

9-7-2012

Johnson v. McPhee Appellant's Brief Dckt. 39669

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Johnson v. McPhee Appellant's Brief Dckt. 39669" (2012). *Not Reported*. 748.
https://digitalcommons.law.uidaho.edu/not_reported/748

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

Curtis "Jay" Johnson)	
)	
)	
)	DOCKET #39669-2012
Plaintiff / Appellant,)	
vs.)	
Mike McPhee)	
JCAV, LLC)	
Defendants / Respondents)	

APPELLANT'S BRIEF

Appeal from the District Court of the 1st Judicial District for Kootenai County. Honorable Benjamin R. Simpson, District Judge presiding.

Curtis Jay Johnson, pro se, residing at 1206 N. 6th St. Coeur d'Alene, ID 83814, Appellant.

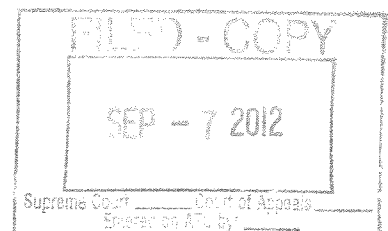


TABLE OF CONTENTS

Table of Cases and Authorities	1
Statement of the Case	1
Course of the Proceedings	1
Statement of the Facts	1
ISSUES PRESENTED ON APPEAL	2
APPELLANT’S ARGUMENT	3
The District Court altered the central question	3
The District Court has misconstrued and mitigated the evidence	5
The District Court has largely ignored or severely mitigated the context	7
The District Court has included irrelevant evidence and testimony	9
The District Court generally ignored or missed the severity	9
CONCLUSION	10

Table of Cases and Authorities

(Rules Civ. Proc., Rule 56(c), Hei v. Holzer, 73 P.3d 94, 139 Idaho 81)

Loomis v. City of Haley, 119 Idaho 434, 807 p.2d 1272 (1991)

Statement of the Case & Course of the Proceedings

The Court of Appeals remanded the respondents' motion for summary judgment on the Negligent Infliction of Emotional Distress to the District Court for a determination of whether Mike McPhee was aware of the appellant's particularly fragile emotional state, such that if he was, the appellant's Motion for Summary Judgment on that claim should be denied.

The presiding Honorable Judge John Patrick Luster subsequently withdrew from the case due to a conflict that was revealed by the appellant. The case was eventually assigned to Honorable District Court Judge Benjamin R. Simpson, who ordered briefs filed by the parties, and then ruled that Mike McPhee was not sufficiently notified that the Appellant was frail and particularly susceptible to emotional injury, and granted Summary Judgment to the respondents.

Statement of the Facts

In 2005 Mike McPhee made two part payments to Jay Johnson for Johnson's work on the Radiant Lake Estates Project. When Johnson asked for a third, and then begged, McPhee refused. Johnson then contacted Jack Vanderwaal (JCAV) to secure further payment.

There was a discussion of the matter between JCAV and McPhee, after which JCAV refused and referred Johnson back to McPhee, who JCAV said was going to be making all the money on the man made lake deal.

Mike McPhee was apparently very irritated that Johnson had contacted JCAV. Within further discussions between Johnson and McPhee, McPhee called Johnson a deranged motherfucker, a fly on his ass, and told Johnson no one would believe him, about being tortured by McPhee, because he was crazy. McPhee left abusive voice mails taunting Johnson about money, knowing Johnson was a desperate, deranged, helpless beggar. All of this despite the two having been best friends and despite Johnson doing exemplary and successful work setting up the Radiant Lake Estates project, and earlier finding and twice brokering a million dollars in profit deal for the respondents.. At the time of the abuse, Johnson was mentally crippled by McPhee's earlier torture, and his deathly trauma and perpetual suffering was violently exacerbated.

Issues presented on Appeal

The District Court has erred in four primary and crucial ways in its ruling. Firstly, and most crucially, the District Court has substantially altered the central question, or issue framed by the Court of Appeals to be considered on remand. Secondly, in answering the altered question, the District Court has misconstrued and mitigated the evidence in favor of the respondents. Thirdly,. the District Court has largely ignored or severely mitigated the context within which the Negligent Infliction of Emotional Distress occurred. Lastly, the District Court has included irrelevant evidence and testimony in answering the altered question. The District Court also erred by generally ignoring or missing the severity and extreme nature of McPhee's conduct, the case in general and Johnson's injury.

Appellant's Argument

**The District Court has substantially altered the central question, or issue framed
by the Court of Appeals to be considered on remand.**

The Court of Appeals stated:

“Thus, the existence or non-existence of a duty of care and proximate causation in this case turns upon whether McPhee was **aware of** Johnson’s abnormal vulnerability and the consequent risk of serious emotional injury from McPhee’s insults.”

“the court may draw the inferences it deems most reasonable concerning whether McPhee had knowledge **or** sufficient notice that Johnson’s mental or emotional fragility made him vulnerable to serious emotional distress from McPhee’s alleged misconduct.” (emphasis added)

The District Court stated:

“The question is whether Johnson’s statement was sufficient **to put McPhee on notice** that any further derogatory comments, or comments involving foul language or concerning whether Mr. Johnson’s suffered from a mental illness, would result in emotional distress to Mr. Johnson.” (emphasis added)

The Court further stated:

“This Court holds that Mr. Johnson’s vague statement to Mr. McPhee does not create a genuine issue as to whether Mr. McPhee was **put on notice** that Mr. Johnson was hindered by a particularly sensitive emotional state...” (emphasis added)

The Court erred, since the issue was not whether McPhee was put on notice, but whether he was aware of Johnson’s condition, whether he knew or should have known. The means whereby this awareness or knowledge arose was certainly not limited by the Court of Appeals to whether McPhee was properly notified by Johnson.

The District Court stated:

“The record only appears to contain a single statement, however, regarding whether McPhee **may have been apprised** of Mr. Johnson’s delicate mental and emotional state.” (emphasis added)

Again, the District Court erred, since the question was not whether McPhee was apprised of Johnson’s condition, but whether he was aware of it, whether he knew or should have known about it, by whatever means that knowledge might have arisen. The District Court posits that the only way McPhee could have known Johnson was particularly frail, or be held responsible for knowing, was if Johnson told him in very clear language. The issue as posed to the District Court on remand is certainly not thus limited.

McPhee was clearly **aware of** Johnson’s condition, he had **knowledge** of it, since he called Johnson a deranged motherfucker, and said, “No one will believe you, you’re crazy.” (Vol. 1, p. 103, 2nd paragraph) (Vol 1, p. 196, pg 92, ln 9-14) He also repeatedly snickered at Johnson’s feeble weakness. (JCAV Tr.2, P. 4-95, Johnson) (Vol.1, p.182-183, pg 94-95)

Furthermore, it wasn’t necessary to apprise anyone of Johnson’s condition, it was obvious to everyone. Johnson by this time was a deranged, crippled, beggar, near death, rumored around town to be a pedophile, rapist or stalker. (Vol. 2, p.391, 2nd paragraph) Anyone and everyone who saw Johnson was struck by his derangement. (Vol 1, p.101, 4th paragraph)

McPhee was aware that Johnson was penniless and a beggar, and his response was to leave Johnson two voice mails saying “Hey you fucking dickhead, why don’t you call me back, I need to borrow some money, you never loaned me a nickel, you fucking prick.” (Vol 2, p. 375) This is specific evidence that being aware of Johnson’s condition did not alter McPhee’s penchant for abusing him, however, the District Court completely ignored this evidence in its ruling. The District Court ignored all the evidence that McPhee was

aware that Johnson was crazy, despite the evidence being clearly stated in the respondent's Brief on remand. (P. 0048 - 0049)

The District Court stated:

“However, there is no indication that Mr. Johnson told Mr. McPhee that his attempts to heal, or his strange bodily experiences, were somehow catalyzed or exacerbated by McPhee's statements to Johnson.”

At the time Johnson told McPhee of his strange bodily experiences and attempts to heal, the relationship between Johnson and McPhee was normalized. McPhee was not making abusive statements. (Vol. 1 p.101, 2nd and 3rd paragraphs)

Regardless, the issue on remand is not whether McPhee was apprised sufficiently by Johnson of Johnson's frail condition, but rather whether he was aware of it.

The District Court has misconstrued and mitigated the evidence in favor of the respondents.

The District Court stated:

“This Court holds that Mr. Johnson's **vague** statement to Mr. McPhee does not create a genuine issue as to whether Mr. McPhee was put on notice that Mr. Johnson was hindered by a particularly sensitive emotional state...” (emphasis added)

“It really fucked me up when you told me to suck your dick” is not a vague statement whatsoever, especially not in this context. By the time of this statement Johnson was obviously crazy, everyone who knew Johnson or saw Johnson knew it. McPhee especially knew it, because he caused it. He knew perfectly well what Johnson was talking about. It was a huge and brave step for Johnson to make that “vague” statement. It could hardly be demanded of Johnson to further elaborate after McPhee's miscreant reply, “I don't know what you're talking about,” especially considering that Johnson fainted at

the thought of confronting McPhee. (Vol.2, p.390, 3rd paragraph)

Court must liberally construe the facts in favor of the non-moving party and determine whether there is any genuine issue as to any material fact and whether the party moving for summary judgment is entitled to judgment as a matter of law. (Rules Civ. Proc., Rule 56(c), *Hei v. Holzer*, 73 P.3d 94, 139 Idaho 81)

The District Court has misconstrued and mitigated the evidence in favor of the moving party.

The District Court stated:

“Johnson asserts that in 2005 he told McPhee that his crude sexual advances negatively impacted Johnson.”

Johnson never referred to McPhee’s rapacious psycho-sexual mind torture as sexual advances. (Vol 1, p.99, 2-3rd paragraph) (Vol. 1, p.183, pg. 95, ln. 1-25) They were not sexual advances by anyone’s testimony. McPhee testified that he never made any such statement, either in jest or otherwise. (Vol. 1, p.91) In referring to the torturous conduct as sexual advances, the District Court reveals that it has construed the evidence in favor of the moving party, i.e. sexual advances do not cause PTSD or derangement.

Furthermore, Johnson could not have told McPhee what had been the overwhelming cause of his being “fucked up” or of his chaotic bodily experiences at the time of these conversations. Johnson was unaware at the time that his condition was caused by imagining himself being violently sodomized by McPhee. Once Johnson saw himself, and the crippled twisted nature of his abdominal area in the “Look Your Heart in the Mirror” video, he realized. The psychosomatic experience was so horrible and devastating, that Johnson had completely repressed it.

The District Court stated in describing altercations initiated by Johnson:

“Via text message, he (Johnson) also told McPhee that he was an ass.”

After months of polite requests and pleadings and finally begging to get paid as McPhee promised, for the work McPhee hired Johnson to do, which Johnson successfully did; Johnson had reached his wit's end. Johnson thought and hoped perhaps McPhee would respond differently to another kind of communication, more his style. Up to this point, Johnson had never been even slightly anything other than a perfect friend and business associate to McPhee. He was "polite calm and reasonable" in seeking the promised payment from McPhee. (Vol. 1, p.291, last paragraph)

McPhee had refused to sign a contract when Johnson asked, and coerced Johnson to accept payment under the table. ..." (Vol 1, p.171-172, pg. 50, ln.14 - pg 53, ln. 2) And it was revealed he committed felony perjury lying to a notary about being a partner in JCAV. (Vol. 2, p.229-230)

McPhee was a criminal, and his rapacious abusive behavior toward Johnson was sociopathic and purely evil. Johnson's finally calling him an ass does not justify or explain anything McPhee did. To infer that Johnson somehow had the abuse coming for calling McPhee an ass, or denying Johnson justice for finally calling him one would be unreasonable and unconscionable.

The District Court has largely ignored or severely mitigated the context within which the Negligent Infliction of Emotional Distress occurred.

The District Court stated:

"This Court holds that Mr. Johnson's vague statement to Mr. McPhee does not create a genuine issue as to whether Mr. McPhee was put on notice that Mr. Johnson was hindered by a particularly sensitive emotional state, which could be exacerbated even by statements which are seemingly innocuous and certainly commonplace in today's society."

Here the District Court erred by ignoring the context of the statements, how extremely malicious they were, and the obviously severe emotional impact they would have on **anyone** in the context. Maliciously abusing a friend for wanting to be paid for a difficult job very well done is NOT commonplace in our society.

Although Johnson admittedly was dealing with difficult emotional life issues, he was a sharp and talented hard working real estate agent when McPhee met him, which is why McPhee befriended Johnson, and made him like a member of his family.

Johnson eventually showed McPhee a commercial real estate deal, which McPhee showed to Jack Vanderwaal, who later became JCAV in order to purchase the deal. JCAV made a quick million dollars off the deal Johnson showed them. (Vol. 2, p.379, 2nd paragraph)

JCAV used the profit from that deal to leverage a loan for the man made lake. Johnson successfully set up the deal and worked for a year on it. McPhee had Johnson to **thank** more than anyone else for his lake deal, instead he taunted and abused Johnson, rather than pay him. He had refused to sign a contract when Johnson asked, and coerced Johnson to accept payment under the table. ...” (Vol 1, p.171-172, pg. 50, ln.14 - pg 53, ln. 2)

The District Court stated:

“Of course, assuming without deciding that McPhee made any such sexual comment to Johnson, this statement was made in 2003, and cannot be considered by the Court due to the applicable statute of limitations.”

The statute of limitations does not bar the 2003 torture from being used as evidence regarding the question of whether McPhee was **aware** of Johnson’s condition in 2005.

Assuming McPhee diabolically psycho-sexually mind tortured Johnson, as Johnson testified and argued, it is entirely unreasonable to infer that McPhee could be oblivious to

Johnson's feeble condition, i.e. not only did McPhee see Johnson's condition, like everyone else, he maliciously **caused** it.

The District Court has included irrelevant evidence and testimony in answering the altered question.

The District Court stated:

“...Johnson himself initiated a number of the contacts occurring in 2005 and 2006, which he now complains resulted in his emotional distress. For example, Johnson complains about an altercation he had with McPhee at the Iron Horse Restaurant.”

This evidence was not offered to bolster or support any of Johnson's claims. Johnson felt his life was threatened, that he was in serious danger, and not knowing what to do about it, he notified the District Court in a non-sworn letter of McPhee's ominous and threatening manner. Unfortunately, this unsworn letter is not in the record on appeal. In the letter, Johnson did not recount the entire altercation, nor did he do so in the affidavit he filed a few days later. (Vol 1, p. 103, 3rd paragraph)

When he was questioned about the altercation as part of the respondents' 2nd deposition, he elaborated, simply to set the record straight, not to “complain”. It happened long after everything alleged and complained about in the complaint, July 22, 2006, (Vol 1, p.198, pg 105, ln. 13-17) and is therefore irrelevant.

The District Court also erred by generally ignoring or missing the severity and extreme nature of McPhee's conduct, the case in general and Johnson's injury.

The Court stated:

“The record mainly consists of vague references to “abuse” and generalized assertions that Johnson's mental health suffered as a result of many factors in his life.”

Johnson testified that he psychosomatically experienced himself being violently sodomized

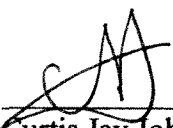
by Mike McPhee, that he soon became deranged, and due to his becoming deranged, every aspect of his life became a living nightmare, 24x7. This type of derangement is obviously not caused by divorce or any life issues, nor can it reasonably be inferred to be caused by “many factors”. It was caused by McPhee’s torture(Vol. 2, p.314) (Vol. 2, p.390, 3rd paragraph) (Vol. 2, p.368-369)

When an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive **at the most probable inferences** to be drawn from uncontroverted evidentiary facts. Loomis v. City of Haley, 119 Idaho 434, 807 p.2d 1272 (1991) (emphasis added)

CONCLUSION

McPhee’s infliction of emotional distress upon Johnson in 2005 was heinous and sociopathic in nature. McPhee was well aware that Johnson was a tortured, deranged, crazy, pathetic, helpless beggar at the time he abused Johnson in 2005. He had to be aware that his abuse would be extremely hurtful to Johnson, given the context of friendship and the large real estate project Johnson worked so hard on. It cannot be reasonably inferred that McPhee was unaware of Johnson’s condition, and therefore the respondents’ Motion for Summary Judgment on the appellant’s claim for Negligent Infliction of Emotional Distress should be denied and remanded to the District Court for trial.

RESPECTFULLY SUBMITTED this 4th day of September, 2012.


Curtis Jay Johnson
Appellant, pro se