaho 112, 116, 169 P. 293, 295 (1917), points in the opposite direction. There, this Court concluded that a jury instruction was erroneous and, because the jury returned a general verdict, it was "impossible to determine the basis on which the jury arrived at it." *Id.* Under those circumstances, this Court could not say "that the giving of this instruction did not prejudice the rights of the appellant." *Id.* at 116, 169 P. at 294–95. The same reasoning applies here. The special verdict does not establish that the jury would have rejected Taylor's claim had it been properly instructed on the business-unfitness category. To the contrary, Statement D, at a minimum, provided a basis from which a properly instructed jury could have found defamation per se under that category. We therefore conclude that the instructional error prejudiced Taylor, vacate the judgment, and remand for a new trial.

C. Davis is not awarded attorney fees under Idaho Code section 12-121.

As a final issue, Davis makes a request for attorney fees on appeal under Idaho Code section 12-121. Davis provides no argument in support of the request. We deny the request for fees for two reasons: first, because Davis has not prevailed on appeal, and second, because this Court does not consider requests for attorney fees that are unsupported by adequate argument or authority. *See Johnson v. Murphy*, 167 Idaho 167, 175–76, 468 P.3d 297, 305–06 (2020) ("Absent any legal analysis or argument, 'the mere reference to a request for attorney fees is not adequate.'" (citation modified) (quoting *Goldman v. Graham,* 139 Idaho 945, 948, 88 P.3d 764, 767 (2004)).

IV. Conclusion

We hold that the district court erred in determining that Idaho law does not recognize the business-unfitness category of defamation per se and that error prejudiced Taylor. Accordingly, we vacate the judgment and remand for a new trial. Costs are awarded to Taylor as a matter of course. I.A.R. 40(a).

Justices BRODY, MOELLER, ZAHN, and MEYER, CONCUR.