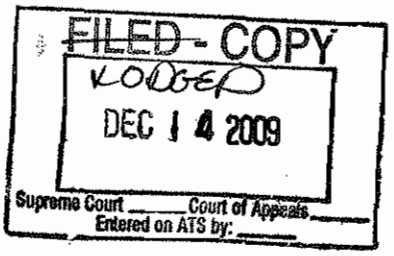
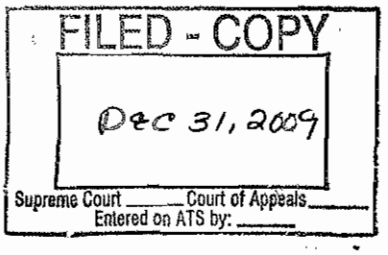
12-31-2009

Davidson v. Davidson Appellant's Brief Dckt. 36535

IN THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE DAVIDSON,	)	SUPREME COURT NO. 36535
Plaintiff-Appellant,	)	
	)	**APPELLANT'S BRIEF**
vs.	)	
	)	
JESYCA HOOD DAVIDSON,	)	
BENJAMIN PUCKETT,	)	
KATHY GUTHRIE,	)	
and JOHN PRIOR,	)	
Defendants-Respondents	)	
	)	





Appeal from: Fourth Judicial District, Ada County
Honorable Timothy Hansen, presiding.
District Court case number: CVOC 0803293

Attorney for Appellant: George Davidson, Pro Se, residing at 1012 N. Pit Lane, Nampa, Idaho, 83687, 208-353-4156

Attorney for Defendants: Christ T. Troupis, for Jesyca Hood Davidson and Kathy Guthrie, residing at 1299 E. Iron Eagle Dr., Ste. 130, Eagle, Idaho, 83616, 208-938-5584

Michael E. Duggan, for Benjamin Puckett, residing at P.O.B. 3845, Nampa Idaho, 83653, 208-442-9080

John Prior, Pro Se, residing at 16 12th Ave. So., Ste. 113, Nampa, Idaho, 83651, 208-465-9839

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASE LAW

IDAHO LAW

OFFICIAL REPORTS AND STATISTICS

MISC. REFERENCES

STATEMENT OF THE CASE

This is a common law tort case for injuries from Slander per se, Intentional Infliction of Emotional Distress, Abuse of Process, Conspiracy, and Negligence/Negligence per se resulting from false allegations of child abuse leveled at the Plaintiff (Davidson) by the Defendants. The statutory authority for Davidson's case comes from I.C. 16-1607. Davidson contends Defendants took their actions with malice or bad faith, acted outrageously, with improper, ulterior purposes, and breached duties of which they knew or should have known with reckless disregard for the truth and for the consequences of their harmful actions.

This case was filed on Feb. 19, 2008. Defendant John Prior (Prior) applied for dismissal under I.R.C.P. 12(b)(5),(6) on March 10. Hearing was held on April 28. On May 21, in a Memorandum Decision and Order, the trial court granted Prior's motion, citing an improper service of process and granting absolute immunity for any conduct by a lawyer involved in a judicial process. Davidson attempted a permissive appeal, but was denied (Idaho Supreme Court Docket No. 35353, dismissed July 22, 2008).

Davidson moved the trial court for permission to amend the complaint and put in a motion for punitive damages on August 26, 2008, citing the discovery of four previously unknown instances of false reporting of abuse by Defendant Jesyca Hood Davidson (Jesyca).

Jesyca and codefendant Kathy Guthrie (Kathy) opposed the amendment on Sept. 5. The motion to amend essentially sat dormant until it was finally denied nearly six months later on Feb. 5, 2009, with only the permission to put punitive damages in front of the jury being granted.

On November 7, 2008, the Idaho Attorney General filed a motion to quash subpoenas duces tecum and depositions which Davidson had served on four Health and Welfare agents who had taken some of the false reports from Jesyca and Kathy. Davidson opposed the Motion to Quash on November 12. Hearing was held (without any previous notice to Davidson) on November 20 and the trial court quashed the subpoenas citing privacy concerns and claiming that Davidson was "on a fishing expedition."

Jesyca and Kathy both moved for summary judgment on August 29,2008 on the grounds of statutory immunity under I.C. 16-1606. Defendant Benjamin Puckett (Ben) moved for summary judgment on the same grounds on October 7. Davidson opposed the summary judgment motions on November 6, 2008. Hearing on summary judgment was held on Nov. 20. At that time, the trial court ordered additional briefing on whether, under the provisions of Title 16, jury trial and the rules of evidence could be dispensed with. Briefs were in by Dec. 3, 2008.

After reviewing those briefs, the trial court held another hearing on January 20, 2009 and called for more briefs on the legislative intent behind Title 16. Briefs were all in by February 3, 2009. The memorandum decision that a jury trial was a right and that the trial court would decide as to the immunity during the summary judgment process was filed on Feb. 17, 2009.

In a memorandum decision on March 2, 2009, the trial court granted immunity to Jesyca for all her reporting, including her claims in the child custody case and petitions for domestic violence protection orders. The trial court also granted full immunity to Ben for what was called his "report.". Kathy was not granted immunity as the court found she had not made a report under I.C. 16-1605. Another trial date was set for June 15 on all remaining claims.

At a pre-trial conference on May 7, 2009 Davidson requested, and was granted by the trial court, voluntary dismissal of all remaining claims not covered by partial summary judgment so as to facilitate the undertaking of this appeal.

STATEMENT OF FACTS

1. March 6, 2007: Jesyca and Kathy reported child abuse of three year old S. to Health and Welfare and Nampa P.D. Result: No abuse took place, Unsubstantiated and Unfounded.

2. June 26: Jesyca and Kathy reported child abuse of three year old S to Health and Welfare. Named Davidson as the alleged abuser. Result: No abuse, Unsubstantiated and Unfounded.

3. July 17 at approx. 9 A.M: Jesyca was released from Ada County Jail after serving a seven day sentence for DUI. Ben picked Jesyca up from jail and they retrieved the kids from Kathy.

4. July 17 at 8:24 P.M: Jesyca and Ben appeared at St. Luke's emergency room to demand a vaginal examination on three year old S. Supposedly S. had touched herself and said "Grandpa."

5. July 17 at 8:35 P.M: The 3 year old child was subjected to a thorough medical and vaginal examination. The report states "there is no evidence of trauma at this time." Dr. Christoph A. Gnadinger concluded: "...the patient does not have obvious physical evidence of abuse..."

6. July 17: Health and Welfare opened an investigation and closed it at 11:21 P.M. that same night. Result: Unsubstantiated, insufficient evidence. No law enforcement referral.

7. July 18: without knowing of the false reporting, Renato Davidson (Renato) filed a Motion to Modify Custody in Canyon County seeking full custody over the two girls and had it served upon Jesyca during the morning hours of July 19.

8. July 19: Jesyca allegedly called Health and Welfare and according to her affidavit of July 30, was advised to make a report to the Caldwell Police. Jesyca also claims she was advised to return the children as usual to Renato's custody on Thursday, July 19 at 6:00 P.M.

9. July 19 at 4 P.M: Jesyca called Renato and told him for the first time her story that Davidson

had molested the 3 year old girl and that the girl's statement and the medical examination proved it. She also claimed that Health and Welfare and Child Protective Services was conducting an investigation and then refused his request to provide Renato a copy of the medical report.

10. July 19 at 6 P.M.: Jesyca and Ben appeared at the exchange location in Nampa in Ben's car and dropped off the two girls with Renato. No comments or special instructions were given by Jesyca. Renato's mother, Laura Davidson, was also present at the exchange as a witness.

11. July 19 at 6:17 P.M.: Jesyca and Ben appeared at the Canyon County Sheriff's Department and made a report to Deputy Crawforth, claiming to have witnessed a violation of IC 18-1508.

12. July 20: Renato filed a Motion for Emergency Ex Parte Hearing for Temporary Custody. Hearing was set for August 9.

13. July 21 at 10:00 A.M.: Renato and Jesyca exchanged text messages. Jesyca told Renato that she had the medical report, that it confirmed abuse, and that S. had identified Davidson as the molester. Renato asked Jesyca to provide a copy of the medical report, but she again refused.

14. July 21 at 4:00 P.M.: Renato went to the Boise Police Department and requested they investigate why Ben was having contact with his daughters when they were bare naked. Renato had not even been told Ben's last name by Jesyca. No investigation was made by Boise P.D.

15. July 22: Renato exercised his right under the divorce decree to have his daughters in his custody for two straight weeks of vacation, mainly to keep them safe from Ben.

16. July 24: Jesyca petitioned Magistrate Judge Russell Comstock in Ada County for two domestic violence protection orders - one against Davidson for sexual abuse of S. and one against Renato for allowing the abuse to occur. Jesyca made it clear she wanted sole custody of the kids.

17. July 25: Judge Comstock dismissed both of Jesyca's petitions - "Innuendo, no proof."

18. July 30: Mr. Prior filed several ex parte motions in Canyon County, the primary one being for Emergency Temporary Custody, taking control of the hearing already set for August 9.

19. August 2: Detective Martineau conducted interviews at the Sheriff's station in Caldwell, of Davidson, of Jesyca, and of Ben. No arrests were made, no charges filed.

20. August 9: an emergency hearing was held in front of Magistrate Judge Southworth, who has jurisdiction over S. and her sister, by way of Renato's divorce decree. The Judge verbally ordered Davidson and Ben to have no contact with the children for an indefinite period of time. The judge also ordered that the joint custody arrangement from March 9, 2007 remain in effect.

21. October 10: Detective Martineau referred the case to the Prosecutor's office for possible filing of charges. So far, there is no explanation for the two month delay in taking this action.

22. On or about October 24: the Canyon County Prosecutor's office declined to prosecute Davidson due to the complete lack of any evidence of abuse and the case file was closed.

23. November 15: upon Renato's motion, through his counsel Alan Coffel, Judge Southworth heard a Motion to Modify Protection Order to reestablish Davidson's visitation. Judge Southworth continued until November 27, in order to examine the closed case file.

24. November 27: Judge Southworth examined all of the documents in the closed police investigative case #C07-12832, and ruled that he found no legitimate privacy interest or law enforcement purposes would be violated by making the records public in the case. The judge also told both Mr. Coffel and Mr. Prior that he saw no abuse in the record before him.

25. Renato and Jesyca then entered into a stipulated agreement, signed by Judge Southworth, that Davidson's visitation with his granddaughters be reestablished effective immediately.

26. On or about January 8, 2008: Jesyca went unexpectedly to visit an acquaintance, Seneca Crow, of Boise, and voluntarily told him a totally exaggerated version of the events described herein, in front of David Eugene Pierce and one other witness, claiming that the investigation of Davidson was still ongoing, that court action in the case was pending, and that Seneca Crow had better not let Davidson ever be around his own small child for fear of molestation by Davidson.

27. On or about January 8: Seneca Crow called his ex-wife Jessica Tanner, also of Boise, and made a death threat against Davidson. When Davidson found out about the death threat, he prepared and filed this lawsuit pro se.

ISSUES PRESENTED ON APPEAL

I) DID THE TRIAL COURT APPLY THE WRONG STANDARDS IN GRANTING STATUTORY IMMUNITY UNDER I.C. 16-1606 TO JESYCA AND BEN?

II) DID THE TRIAL COURT MISAPPLY I.R.C.P. 12(b)(6) AND ERR IN GRANTING IMMUNITY TO ATTY. PRIOR UNDER THE CASE LAW PRECEDENT OF MALMIN V. ENGLER, 124 IDAHO 733?

III) DID THE TRIAL COURT ERR BY ALLOWING INADMISSIBLE EVIDENCE TO INFECT THE SUMMARY JUDGMENT PROCEEDINGS WITHOUT FOLLOWING ANY ESTABLISHED PROCEDURES FOR DETERMINING RELEVANCE, RELIABILITY, OR ADMISSIBILITY.

SUMMARY OF ARGUMENT

I) THE TRIAL COURT APPLIED THE WRONG STANDARDS IN GRANTING STATUTORY IMMUNITY UNDER I.C. 16-1606 TO JESYCA AND BEN.

a) Statutory immunity, opposed to qualified immunity

i) Common law state tort action versus constitutional action

ii) Professional versus "other person" reporters/ actors

iii) Wyoming statute and case cite completely inapposite

iv) Trial court misconstrued scope of immunity under I.C. 16-1606

b) Misapplication of bad faith, malice, and reasonable belief standards

i) *Rosenberger* case inapposite

ii) Jesyca's proven dishonesty and demonstrated malice

iii) Ben's proven dishonesty and admitted hatred, bias, and prejudices

iv) Idaho legislature intends for suits like this one to go forward

c) Summary judgment standards same despite defense of immunity

i) Idaho trial courts bound by higher court precedents

ii) Idaho Supreme Court has rulings on point of statutory immunity

iii) Disputed, fact-bound cases not appropriate for summary judgment

iv) Trial court not allowed to make credibility determinations

II) THE TRIAL COURT MISAPPLIED I.R.C.P. 12(b)(6) AND ERRED IN GRANTING IMMUNITY TO ATTY. PRIOR UNDER THE CASE LAW PRECEDENT OF MALMIN V. ENGLER, 124 IDAHO 733.

a) Facts as presented in complaint don't support attorney immunity

i) Trial court ignored or misconstrued facts presented in complaint

ii) Prior violated Idaho statutory law and was negligent

iii) Prior violated Idaho Rules of Professional Conduct and was negligent

iv) Prior demonstrated improper purpose and ulterior motive

b) Malmin v. Engler inapposite to this case

i) Defamatory statement versus abuse of process

ii) One time defamatory speech versus four month long course of conduct

c) Trial court never properly specified conditions of dismissal

i) With or without prejudice?

ii) No final judgment ever entered as to Prior

iii) If service improper, supposed dismissal came before six month limit

III) THE TRIAL COURT ERRED BY ALLOWING INADMISSIBLE EVIDENCE TO INFECT THE SUMMARY JUDGMENT PROCEEDINGS WITHOUT FOLLOWING ANY

ESTABLISHED PROCEDURES FOR DETERMINING RELEVANCE, RELIABILITY, OR ADMISSIBILITY.

a) Affidavits of Defendants should have been stricken in whole or in part

i) Statements not made from personal knowledge

ii) Affiants not competent to testify to facts alleged

iii) Statements inadmissible hearsay, speculative, conclusory

iv) Defendants' statements prima facie false, creating factual disputes

v) Defendants offered no evidence except their affidavits

vi) Trial court admits Renato's hearsay statement inadmissible at trial

b) Trial court refused to hold hearing on threshold issues of admissibility

i) Trial court ignored Idaho case law precedent of Field and Grist

ii) Trial court ignored U.S. Supreme Court precedent of Idaho v. Wright

iii) Statements do not fall within an established hearsay exception

iv) Trial court refused to consider surrounding circumstances

v) Trial court wrongly concerned with privacy of lawbreakers

c) Defendants offered nothing to rebut presumption of unreliability

i) Defendants developed no evidence during discovery

ii) Defendants declined to cross examine Renato

iii) Defendants did not say on what grounds they offered statements

CONCLUSION

THIS CASE SHOULD BE REMANDED WITH SPECIFIC INSTRUCTIONS.

ARGUMENT

I) THE TRIAL JUDGE APPLIED THE WRONG STANDARDS IN GRANTING STATUTORY IMMUNITY UNDER I.C. 16-1606 TO JESYCA AND BEN.

The trial court found little precedent as this case "appears to be a matter of first impression in Idaho" (R.Vol.III, P.495, L.2). The trial court also found that Davidson did not pursue this case frivolously or maliciously, and admitted that Davidson probably has a reasonable argument on appeal about the dependence upon a Wyoming case by the trial court which Davidson contends is inapposite (ibid. L.1-11, see detailed argument below). Other case law supplied by counsel for Defendants blurred the line between constitutional violations and state statutes, and where Jesyca and Ben, "other person" reporters (I.C. 16-1605) with personal axes to grind against Davidson, were extended the same credibility and status as professionals like police officers, teachers, doctors, and social workers (for example, see Defendant's Legislative History Information, R.Vol.III, P.396, including an outdated Idaho Attorney General's Opinion, No. 93-2, directed toward school teachers only, ibid. P. 403, and a 9th Cir. case from 1986, *White by White v. Pierce County*, 797 F.2d 812, ibid. P. 414, dealing with police officers and federal constitutional rights violations). These off-point cases and misleading tactics affected the trial judge, who then attempted to forge a new, unique standard completely out of line with Idaho law.

Atty. Troupis promoted the erroneous notion that I.C. 16-1606 creates a presumption of good faith and misled the trial court that Davidson is required to rebut that presumption to overcome the automatic granting of immunity (GosneyTr.P.222, L. 12-15). In fact, Jesyca and Ben can point to no authority in Idaho to support such a presumption, especially not the plain language of the statute. Troupis also dragged out a red herring that Davidson must prove actual malice to withstand summary judgment on the slander per se under I.C. 16-1606 (citing to *Clark v. Spokesman Review*, 144 Idaho 427, R. Ex. 20, p.5., see also GosneyTr.P.182 L. 1-8).

Atty. Duggan (for Ben) contributed to the confusion by claiming "good faith" as a newly created statutory affirmative defense to slander per se (GosneyTr.P.184, L. 3-20, AndersonTr. P. 41, L. 5-21), while never shouldering the burden of proof to support it save a self-serving, speculative, conclusory affidavit filled with inadmissible hearsay (see Argument III, below).

Jesyca and Ben performed an obvious "bait and switch" by pretending up until summary judgment that they would proffer evidence of Davidson's guilt to support their defense of truth, and even had the trial judge himself supporting them on that point (GosneyTr.P.74, L. 9-25, P. 75) when a basic reading of the facts in the complaint would have dispelled the notion that there was any truth to the allegations of abuse against Davidson (R. Vol. I, P. 17-20). Davidson claimed at that time that the discovery efforts of Jesyca and Ben were made for the improper purposes of harassment and to cause anxiety and embarrassment. He moved for a protective order, which was denied by the trial judge who could not distinguish between discoverable matters and irrelevant matters (GosneyTr. P. 66, L. 10-15, P. 74, L. 4-22, P. 85, L. 20-25, P. 86-89, L. 14). Obviously, it aided Jesyca and Ben's cause for the trial judge to wrongly assume they had actual evidence of Davidson's guilt; as a result Davidson was treated with the disdain afforded a convicted child molester throughout most of the proceedings. Then, when Jesyca and Ben utterly failed to back up their affirmative defenses with admissible evidence at summary judgment, Atty. Troupis continued the sleight of hand lawyer tricks, suddenly replacing the defense of truth with his bald, blatantly unfair and open-ended opinion: "...we will never know if George Davidson molested Renato and/or S., and that is not the issue..." (R. Ex. 20, p.4., see also Davidson's objection, GosneyTr.P.202 L. 3-25, P. 203, L. 1-10). For Davidson, bearing the burden of proof of falsity on the slander per se, this biased environment created an impossible situation for a pro se Plaintiff, where no matter how well-supported by law or facts or how well-reasoned Davidson's arguments, they were rejected out of hand due to an unspoken presumption

of guilt. The hidden premise was:the more you proclaim innocence, the more guilty we find you.

The trial court was apparently unprepared for the complexity of a slander per se case (where every detail is important) and counsel for Jesyca and Ben purposely muddied up the waters at every opportunity, continually using inflammatory words and phrases like "sexual assault" (GosneyTr. P. 66, L. 10-15) and "molested" (R. Ex. 13, #4) where there is not a scintilla of evidence to back up such claims. Even when the trial court specifically ruled that Davidson's granddaughter had responded to a question rather than making a statement or statements (GosneyTr.P.91-95, see also R.Vol.I, P.17, Statement of Facts, para. 2, and R.Vol.II, P.193), Jesyca and Ben continued to claim the girl made "statements" and "disclosures" to the bitter end (R. Ex. 18, #9,10, also R. Ex. 13, #4). Atty. Troupis' crowning achievement came when he concocted imaginary threats of physical violence by Davidson and then used those to make sure Jesyca and Kathy never even got deposed although the trial court ultimately only found the two female parties would be "uncomfortable." being deposed by Davidson (R. Vol. I, P. 120, para. III, see also ChristensenTr. P. 38, L. 3-18, P. 43, L. 4-25, P. 44, L. 1-7, also GosneyTr. P. 151, L. 14-21). Ben in the meantime fled to Las Vegas, thus insuring that his deposition only took place by telephone (GosneyTr. P. 128, L. 22-25, P. 129, L. 1-3). Little wonder that all these overt manipulations were allowed to continue, as the trial judge admitted in open court that he only had seven months experience on the district court bench (ibid, P. 39, L. 17-22), whereas Atty. Troupis likes to brag he has over 32 years experience as a trial lawyer (ibid. P. 57, L. 17).

In interpreting an Idaho statute, this Court exercises free review, looks to the plain language of the statute to discern its meaning, and that meaning must give effect to the intent of the legislature (*Paolini v. Albertson's, Inc.* 143 Idaho 547,551). Davidson contends that the Idaho legislature intended for people who abuse the system by reporting in bad faith or with malice get punished and fact-bound suits like this one proceed to jury trial. I.C. 16-1606 and 1607 do not

automatically grant immunity to everyone who reports child abuse; rather, immunity is denied and liability created upon a showing of bad faith or malice. Davidson argues the immunity should be denied at summary judgment, and that should be done using the normal standards, by the moving party first presenting evidence of no factual disputes, and then the nonmoving party presenting evidence of material facts in dispute, and with the evidence liberally construed and all reasonable inferences drawn in favor of the nonmoving party. If reasonable minds could reach different conclusions or draw differing inferences from the evidence, summary judgment (and immunity) should be denied *(McPheters v. Maile*, 138 Idaho 391,394) and a trial should be had.

The Wyoming case erroneously depended upon by the trial court, *May v. Southeast Wyoming Mental Health Ctr.*, 866 P.2d 732, cites to their statute, Wyo. Stat.14-3-205 which, like I.C. 16-1605, requires any person with reasonable belief of a child being abused to report it to authorities within twenty-four hours. The difference between Idaho law and Wyoming law becomes apparent in the immunity statute, 14-3-209, which states that a person reporting abuse in good faith will be immune from any civil or criminal liability and that the "good faith...shall be presumed" (id. at 741). The imposition of this foreign law upon Davidson forces him to rebut a presumption; a much higher standard than proving the existence of material factual disputes concerning bad faith or malice under I.C. 16-1606 (malice is not even an element in Wyoming, nor does their statute create a criminal penalty for failing to report as does I.C. 16-1605).

To further distinguish the cases, the child victim in *May* had reported and described actual instances of sexual abuse which were investigated and substantiated by social workers and medical personnel. May was referred to law enforcement, probable cause was found, and he was arrested, charged, tried, and convicted of child abuse by a jury (in Colorado). May's conviction was only overturned on the point of a wrongful jury instruction. The prosecutor then declined to refile the charges as the victim had recanted her story in the meantime (id. at 737). In the instant

case, Davidson's three year old granddaughter never accused him of anything and there were never any accounts of actual sexual abuse. Jesyca and Ben's fantastic allegations were investigated four different times and each time proven to be unsubstantiated and unfounded (R. Vol. II, P. 246-251, P. 252-254, 255-257, P. 218-223, R. Vol. I, P. 19, #22). A medical examination on the girl (demanded by Jesyca upon direct orders from her mother, codefendant Kathy Guthrie) showed no signs of abuse (R. Vol. II, P. 264, "Initial Assessment and Plan"). Davidson was never arrested, charged, tried, or convicted of child abuse (R. Vol. I, P. 14, para. III b) and Davidson's visitation with his granddaughters was reestablished by stipulated agreement of Jesyca, the false accuser, herself (R. Ex. 4, #13). Canyon County Magistrate Judge Southworth, who has jurisdiction over the Davidson granddaughters until the age of majority, looked at the evidence in the case and wondered out loud where was the supposed abuse (ibid). The reporters sued in *May* were social workers and medical personnel with little or no motive to fabricate, but the evidence here supports the contention that Defendants made false reports for revenge and to get Davidson to drop a small claims suit against Jesyca, and for his son (Renato) to drop attempts to gain sole custody over the girls (R. Ex. 7, #19, #21, also R. Ex. 4, #9-13).

The trial court compounded its error by following what it said was the precedent of the Wyoming case and wrongly enlarging the scope of immunity to cover Jesyca's statements in what were termed "related actions" including "claims made as part of the child custody case and her petition for a domestic violence protection order." (R.Vol.III, P.438E). That is an overreach flying in the face of the plain language of I.C. 16-1606, which extends immunity only to "any such judicial proceeding resulting from such report" not "related to" (emphasis added). Davidson has thoroughly argued the point that the trial court misconstrued the statute, and that Jesyca should not be rewarded for perjury (filing falsified petitions for domestic violence protection orders, see detailed argument in which some of Jesyca's statements are proven false by evidence

in opposition to summary judgment, R.Vol.II, P.198-199, see also, Renato's birth certificate, R.Vol.II, P.258, also the perjured petitions themselves where Davidson is repeatedly referred to as "step father of Renato" and "step grandfather of S. and R.", R.Vol.II, P.316-332, see also this Court's decision in *Hopper v. Hopper,* 144 Idaho 624, "Because the mother violated the law by...filing a false protection order, she should not have received...benefits...") and abuse of the legal process in his Motion for Reconsideration (R.Vol.III, P.440-442), which was flatly denied by the trial court (R.Vol.III, P.459-461). It must also be noted that Jesyca filed the two sworn petitions for domestic violence protection orders not to protect the children, but for her own declared ulterior purpose of seizing custody of the two little girls (R.Vol.II, P.321, para. 7, L. D, also P.328, para. 7, L. D), something this Court has said is outside the purview of Title 16 CPA actions (*In Re: Doe*, 134 Idaho 760), if "protecting the children" is what Jesyca claims now.

The trial court also erred in depending upon *Rosenberger v. Kootenai Co. Sheriff's Dept.*, 140 Idaho 853, a 42 U.S.C.s.s.1983 excessive force claim where qualified immunity was granted to police officers during the course of their official duties. In *Rosenberger* this Court stated at 857: "Excessive use of force claims are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred" (emphasis added). The trial court took this phrase out of context and wrongly applied it to reporting of abuse under I.C. 16-1605 (R. Vol. III, P. 438C, L.5-7). Yet by contrast a police officer must "make split-second judgments in circumstances that are tense, uncertain, and rapidly-evolving..." (*Rosenberger* at 859). That is the opposite of the instant case, where Jesyca began making unsubstantiated reports in March 2007 and then continued serially making at least six more unsubstantiated reports over the next several months (R. Vol. II, P. 246-251, P. 252-254, P. 255-257, P. 262, P. 218-223, P.316-324, P. 325-332). So, what was known to Jesyca "at the time the report was made" depends upon which of the seven reports one is referring to; they were all made under different circumstances, at

different times and locations, to different agencies, with differing intentions, and covered a wide enough time span to allow for plenty of reflective thought and formation of motive, intent, and of a conspiracy involving Kathy Guthrie, Ben, and John Prior, as well as preparation, plan, knowledge, and therefore the distinct probability that bad faith and malice could enter the picture.

What Ben knew "at the time the report was made," the evidence shows was pure hearsay relayed to him either by Jesyca or Kathy over a period of at least two months and which he uncritically accepted as true (R, Vol. II, P. 369, p. 35, L. 17-25, p. 36, L. 1-6). Davidson has argued extensively that Ben should not be granted immunity as he never actually made a report under I.C. 16-1605 (Motion for Reconsideration, R, Vol. III, P. 442-443) and was negligent per se in violating a statute requiring him not to make a police report of an offense of which he had no personal knowledge (I.C. 18-5413(1), also see R. Vol. II, P. 225, p. 5, L. 5-10). The mere fact that Ben was not charged with making a false police report should not be enough to exonerate him civilly, as Ben's malicious motives were on full display in his testimonial statement to the police; he openly expressed his hatred, bias, and prejudice against Davidson (whom Ben had been led to believe was an "admitted child molester") to CC Sheriff's Detective Martineau (R.Vol.II, P.226, p. 4, L. 14-25. P. 227, p.5) as well as to Deputy Donahue (R.Vol.II, P.348, p. 61, L. 17-25. P. 349, p.65, L. 5-15), even threatening to kill Davidson at one point during the interview (R.Vol.II, P.349, p. 67, L. 4-12). Detective Martineau himself certainly considered Ben more of a suspect and an accessory to making a false police report than a witness (R.Vol.II, P.227, p.8, L. 16-25, P. 228, p. 9, L. 1-25, p. 10, L.1-12). "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." (*Hunter v. Bryant*, 112 S.Ct. 537). "Falsehood and the absence of probable cause will amount to proof of malice." *White v. Nicholls*, HOW., at 291, (1845) cited in *Briscoe, et al v. LaHue, et al*, 460 U.S. 325,357. See also I.C. 16-1606,1607.

As in *May*, Rosenberger was arrested, charged, tried, and convicted by a jury of resisting

and obstructing officers, which diminished his claim that the officers had used excessive force. Davidson has never been arrested, charged, tried, or convicted of child abuse which adds weight to his claims against Jesyca and Ben for making false allegations of child abuse against him.

The *Rosenberger* Court, quoting *Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th Cir. 1985), draws a bright line between constitutional violations and statutory ones: "Allegations about the breach of a statute or regulation are simply irrelevant to the question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right." The converse must also be true: "Allegations about the breach of a constitutional right by a government official are simply irrelevant to the question of a private person's eligibility for immunity under a state statute." The U.S. Supreme Court, dealing with witness immunity in the case of *Briscoe, supra*, further clarifies the point: "The Congress that enacted s.s.1983 had concluded that ""a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right..."" citing *Monroe v. Pape*, 365 U.S. 167,196.

Davidson believes the trial judge erred further when he took another phrase out of context from *Rosenberger*, "...to deny summary judgment any time a material issue of fact remains on the excessive force claim, could undermine the goal of qualified immunity to avoid excessive disruption of government..." (emphasis added) and convoluted it into the following new standard which is contrary to Idaho law: "...issues of material fact do not preclude summary judgment on the basis of immunity from suit." (R. Vol. III, P. 438B, L. 11-15). This after the trial court had reminded Davidson several times at the summary judgment hearing on November 20,2008 to stay focused on material factual disputes (GosneyTr. P. 192, L. 23-25, P. 193, L. 1-15, P. 200, L. 14-23, P. 205. L. 6-8). The trial court is not free to change the rules in the middle of the game.

The *Rosenberger* Court, referring only to the two-part analysis required in 42 U.S.C.1983 cases after *Saucier v. Katz*, 533 U.S. 194, could not have anticipated that *Katz* would be

overturned on the two-part analysis requirement by *Pearson v. Callahan*, 128 S.Ct. 1702. The U.S. Supreme Court said in *Katz*, referring to factual disputes at 207: "Underlying intent or motive are not relevant to the inquiry..." citing *Graham v. Connor*, 490 U.S. 396 (completely the opposite of the bad faith and malice inquiry of I.C. 16-1606). The *Katz* Court went on to caution that even in a constitutional violation suit, the material facts must still be accounted for:

> "...granting summary judgment where...the challenged conduct is objectively reasonable based upon relevant, undisputed facts...(but) when a plaintiff proffers evidence that the official subdued her with a chokehold even though she complied at all times with his orders, while the official proffers evidence that he used only stern words, a trial must be had" (*Katz*. at 212, emphasis added).

That directly contradicts the trial court's unique standard here, in which fact finding, weighing of evidence, and credibility determinations may be arbitrarily shifted to the trial court at its own discretion if public policy concerns ("disruption of government," i.e. Health and Welfare child protection investigators being called upon as witnesses or subpoenaed to produce non-privileged investigative records) are raised at summary judgment in a case invoking I.C. 16-1606 (R.Vol.III, P.436, L. 18-25 see also, AndersonTr. P. 33-37, L. 6).

In point of fact, this trial judge made dilatory efforts to seize control of fact-finding on a pretext of turning this case into a CPA proceeding under Title 16, and to circumvent Davidson's right to a jury trial (GosneyTr.P.164-167, AndersonTr. P. 23, L. 16-25, P. 24-37, L. 6) which Davidson successfully resisted (R.Vol.II, P.376-382, also R.Vol.III, P.436, L. 8-11). Davidson felt so strongly about the impropriety that he moved for the trial court to disqualify itself for prejudice (R. Vol. II, P. 383-395) which the trial court orally denied at hearing (Anderson Tr. P. 3-22). Davidson argues that when the effort to extra-judicially take control over the fact-finding failed, the trial judge granted immunity as a last resort to simply rid himself of this complex, unpleasant case, in spite of the many unresolved material factual disputes and totally without

due regard for Davidson's constitutional rights or permanently damaged reputation.

> "Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury." *David Steed and Assoc. v. Young,* 115 Idaho 247,249.

Davidson does not believe this Court intended to overturn I.R.C.P. 56 *et seq* with the *Rosenberger* decision, nor to throw out the oft-quoted Idaho standards for summary judgment proceedings simply because a case contains allegations of child abuse, yet that is essentially what the trial court has done here. In place of the usual standards, the trial court creates a new standard only applicable to "special" cases like this one: "...unlike other cases, where claims of immunity are involved issues of material fact do not preclude an award of summary judgment" (emphasis added, R.Vol.III, P.461, L.2-4). That completely rejects the conclusion of this Court in the case of *Rees v. State Dept. of Health and Welfare*, 143 Idaho 10,29, "...the ITCA does not provide either the department or Ott with immunity from suit because there are genuine issues of material facts as to whether Ott competently performed her investigation..." (emphasis added).

One can easily argue that the *Rees* case was far more horrific and undesirable than the instant case and that the government agency, Health and Welfare, being named a party and sued was far more "disrupted" in that case than here. In this case however, the trial court demonstrated its overzealousness to "avoid disruption of government" by quashing Davidson's subpoenas duces tecum for the depositions of the Health and Welfare workers who took the various reports from Jesyca (R. Vol. II, P. 351-358, see also Gosney Tr. P. 232-249) and who allegedly gave her legal advice, and Jesyca claims, a supposed law enforcement referral (R. Vol. II, P. 274, 275, #6-8, P. 256-257), both material facts which Davidson disputes. The development of critical evidence concerning the bad faith or malice expressed to the agency tasked with

investigating child abuse under Title 16 should have been allowed (I.R.C.P. 26(b), "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..."). The trial judge's reasoning in this area is altogether unclear from the record, nor did he state what were the legal standards upon which he based his decision (Gosney Tr. P. 232-249). This case is all about false reporting to Health and Welfare and the police and the courts, but the trial court apparently did not want the truth to come out about the social workers' findings on the mindset behind Defendants' statements (Gosney Tr. P. 238-239).

The trial court, in granting summary judgment goes on to admit that "issues of fact exist in this case" yet granted immunity anyway based upon its conclusion that "considering all of the information available to (Ben) and (Jesyca) at the time the reports were made, the court is satisfied there was a good faith basis for those reports" (R.Vol.III, P.461, L.6-8). Davidson strongly contradicts this with evidence. The trial court even contradicts itself because earlier in the proceedings, in granting Davidson permission to put punitive damages in front of the jury, the same trial judge had said "Through his various supplemental documents, (Davidson) has shown he has sufficient evidence of false representations by the Defendants to support an award of punitive damages on that basis" (R.Vol.III, P.432, L.12-14). That same evidence was also in the record during summary judgment, and Davidson cannot reconcile how Jesyca and Ben were simultaneously making "false representations" and acting in good faith, since by definition, good faith equals "honesty in belief or purpose" and bad faith equals the opposite, "dishonesty in belief or purpose." (Black's Law Dictionary). "Summary judgment is not proper where the depositions and affidavits raise any question as to the credibility of witnesses." (*Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, *Athay v. Stacey*, 146 Idaho 407).

To overcome the statutory immunity, Davidson believes he was only required to "come forward with sufficient evidence to create a genuine issue of material fact" (*P.O. Ventures, Inc. v.*

Loucks Family Irrevocable Trust, 144 Idaho 233,237) about the bad faith or malice behind the reports made by Jesyca and Ben, both of which are state of mind questions closely related to "underlying intent or motive." Davidson was not required to prove his entire case at summary judgment with the preponderance of the evidence, because state of mind questions like bad faith or malice are ultimately left to a jury (*Wiemer v. Rankin,* 117 Idaho 566). Therefore, Davidson presented both direct and circumstantial evidence concerning the "dishonesty in belief or purpose" and the "desire to inflict injury or suffering on another" (Random House College Dictionary Rev. Ed. definition of malice) of Jesyca and Ben toward Davidson. Even circumstantial evidence alone has been found sufficient by this Court to fend off a state statutory immunity defense under summary judgment, so long as it raises a material factual issue in dispute (*Sherer and Santillanes v. Pocatello Sch. Dist. No. 25, et al,* 143 Idaho 486,490).

Idaho district courts are bound by the precedents of the Idaho Supreme Court and the Idaho Court of Appeals (*State v. Guzman*, 122 Idaho 981, *State v. Grist,* 205 P.3d 1185). Trial courts of this state are not free to create a "special" class of cases given disparate treatment just because child abuse has been alleged (*Grist, supra).* Criminal cases and civil cases use many of the same standards, with the burden of proof and constitutional issues comprising the main differences (*Morgan v. Foretich,* 846 F.2d 941, esp. see special concurrence, P. 955, footnote 2). Although there appears to be no case law dealing directly with I.C. 16-1605,1606, and 1607 (which should be viewed *in pari materia*) in the context of a common law tort case, there are Idaho cases the trial court could have relied upon as precedent involving summary judgment proceedings where statutory immunity has been raised as a defense. In *Uranga v. Federated Publ. Inc. DBA The Idaho Statesman*, 138 Idaho 550, which dealt in a different way with false reporting of child sexual abuse, Uranga's invasion of privacy and intentional infliction of emotional distress torts against the Statesman were dismissed on immunity grounds by the

district court. Like Davidson, Uranga was never arrested or charged, so he was a private person relying on the privacy of personal information. The First Amendment analysis of *Uranga* is largely irrelevant here, but Idaho precedent is that even when reviewing a defamation case under First Amendment immunity, "whether summary judgment should be granted ...is determined in the same manner as all other cases in which it is claimed that a case should not go to the jury...the trial court's sole inquiry is to ascertain whether issues of material fact exist...(internal citation omitted, emphasis added, *Steele v. The Spokesman Review, et al.*, 138 Idaho 249).

As to state statutory immunity, the *Uranga* Court analyzed whether summary judgment was appropriate under Idaho's fair reporting statute, I.C. 6-713, which grants immunity to newspapers for defamatory statements made without malice under specified conditions. In reversing the trial judge, the Court concluded the circumstances of Uranga's case could be likened to a defamation action and listed several disputed facts and circumstances put forward by Uranga which implicated liability for the Statesman and which the district court had erred in disregarding. The Court stated:"construing the record liberally in favor of Uranga, and drawing all inferences in his favor, we find reasonable people could reach different conclusions from the evidence..." In remanding for a jury trial, the *Uranga* Court concluded that immunity should not have been granted under the state statute. Bearing in mind that a civil jury trial is a constitutionally protected right (U.S. Const. Amend. 7, Idaho Const. Art. I, Sec. 7, I.R.C.P. 38(a), *David Steed and Assoc. v. Young,* 115 Idaho 247,249, see also R. Vol. II, P. 377) that is the same conclusion the trial court should have reached in the instant case - present the evidence - let the jury decide.

Jesyca and Ben have utterly failed to meet even their initial burden of presenting evidence of a lack of disputed facts, or anything proving that they acted in good faith or without malice other than their own self-serving, speculative, conclusory affidavits which contain much inadmissible evidence under I.R.C.P. 56(e) *(Hecla Mining. Co. v. Star-Morning Mining Co.*, 122

Idaho 778, cited in *Dulaney v. St. Alphonsus Reg. Med. Ctr., et al,* 137 Idaho 160). In granting immunity, the trial court used the wrong standards, misconstrued Idaho law, ignored its own findings, ignored and misconstrued evidence, failed to construe the evidence liberally in favor of Davidson, and implicitly ruled upon the credibility of the parties and witnesses, apparently finding Jesyca and Ben more credible (regardless of an earlier ruling that they were lying). "The determination of a party's credibility may not be determined on summary judgment if that credibility can be tested by testimony in court before the trier of fact." (*Argyle v. Slemaker*, 107 Idaho 668,670, *Intermountain Forest Mgmt. Inc., v. Louisiana Pac. Corp.*, 136 Idaho 233,238).

II) THE TRIAL JUDGE MISAPPLIED I.R.C.P. 12(b)(6) AND ERRED IN GRANTING IMMUNITY TO ATTY. PRIOR UNDER THE CASE LAW PRECEDENT OF MALMIN V. ENGLER, 124 IDAHO 733.

The ultimate reason the trial judge gave for dismissal as to Prior is that Davidson failed to state a claim upon which relief could be granted (R.Vol.I, P.54-56). Although Prior was the first one to file an affidavit, prompting Davidson to respond with four affidavits of his own, the trial court opted to not consider the affidavits and decide the matter based solely upon the allegations in the complaint (*Owsley v. Idaho Ind. Comm.,* 141 Idaho 129,133). However, the trial court erred by not applying the correct standard under I.R.C.P. 12(b)(6) in which all the reasonable inferences that could be drawn from the complaint were supposed to be drawn in favor of Davidson. (R. Ex. 3, P. 1-4, "The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims," *Orthman v. Idaho Power Co.*, 126 Idaho 960.961). Viewing the complaint in the light most favorable to Davidson, the trial court should not have dismissed Prior scot-free without any evidence being presented.

The trial court ignored and misconstrued the facts from the complaint, depending exclusively upon a purposeful misquote from the complaint: "Mr. Prior's role was to push

matters through court." (R.Vol.I, P.56, L.1-12). Yet, a true reading of the complaint shows that the period does not occur after the word "court" and the actual quote should have included the qualifying phrase "with no regard for law, evidence, or the truth." (R.Vol.I, P.16, p.5). Clearly, any lawyer doing his duty to a client may "push matters through court" and could hardly be sued on that basis, but that performance can also turn into intentional tortious conduct when done "with no regard for law, evidence, or the truth." The intentional misquote proves to Davidson that the trial court was already predisposed toward dismissal, the complaint notwithstanding.

Also, the section misquoted by the trial court above is merely from the listing of the actors, not a listing of their actions. The complaint alleges that Defendants (meaning Prior, acting in concert with Jesyca), "...acted willfully, abusing the judicial process and unduly influencing a court with a motion backed by misleading affidavits and baseless rhetoric, two medical reports which actually proved the opposite of Defendants' contentions, but were proffered as bolstering their claims, confidential police information which should have been inadmissible, and did thereby cause Plaintiff to lose contact with his granddaughters for four months without probable cause... (and)...as an ulterior purpose Defendants attempted to use the false allegations to coerce Plaintiff into dropping a small claims action and for Plaintiff's son to drop a Motion to Modify Child Custody. Also, Defendant John Prior, an attorney, attempted to extract revenge upon Plaintiff for raising an ethical complaint against him with the Idaho Bar Association..." (R.Vol.I, P.14, L.14-29). In addition, under section V. of the complaint, Negligence, it is alleged that Prior "had an ethical duty to not present misleading information to a tribunal and not to allow his client to proceed on a course of action he knew or should have known was without just cause." (R.Vol.I, P.15-16, s.V, see also, I.C. 3-201 and the I.R.P.C. 3.1, 3.3, 3.4, 3.5). According to the complaint, after examining all the evidence in the case, Canyon County Magistrate Southworth, who had been moved to ban Davidson's visitation with his granddaughters for supposed child abuse,

stated to lawyers Coffel and Prior that "he saw no abuse in the record before him." (R. Vol. I, P. 19-20, para. 24). Assuming those facts to be true, as the trial court should have under the correct standard, Davidson has a good enough case against Mr. Prior to at least be able to bring forth the extant affidavits and perhaps to develop even more evidence through discovery.

Prior showed the trial court his abusive tactics by repeatedly misstating the facts and the law of this case at the motion hearing held on April 17, 2008, essentially proving Davidson's point about what an underhanded lawyer Prior really is. First, Prior asserted that *Malmin*, supra, stands for the proposition that "any communications, any actions, the filing of pleadings, anything that has some relation to the judicial process that a lawyer engages in is absolutely privileged...whether it is the truth, whether it is done with malice, whether it is done in any way to cause any difficulty for Mr. Davidson" (GosneyTr.P.14, L. 7-19, emphasis added) is covered by absolute immunity in Prior's view. This notion was erroneously adopted by the trial court: "In this case, Mr. Prior's sole issue or basis for his claim that this matter should be dismissed...is that there is immunity for attorneys for conduct and statements made while in the process of dealing with or handling judicial proceedings." (GosneyTr.P.35, L. 11-17). In it's Memorandum Decision and Order of May 21, 2008 (R.Vol.I, P.56, L. 1-12), the trial court reiterates the misinterpretation of *Malmin* and magnifies the error by misstating the facts as if the only tort in the case was slander: "...it appears from the Complaint that the allegedly false allegations attributed to Defendant Prior were part of judicial proceedings related to visitation between Plaintiff and his granddaughters...these allegations were absolutely privileged and will not support this cause of action by Plaintiff..." (id.). Of course the conduct complained of in Prior's case was not merely false allegations (R.Vol.I, P.13-16), which were actually directly perpetrated by Jesyca and Ben with conspiratorial support from Prior and Kathy Guthrie, but rather "...a four month long course of conduct not having to do with protecting the children, which is what

they would like you to believe and that is what they wanted Judge Southworth to believe...But all the facts show there was nothing to protect the children from. And, therefore the ulterior purposes of the abuse of process was...he wanted that small claims thing, he wanted me to drop that...the motion to modify, he wanted that dropped...and then also...he has a personal thing against me because...I took him to the bar association." (GosneyTr.P.40, L. 6-23).

Prior, an attorney with at least ten years experience, demonstrates an appalling lack of understanding of American and Idaho jurisprudence, from which the inference can be drawn that he engaged in intentional tortious behavior in this case at least in part because he doesn't know of any limits on his lawyer power (telling the trial court why he can't be found negligent): "...I have no duty to Mr. Davidson. I have no duty to Mr. Davidson whatsoever." (GosneyTr.P.15-16, L. 24-25,1). Prior should have noted the difference between malpractice and abuse of process and negligence, and carefully read I.C. 3-201 (especially s.s.3,4,6, and 7) and the I.R.P.C. 3.1, 3.3, 3.4, 3.5. To make matters worse, Prior does not even know what "abuse of process" means:

> "...abuse of process is a process under 16-1607, I believe. And that charge arises out of someone going to Health and Welfare and law enforcement and accusing someone of inappropriate conduct with another person. I never did that. It is never alleged that I did that. I can't be brought into this abusive process because it doesn't stand for that very reason." (GosneyTr.P.18, L. 14-21).

Prior, by his own statements on the record, rejects one of America's most important legal precepts, the presumption of innocence, further showing his woeful lack of knowledge and utter disrespect for persons (lecturing the trial court on how it should evaluate his immunity defense):

> "The way the absolute immunity works, Judge, is simply this: This Court has to go through a process of evaluation. And they start this process assuming that the allegations against Mr. Davidson are true and that he molested his child, his grandchild. Once the Court determines and says all right, that allegation is true...then you look back through the proceedings and the judicial proceedings to see if any of the conduct that the attorney engaged in as part of the judicial process had some relation to that."
> (GosneyTr.P.16, L. 21-25,P. 17, L.1-12, emphasis added).

Beside the obvious fact that Prior cites no authority to support this nonsensical scenario, the objectionable use of inflammatory rhetoric and the "presumption of guilt" is far too typical of all the Defendants' behavior in this case. Prior appears to be trying to sway the trial court here on the pretend basis that he has some pretend inside information concerning Davidson's pretend guilt. Never mind that the allegations against Davidson have been investigated by professionals and found time and again unsubstantiated and unfounded, or that no specific act of abuse has ever even been alleged, let alone "molestation" uncovered. The veiled premise utilized here by Prior, and which has infected this case from day one is: "...we accused you of child abuse, you are obviously guilty because we accused you, and good luck proving yourself innocent."

The trial court also erred because it failed to follow relevant precedent concerning the abuse of process tort. Davidson had proffered the case of *Cunningham et al v. Jensen et al*, Idaho Supreme Court Docket No. 31332, which unbeknownst to Davidson, turned out to be a withdrawn opinion that the trial court deemed was "not only an unpublished opinion; legally it no longer exists and is of no force or effect." (R.Vol.I, P.54, L. 9-20). However, assuming that the trial court ever fully read *Cunningham*, there were other cases cited within that decision which are good precedent or they would not have been cited by the Idaho Supreme Court. Since Idaho law is decidedly lacking in precedent concerning the abuse of process tort, it is permissible to turn to other jurisdictions for guidance. The trial court certainly was quick to do this with *May* (bad precedent from Wyoming), and Davidson had pointed out the existence of case law from other states to the trial court at the hearing in reference to *Cunningham,* but was ignored: "They (the Idaho Supreme Court) compared it to other jurisdictions, they compared it to Louisiana, they compared it to California, they compared it to a couple of other jurisdictions..." (GosneyTr.P.30, L. 12-15). In the copy of *Cunningham* provided to the trial court by Davidson, this Court cited *Ulmer v. Frisard*, 694 So.2d 1046 (La. App. 1997) , which in turn quoted the

Louisiana Supreme Court in the case of *Penalber v. Blount,* 550 So.2d 577,582 (1989), that "intentionally tortious actions, ostensibly performed for a client's benefit, will not shroud an attorney with immunity." (694 So.2d at 1048). See also *Shick v. Lerner*, 238 Cal. Rptr. 902 (Cal. Ct. of App. 1987), "an attorney may not, with impunity, in the course of his representation of a client, engage in intentional tortious conduct against third persons." Also, a Montana Supreme Court opinion from 2008, *Seipel v. Olympic Coast Invst.et al,* 188 P.3d 1027, had overturned summary dismissal and allowed an abuse of process claim against a company and their lawyers to go to trial after affidavits proffered by the plaintiff were shown to create material factual disputes about the ulterior motive (to extort cash from plaintiff) and sustain the two elements of the tort.

No Idaho or other precedent has been brought forward by Prior or the trial court to support the dismissal of the abuse of process, IIED, conspiracy, and negligence against Prior. Davidson argues *Malmin v. Engler* deals only with defamatory statements, not intentional tortious conduct; also, that the definition of abuse of process does need to be expanded in Idaho, as this Court set out to do in *Cunningham*, and Davidson rejects the notion that will open the floodgates of frivolous lawsuits against lawyers as Prior self-servingly claimed (GosneyTr.P.27, L. 1-25). Rather, it should provide injured parties like Davidson with a means to fight back against ethically-challenged, "win at all cost" lawyers who are already very powerful opponents under the existing system: "...if he (Prior) can do this and get away with it, then he can do anything and get away with it. He can commit a murder and get away with it, and all he has to say is I was helping my client get her case resolved in her favor" (GosneyTr.P.42, L. 11-15).

Yet another error concerns the fact that the trial court has never issued a final judgment and order dismissing Prior out of the case. It's Memorandum Decision and Order of May 21, 2008 is interlocutory in nature and not a final judgment (I.R.C.P. 58(a) "Every judgment shall be set forth on a separate document."). Even if this Court were to find that the Order and Judgment

as to All Remaining Claims of May 12, 2009 (R.Vol.III, P.470) somehow generically dismissed Prior as well, neither that Order, nor any other document in the record of this case specifically refers to finally dismissing Prior by name. Neither does any Order specify whether or not the claims against Prior were supposedly dismissed with or without prejudice. Therefore, Prior has never been properly dismissed and is still a party to this action.

Finally, if the service by certified mail on Prior was improper and the trial court supposedly dismissed Prior out of the suit on that basis on April 17, 2008 by verbal order (GosneyTr.P.47, L. 4-8), then Davidson should still have had six months from the date of the filing of the complaint (Feb. 19, 2008) to personally serve Prior under I.R.C.P. 4(a)(2). However, the trial court also granted Prior absolute immunity and supposedly dismissed him out of the suit again on May 21, 2008, well before the end of the six month time limit for service under Rule 4(a)(2). Therefore, if this Court overturns the trial court on its *Malmin v. Engler* dismissal and remands this case, it should also order that the six month time limit for service is waived for good cause and allow Davidson to re-serve Prior in person to properly re-join him as a defendant.

III) THE TRIAL COURT ERRED BY ALLOWING INADMISSIBLE EVIDENCE TO INFECT THE SUMMARY JUDGMENT PROCEEDINGS WITHOUT FOLLOWING ANY ESTABLISHED PROCEDURES FOR DETERMINING RELEVANCE, RELIABILITY, OR ADMISSIBILITY.

Jesyca and Ben have proffered no evidence in support of summary judgment other than their affidavits, plus Kathy Guthrie's affidavit, most of which are not based upon personal knowledge, which contain factual misstatements and inadmissible hearsay, in which material facts have been disputed by Davidson, which contradict themselves and each other, which rely upon inadmissible 404(b) evidence which the court has never even tested for reliability, all of which Davidson has objected strongly to in his Opposition to Summary Judgment (R.Vol.II, P.191, par.

c, P. 192-195, 206-207, #17) and at the November 20, 2008 summary judgment hearing (GosneyTr.P.189, L. 1-16, P.195, L. 6-15, P.196, L.5-25, P.197-198) and in his Motion for Reconsideration of Partial Summary Judgment (R.Vol.III, P.443, last para.). The affidavits of Ben, Jesyca, and Kathy should have been at least disregarded by the trial court, if not stricken altogether. Instead, Defendants' affidavits were deemed "established facts," no attempt was made by the trial judge to determine the threshold issue of whether or not they contained admissible evidence, and almost every inference in this case was drawn directly from a favorable reading of Defendants' affidavits by the trial judge with no questions asked and with contradictory evidence proffered by Davidson ignored, misconstrued, or trivialized (R.Vol.III, P.438C, L. 16-26, P. 438D, compare that to R. Ex. 13, 14, 18). Since Jesyca and Ben's entire defense rests solely upon the affidavits, that is reversible error according to the precedent of this Court:

> "The only evidence offered in support of the motion for summary judgment...was the affidavit. If the evidence contained in the affidavit would be inadmissible at trial, the court should not have considered it in ruling on the motion for summary judgment.Because the district court made no determination on the admissibility of this evidence, summary judgment based solely upon the "unrebutted evidence"... contained therein was inappropriate." *Gem State Ins. Co. v. Hutchinson,* 145 Idaho 10,17.

Why the Affidavit of Benjamin Puckett is presumably unreliable, inadmissible, and creates material factual disputes:

R. Ex. 18, #6. "S. approached my chair from behind."

a) No personal knowledge, inadmissible hearsay, incompetent to testify. Omits the ultimate fact that Jesyca only told Ben what supposedly happened, he saw nothing except the video game he was playing at the time (R.Vol.II, P.225, p. 5, L. 1-24).

b) Contradicts Ben's handwritten witness statement to C.C. Sheriff: "S. <u>came up to me</u> and tried showing her privates..." (R.Vol.II, P.221,223, emphasis added). Note that Ben

did not qualify this statement with "Jesyca told me..." (I.C. 18-5413(1)..."knowing that he has no information relating to the offense or danger"). How could a person simultaneously "come up to me" and "approach my chair from behind?". Also contradicts what Jesyca told Deputy Crawforth of CC Sheriff in the July 19, 2007 police intake report: "S. went and sat on the couch next to Jesyca's boyfriend Ben...again spread apart her genital area and said look Ben." (R.Vol.II, P.223, para. 2). In this version the little girl is sitting on the couch next to Ben and spreads herself open and says "look Ben." How could Ben fail to see or even notice something like that going on next to him? Why hasn't Ben ever averred that he heard the little girl say "look Ben." And, which was he sitting on, a chair or a couch?

R. Ex. 18, #7. "Jesyca said that S. had just tried to show herself to you...Jesyca indicated that S. was trying to show me her privates and that she had just shown them to Jesyca in the kitchen." (emphasis added).

a) Inadmissible hearsay, no personal knowledge, incompetent to testify. When Ben deposed on Nov. 17, 2008, he contradicted himself and Jesyca by answering the question, "So when you asked her "who taught you that?" what were you asking her about?" by responding "I was talking about what Jesyca had just told me she had done in the kitchen." That means there was no second time of the little girl going up to Ben and trying to show him her privates in the living room, only the one time when Jesyca said S. supposedly did it to Jesyca in the kitchen, which Ben also only heard about from Jesyca (R.Vol.II, P.368, p. 29. L. 5-25, p.30, L. 1-3). Jesyca also contradicts this version to Detective Martineau when responding to the question "But you also heard her say that it was her Grandpa that showed her?" with the response "Yeah I was sitting right there." (R. Vol. II, P. 225, p. 6, L. 5-7, yet, the couch or the chair, whichever one it was, is clearly not located in the kitchen, but in the living room in front of the T.V. where Ben supposedly was sitting playing his video game, so how could Jesyca be

"sitting right there" if she had just followed S. out of the kitchen? R. Vol. II, P. 226, p. 3-4).

R. Ex. 18, #8. "I asked S. who taught her to do that. She replied "Grandpa.""

`a) Directly contradicted by the affidavits of codefendants Jesyca (R. Ex. 13, #2) and Kathy Guthrie (R. Ex. 14, #2).

b) Contradicted by the Second Affidavit of Laura Davidson, R. Ex. 25, #4-7 (S. could not pronounce the word "Grandpa" at age 3 and instead referred to Davidson as "cup pa").

c) Leading question, assumes someone taught her "that," assumes a three year old knows what is meant by "who taught you that," and the questioner, whether it was Ben or Jesyca, already has an expectation of what the answer to the question should be, therefore presumably unreliable. (R.Vol.II, P.226, p. 4, L. 14-16). *State v. Wright*, 116 Idaho 382,385, also *Idaho v. Wright*, 497 U.S. 805, "... blatantly leading questions were used... this interrogation was performed by someone with a preconceived idea of what the child should be disclosing."

R. Ex. 18, #9. "After S. stated "Grandpa"...

a) See objection to #8 above. Also see objection to #10 below (answer to a leading question a response, not a statement).

b) Omits the following critical statement Ben made to CC Sheriff about what S. did after she answered: "And she looked up, like she was in trouble, and then she kind of like smiled and she's all "Grandpa." And then blah, blah, blah, blah, and she starts talking. And her hands are kind of going, like this; but you couldn't understand what she was saying." (R.Vol.II, P.226, p.4, emphasis added, see also R.Vol.II, P.367, p.28, P. 368, p. 29, L. 1-4). Indication of unreliability: Ben, the self-appointed witness, admits he couldn't even understand what the three year old was saying. Also, Jesyca's handwritten statement to CC Sheriff indicates the girl said Grandpa and then giggled (R.Vol.II, P.220, para.2). In both accounts, wrong emotional affect for a true disclosure of sexual abuse also points toward unreliability (*Idaho v. Wright, id.).*

R. Ex. 18, #10. "...I was present when S. made the disclosure." (emphasis added).

a) Prima facie false, there was no disclosure. See trial judge's ruling (which the trial judge himself apparently ignored when deciding summary judgment) on the fact that the little girl responded to a question as opposed to making a statement (GosneyTr.P.91-95, see also R.Vol.I, P.17, Statement of Facts, para. 2, and R.Vol.II, P.193). A disclosure is a voluntary statement which reveals something in detail, not a one word response to a leading question. *State v. Wright*, also *Idaho v. Wright*, id, "the questions and answers were not recorded on videotape for preservation...and blatantly leading questions were used..." Questions and answers are not referred to as "disclosures" or "statements" unless a false impression is being created that the little girl voluntarily said something inculpatory about Davidson, which clearly she did not.

R. Ex. 18, #15. "I have never spoken with Kathy Guthrie about this incident with S."

a) Prima facie false, by Ben's own admission (R.Vol.II, P.339, p.25, L. 5-13).Ben told the police that Kathy clearly stated her motive to preemptively strike out against Davidson when she said "if they didn't accuse you, they would have accused me because I'm a lesbian..." (Not hearsay, admission of a party opponent, statement of co-conspirator, I.R.E. 801(d)(2)). Ben also said Kathy had referred to George Davidson by name in that conversation (If you hadn't been...in her life...and...she [Jesyca] had accused George...then they would've accused me..."). Clearly the only possible context for that conversation is the so-called "incident with S." in which Ben was treated as a suspect, not a witness, due to his having been in the apartment with the little girl running around naked when the so-called incident took place. (R.Vol.II, P.227, p.8, L. 16-25, P. 228, p. 9, L. 1-25, p. 10, L.1-12, Det. Martineau: "And eliminate you as ever inappropriately touching her.") Suspects are "eliminated," not witnesses.

R. Ex. 18, #17. Self-serving, speculative and conclusory.

R. Ex. 18, #18. Self-serving, speculative and conclusory.

Why the Affidavit of Jesyca Hood Davidson is presumably unreliable, inadmissible, and creates material factual disputes:

R. Ex. 13, #2. "...my four year old daughter S. exposed her genital area...I asked her who taught her to do that and she replied "Grandpa." That is how she referred to George Davidson..."

a) Prima facie false, S. had just turned three years old on July 17, 2007. Her birthday is June 17, 2004 (R. Vol. II, P. 232, para. 2). Davidson contends this falsehood by Jesyca is not a typo, nor mere trivia or inconsistencies, but a deliberate misstatement of the facts attempting through an unrebutted affidavit to overcome the well-known exhibitionist tendencies of a three year old (even childless Ben admitted to the police he was aware of this, see R. Vol. II, P. 338, p. 24, L. 11-13). Further, Jesyca is here trying to deflect attention from the fact that the comprehensive and language abilities of a three year old are considerably less developed than those of a four year old. Even Ben admitted he couldn't understand the girl's speech patterns (see #9, above) and the girl's Grandmother, a certified school teacher with over fifteen years in the classroom working with small children (R. Ex. 8, #4), swore the three year old could not even pronounce the word "Grandpa." (R. Ex. 25, #4-7), something which was common knowledge and was even joked about in the Davidson family (ibid). Davidson argued that the one year discrepancy in S.'s age at the time was a disputed material fact wrongly adopted by the trial court (R. Vol. III, P. 438C, L. 17-18) and was disregarded (see R.Vol.III, P.447, s.s.1, also R.Vol.III, P.460, L. 3-6); the trial court admitted the mistake, but dismissed it as trivia.

b) Omits the critical fact that S.'s vagina was already exposed as Jesyca had stripped her down naked in front of Ben by her own admission (R. Vol. II, P. 320, also P. 257, and P. 263, para. 2, also R.Vol.I, P.17, Statement of Facts, para. 2). This established fact was a serious concern to Det. Martineau when interviewing Ben as a suspect (R.Vol.II, P.228, p.11, L. 5-25, p. 12, L. 1-13). Once again, the trial court ignored this material fact raised in opposition by

Davidson (R.Vol.II, P.192, para.3), continued to misapply the prejudicial and misleading phrase "exposed herself" (Mem Dec, see also R.Vol.III, P.460, L. 3-6), and refused to reconsider (R.Vol.III, P.448, para.5, see also R.Vol.III, P.459-461), making this highly important inference (that Jesyca manufactured the "incident" by stripping the girl of clothing) irrelevant by simply pretending it never happened.

c) Conclusory, leading question, assumes someone taught her "that," assumes a three year old girl knows what is meant by "who taught you that," also presumptively unreliable under *Idaho v. Wright*, supra. Directly contradicts Ben's affidavit (#8), contradicts Jesyca's own testimonial statement to Detective Martineau in which Jesyca responded unequivocally to a direct question from the detective on whether it was Ben or Jesyca who asked the question of the little girl (R.Vol.II, P.225, p.5, L. 20-24, see also Jesyca's handwritten statement made under oath to Magistrate Comstock, R.Vol.II, P.320); contradicts the Second Affidavit of Laura Davidson (girl could not pronounce the word Grandpa); strongly conclusory and speculative as to who the little girl was supposedly referring (R.Vol.II, P.289, Int. #20).

R. Ex. 13, #3. "About five years before this occurrence, Renato Davidson had confided in me that his father had molested him as a child...I believed at the time that he was telling me the truth...I was convinced...that Renato hadn't been molested...the issue was dropped until the incident with S. occurred." (emphasis added).

a) Contradicted by the Second Affidavit of Renato Davidson (R. Ex. 9, #3-6). Renato never specified exactly what he said that night in 2002, because he was too drunk and stoned at the time to remember exactly what he said (ibid. #5, see also R. Ex. 8, #8, "They [Kathy and her lesbian lover Kris Wise] told me that Renato had told Jesyca about it but with no details as to when, where, and how, which made no sense to me." emphasis added). Also, contradicts Jesyca's own handwritten statement made under oath to Magistrate Comstock

(R.Vol.II, P.320) ..."learning this (what Renato allegedly said) I took Synphany to St. Luke's right away." (emphasis added). This clever little lie purposefully omits the five year gap in the story. Up until her July 26, 2008 affidavit in this case, Jesyca has always omitted the critical detail about the five year gap (see R. Vol. II., P. 284, Int. No. 11, predates Jesyca's affidavit in this case by approx. 7 weeks, also R. Ex. 13), making it sound as if these two occurrences happened one right after the other (R.Vol.II, P.225, p. 6, L. 23-25, also P. 263, para. 3) which is not merely trivia or an inconsistency, but rather a purposeful attempt to deceive by omission. Paradoxically, in her July 30, 2007 affidavit to Judge Southworth in the custody case in Canyon County, Jesyca failed to mention Renato's so-called "confidence" altogether (R. Vol. II, P. 274-276), apparently deeming it too unimportant to mention. Upon moving for summary judgment in this case, and only after Renato had pointed out the five year discrepancy (R. Ex. 9, #3, #18), the five year gap in Jesyca's story suddenly appears for the first time in her affidavit, but is trivialized by the trial judge (R. Vol. III, P. 438C, L. 20, "Sometime earlier" is substituted for "five years earlier," even though "sometime earlier" could just as easily be construed as "five minutes earlier," a fact the trial judge must have realized). Davidson argues Jesyca admitting knowing something to be false for five years or more and then suddenly deciding it is true again when convenient cannot be "reasonable belief" under any realistic standard (R.Vol.III, P.446).

b) Inadmissible hearsay, not allowed under any established exception, inadmissible as prior bad act, too remote in time to be reliable (*State v. Downing,* 128 Idaho 149,152), especially if, as here it bears little or no resemblance to the current event which it purportedly corroborates (*State v. Law*, 136 Idaho 721, also *State of South Dakota v. Chamley*, 1997 SD 107, "...the age of the prior bad acts and their lack of similarity significantly cuts into the ...argument regarding their admissibility"). In her sworn statement to Judge Comstock on July 24, 2007, Jesyca detailed what she believes is the so-called "sexual molestation" of Renato:

> "George Davidson has been known to molest his son. It was never legally acted on but he and Renato both admitted to me that George had given him a bath around the age of 7 or 9. George was rubbing lotion on Renato's back and got excited. Another insident (sic) Renato had made George mad, George went to the bar, came home drunk and wanted to punish Renato by scaring him, so he got into bed with him." (R.Vol.II, P. 320).

Even assuming *arguendo* that the described events ever took place in reality (which even Jesyca doubts, as she lacks the courage to swear to it in her affidavit in this case, instead hiding behind the anonymity of the domestic violence protection petition, while Renato disputes making any admissions of that nature, R. Ex. 9, #11, Laura Davidson also states there have been no details of abuse whatsoever revealed, R. Ex. 8 #8, and Judge Comstock went so far as to adjudge Jesyca's story "innuendo, no proof." R.Vol. II, P.324) nothing in that story amounts to actual sexual abuse ("Idaho cases affirming the use of bad acts evidence in sexual misconduct cases focus on prior conduct that was actual sexual abuse..." *State v. Field,* 165 P.3d 273). To further the distinction, giving a 7 or 9 year old boy a bath, rubbing lotion on his back and getting excited, or coming home drunk and climbing into a 7 or 9 year old boy's bed bears absolutely no similarity to the complained of conduct of supposedly teaching a three year old girl to go around showing her vagina to people when she is already naked. While there is a slight similarity in familial relationship to Davidson, one being a son and the other a granddaughter, differences include gender, age, and that the son lived in Davidson's house, while the little girl never did. In fact, the evidence shows that no one, including Jesyca, even knows, nor, more importantly, have Jesyca or Ben ever proffered any evidence of, when or how often Davidson even had contact with his granddaughter in the summer of 2007 (H&W report, closing the investigation on the same day it started, 7-17-2007, R. Vol. II, P. 257, "...unknown when this child may have last seen her paternal grandfather"). Further, Jesyca's own voluntary actions in the five year period after Renato made the so-called statement indicate she knew it to be false:

i) Jesyca married Renato in December 2003 (R. Ex. 7, #3).

ii) Jesyca had two children by Renato (R. Vol. II, P. 232).

iii) Jesyca entered into a business partnership with Davidson in 2004, borrowing money from the business and from Davidson (R. Ex. 4, #7).

iv) Jesyca and Renato "heavily depended on my mom and dad to baby-sit the girls for us." (R. Ex. 9, #15,16) That was the pattern throughout their marriage. When asked in Interrogatory #27 how many times did she take the children over to Davidson's house for baby-sitting during the years she was married to Renato, Jesyca's memory conveniently failed (R.Vol.III, P.446), but Renato's didn't, and neither did the children's paternal grandmother's (R. Ex. 8, #18). A concerned mother doesn't take her kids to a molester's house for baby-sitting.

v) Jesyca never said anything about the possibility of Davidson being a threat to the children during the course of the marriage (R. Ex. 9, #16, also R. Ex. 8, #19) instead waiting until Davidson began to attempt collecting money Jesyca owed to the Davidsons' family business (ibid). Jesyca also only escalated matters by going to the police after Renato served her with a Motion to Modify Child Custody seeking sole custody of his daughters ((R. Ex. 7, #15, 16). This Court has recently shown skepticism of such opportunistic claims even in a circumstance where the accused father actually had a past conviction for child abuse (*Michalk v. Michalk*, Idaho Supreme Court Docket No. 35221).

vi) Jesyca stipulated to joint custody with Renato and never asked for any restrictions upon Davidson's visitation with his granddaughters in the divorce (R.Vol.II, P.231-236). The decree was drafted by John Prior himself, representing Jesyca (ibid. P.231, upper left corner) raising the reasonable inference that whatever Jesyca wanted in the decree was in there when she and Renato stipulated to it, and she voiced no fears of Davidson at that time, in direct contradiction of what she told medical personnel on July 17, 2007 (R. Vol. II, P. 263).

vii) July 19, 2007, after lying to Renato and telling him that the medical report showed definite signs of abuse, and secretly knowing that she and Ben were on their way out to CC Sheriff's station to make yet another unsubstantiated report, Jesyca turned the kids over to Renato at 6:00 P.M. at the daycare in Nampa without any comment or special instructions (R. Vol. I, Page 18, para. 9, 10). Laura Davidson was there as a witness.

viii) After Renato had held onto the children for two weeks pending a court order (to make sure that Ben did not have access to them or contact with them, R. Ex. 17, #15) Detective Martineau told Jesyca on August 2, 2007 that he had been in contact with Renato and would have Renato bring the children to the police station and turn them over to her if she showed the court order to the detective. Jesyca nonchalantly replied that she didn't want the children back because "today is Renato's day, anyways." i.e. Jesyca and Ben probably had plans for the weekend and didn't need to make sure the children were O.K. because Jesyca knew they were in good hands when in Renato's custody (R. Vol. II, P. 224, p. 3, L. 8-25, p. 4, L. 1-8).

ix) Jesyca, along with Renato, signed a stipulated agreement to remove the no-contact order as to Davidson and his granddaughters on November 27, 2007 (R. Ex. 4, #13). A truly concerned mother does not allow a molester access to her kids under any circumstances.

c) Circumstances surrounding the making of a non-testimonial out of court statement are the most important indicator of its unreliability (*Idaho v. Wright,* supra). Back in 2002, prior to any alleged statement made against Davidson, Jesyca and Kathy had openly expressed their malice toward Davidson based upon his "chewing out" his son Renato over work-related matters in the family-owned construction business. Jesyca and Kathy had even gone so far as to tell Renato that getting chewed out for poor work performance constituted abuse and that Davidson did not love Renato (R. Ex. 9, #6-7). On the night of his so-called statement, Renato describes being taken to an unfamiliar, isolated location for what turned out to be an all-

night drinking and drug session with Jesyca in which the hard liquor and drugs were supplied to the two minor teenagers by codefendant Kathy Guthrie (ibid, #5). Jesyca, not Renato, steered the conversation toward abuse by describing, among other horrific things, her being raped by her own father as a child, a story which included details (ibid, admission of a party opponent, I.R.E. 801(d)(2). Renato never gave any details of actual abuse at the hands of his father (ibid, #11), nor have Jesyca or Ben proffered any evidence along that line except for inflammatory rhetoric. Although often mischaracterized and misquoted, Renato's Second Affidavit has never been refuted or objected to by Jesyca or Ben (R. Ex. 20). Kathy has never denied giving the drugs and alcohol to the minors. The trial judge specifically asked Atty. Troupis in open court if he wanted to strike any of Davidson's affidavits and Troupis replied "I didn't feel a motion to strike would make sense" (GosneyTr.P.180, L. 1-19). Drawing the inferences in favor of Davidson, Renato had made this so-called "confidence" in 2002 at age 18 while extremely drunk and stoned, in the context of an atmosphere of malice toward Davidson spearheaded by Kathy and Jesyca. Davidson's disciplining of his son had already earned Davidson the undeserved title of "abuser" with the mother/daughter team of Kathy and Jesyca. On the night in question, Jesyca led the conversation in the direction of abuse and gave details of her own abuse at the hands of her father, whereas Renato gave no details nor described any instances of actual abuse, and Renato recanted the alleged statement while sober, whereas Jesyca stands by her story of being raped by her father, including making a report to the Malheur County Sheriff (R. Ex. 9, #5, R. Ex. 17, #16) which Davidson argued should have been discoverable in this case as a prior bad act (common scheme of making false reports of sex abuse against father figures, 404(b) and as evidence of mentally messed up character, 405(b), see ChristensenTr. P. 31, L. 21-25, P. 32-37, L. 10, also GosneyTr. P. 268, L. 12-25, P. 269-272, L. 16, P. 275, L. 14-25, P. 276-278, L. 8).

The totality of the circumstances makes Renato's so-called confidence presumably

unreliable and inadmissible (*Idaho v. Wright*, ibid). When this was pointed out to the trial judge in open court, a contentious exchange took place (GosneyTr.P.198-201, see also R.Vol.II, P.190, para. 1) with Davidson expressing serious concerns about the circumstances surrounding Renato's out of court statement. The trial court's priority seemed to be protecting the reputation of Kathy Guthrie, who has never even denied she gave the alcohol and drugs to the minors. The trial court had implicitly ruled Renato's so-called "statement" was relevant by ordering discovery about it (I.R.C.P. 26(b)(1), another huge point of contention, see GosneyTr.P. 65-76), refused to hold a hearing which could have tested the truth of the matter under cross-examination (ibid), and then contradicted itself and the law by ruling that the circumstances surrounding the making of it were irrelevant (GosneyTr.P.200, L. 2-19). To Davidson, that is reversible error.

d) The trial court erred by depending upon this "prior bad act evidence" to grant immunity to Jesyca and Ben (R. Vol. III, P. 438C. L. 16-25), implicitly ruling on Davidson's propensity to commit sexual abuse (see also, R.Vol.III, P.460, L. 18-25) without ever holding a hearing on the impermissible 404(b) matter *(State v. Field*, supra). Davidson had verbally moved the trial court to conduct such a hearing and had even procured the presence of both Renato and Laura Davidson in court on Sept. 2, 2008 to allow Jesyca and Ben the opportunity to cross-examine them (GosneyTr.P. 65, L. 4-12, P. 67, L. 6-11, P. 70, L. 13-25, P. 71). Yet the trial court steadfastly refused, instead focusing on how busy the court was, and how the trial court had no time to try to get to the truth of the matter, and that Davidson would be causing a several month delay if he insisted upon such a hearing (GosneyTr.P. 72, L. 8-15). Davidson's objection was clearly renewed in Opposition to Summary Judgment (R.Vol.II, P.190, para. 1) and was reiterated in even more detail by Davidson in his Motion for Reconsideration (R.VoLIII, P.444-447), particularly in light of this Court's interim decision in *State v. Grist*, 205 P.3d 1185, all of which the trial judge flatly ignored in granting summary judgment and denying

reconsideration. Regardless of the trial court's stated rationale that it only considered the inadmissible hearsay and 404(b) matter to support Jesyca and Ben's reasonable belief claim (R. Vol. II, P. 438C, also R. Vol. III, P. 460, L. 18-25) that is still an impermissible purpose, i.e. simply "propensity evidence served up under a different name" *(State v. Grist*, ibid). Incredibly, the trial judge concedes the hearsay statement attributed to Renato is inadmissible at trial under 404(b), yet fails to see the paradox of accepting it at face value in an affidavit to grant summary judgment in spite of I.R.C.P. 56(e). (R. Vol. III, P. 460, L. 23-25).

e) "I believed at the time that he (Renato) was telling me the truth...I was convinced...that Renato hadn't been molested..." Conclusory, speculative and self-contradictory. "Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." (*Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, cited in *Dulaney v. St. Alphonsus Reg. Med. Ctr., et al*, 137 Idaho 160).

f) "...the issue was dropped until the incident with S. occurred." Prima facie false, directly contradicts the evidence. Jesyca first reported to Health and Welfare that she thought S. was being sexually abused on March 6, 2007 when someone had smeared lipstick all over S.'s legs and privates and tried to pass it off to Nampa P.D. and Health and Welfare as "extreme bruising from crotch to legs." (R.Vol.II, P.246-251). Then on June 26, 2007, Jesyca reported S. must be sexually abused because she was uncomfortable in her panties and would wake up crying in the middle of the night "after visits with Dad" (R.Vol.II, P.252-254). Reading through the redactions, it seems clear Jesyca was telling Health and Welfare her opinion on Davidson's supposed propensity to abuse (ibid. P. 254, [Renato] said that he was molested...) and her claim that the children's behavior is only different because she "knows that he (Davidson) comes to his (Renato's) home when the girls are there" (ibid). What Jesyca and Ben have called the "incident with S." didn't occur until July 17, 2007, a date Defendants wanted the trial court to believe was

the beginning and end of the false reporting, in spite of the evidence to the contrary proffered by Davidson (R.Vol.I, P.86-87, esp. note para. 2). Ben was totally ignorant of any reports made previous to July 17 (R. Vol. II, P. 368, p. 32, L. 7-13). Again, in all of the reports, supposedly based upon "reasonable belief," no actual accounts of abuse are found, nor any actual complaints by S.; it is always Jesyca who does the complaining, fantasizes herself into the role of "victim" (even Deputy Crawforth of CC Sheriff was naively convinced Jesyca was a "victim," as he indicated in his intake report of 7-19-2007, R. Vol. II, P.222) and then quickly resorts to hearsay and giving her "expert" opinion about what she believes Davidson did to Renato 17 or 19 years before (R. Vol. II, P. 191, para. 2). Know-nothing Ben followed the exact same pattern when interviewed by the police (R. Vol. II, P. 226, p.4, L. 10-25) admitting he only became concerned in the context of "we both knew that her grandpa is--has molested Renato..." Ben deposed that he was being told malicious hearsay about Davidson for at least two months before July 17, 2007 (R. Vol. II, P. 369 p.35, L. 1-16) which he claims he accepted as true without reflective thought. **R. Ex. 13, #4.** "Upon hearing S.'s statements... Renato...covering up for his father...Renato had confided...S.'s statements...I was very concerned that S. had in fact been molested by...Davidson. I immediately took Synphany to St. Luke's...I was advised by the medical staff that there was no physical indication that she had been molested...I was still very concerned that she may have been inappropriately touched by ...Davidson...Renato's statements...S.'s safety was at risk if left unattended with...Davidson."

a) S. never made any statements, self-contradictory, not supported by the evidence. Goes against the trial court's own ruling (GosneyTr.P.91, L. 10-P. 95). Also, the evidence proves Renato never "confided," nor made any "statements" to Jesyca (R. Ex. 9, #3-6).

b) Renato...covering up for his father...Conclusory, speculative, prejudicial, no personal knowledge, calls for a credibility determination, Jesyca is in no way qualified to testify

about whether or not someone got sexually abused: *State v. Konechny,* 134 Idaho 410:

> "... the art or science of divining whether a child who has made allegations of sexual touching has in fact been abused calls for additional expertise that was not shown to be possessed by these witnesses. Consequently, we conclude that, on the foundation presented, the district court erred in finding these (witnesses) qualified to testify as to their diagnoses of sexual abuse."
> See also *State v. Zimmerman,* 121 Idaho 971, 978 (no proof of reliable basis for opinion).

The Court of Appeals went on to conclude:

> "The fact that child sexual abuse has emerged as a critical problem about which the public is seriously concerned does not mean that all legal rules that may constitute obstacles ...can properly be brushed aside. *Rimmasch,* 775 P.2d at 390. Our abhorrence of the offense does not justify a diminishment of judicial vigilance against the use of untrustworthy evidence." (emphasis added).

c) The word "molested" is used twice and "inappropriately touched" once connected to the name of Davidson in reference to S. Self-serving inflammatory rhetoric wholly unsupported by any evidence. Jesyca can point to no evidence in this case to even remotely support any charge under I.C. 18-1508; her unsubstantiated and unfounded claim on July 17, 2007 was apparently that somehow Davidson had taught the little girl to go up to people and show her vagina while already naked and even that is purely speculative and imaginary in light of the facts. Since these "molestation" and "inappropriate touching" claims are nonexistent in the evidence in front of the trial court, both as to S. and Renato, Jesyca has no personal knowledge and is incompetent to testify; all such claims are inadmissible and should have been stricken.

d) "I immediately took Synphany to St. Luke's..." Prima facie false, contradicts Jesyca and Ben's own testimonial statements and the evidence.This point was clearly made to the trial court in detail by Davidson opposing summary judgment (R. Vol. II, P. 194-195). Ben's affidavit (R. Ex. 18, #2) says this so-called incident happened in the "late afternoon." That has

never been disputed. Ben's handwritten witness statement to CC Sheriff says "We immediately loaded S. in the car to take her to St. Luke's..." (R. Vol. II, P. 221). Yet Ben told Det. Martineau the first thing Jesyca did after S. answered his question was to call her mother, Kathy Guthrie, and have a conversation about it (R. Vol. II, P. 227, p. 5, L. 18-21). Jesyca's handwritten witness statement to CC Sheriff says that she took S. to St. Luke's "that night" (R. Vol. II, P. 220) whereas in a different version to Magistrate Comstock, Jesyca says she took the girl to St. Luke's "right away" (R. Vol. II, P. 320). St. Luke's records, within the medical report demanded by Jesyca herself, shows an arrival time at the emergency room of 8:24 P.M. (R. Vol. II, P. 264). Assuming *arguendo* that Ben's "late afternoon" means around 5:30 P.M., and accepting the hospital's record of arrival time, that means it took about three hours to put two little girls in the car and drive from Apple and Boise Ave. in southeast Boise to St. Luke's hospital, a drive of no more than 12-15 minutes. That does not fit any definition of "immediately" and indicates lying for added drama and to make Jesyca and Ben seem more concerned, upset and agitated.

e) ..."no physical indication...however, I was still very concerned..." Self-serving and conclusory, not supported by the evidence. Reasonable belief under I.C. 16-1605 cannot be sustained upon an unsubstantiated and unfounded finding by Health and Welfare on 3-6-07 (R. Vol. II, P. 246-251), and another unsubstantiated and unfounded finding by Health and Welfare on 6-26-07 (R. Vol. II, P. 252-254), plus a clean bill of health from an examining physician on 7-17-07 (R. Vol. II, P. 264, INITIAL ASSESSMENT AND PLAN), which led to yet another unsubstantiated and unfounded finding by Health and Welfare that very same night (R. Vol. II, P. 255-257). Yet Jesyca was still not satisfied and went to the police to initiate another unnecessary investigation on July 19 (R. Vol. II, P. 222). Still so "concerned" Jesyca then tried to convince an Ada County magistrate judge with no jurisdiction to grant her sole custody over.the children by filing two completely perjurious petitions for domestic violence protective orders on July 24 and

25th (R. Vol. II, P. 316-332). Supposedly still "very concerned" Jesyca and John Prior went into Canyon County court on August 9, 2007 and misled and deceived Magistrate Southworth with false and misleading affidavits (R. Vol. II, P. 274-276), so-called supporting exhibits (two medical reports, which actually proved the opposite of their claims, R. Vol. II, P. 264-273), and baseless innuendo about an ongoing confidential police investigation. Jesyca and Prior totally failed to mention any of the six previous reports (lying by omission). Judge Southworth, failing on his part to contact Health and Welfare as required by I.C. 32-717(C) allowed Jesyca and Prior to abuse the legal process by removing both Davidson's (and Ben's) contact with S. and her sister for an indefinite period of time (which in Davidson's case lasted four months) on Prior's unsworn statements. Ben is still under that verbal no contact order, a fact of which Jesyca failed to even inform him (R. Vol. II, P. 371, p. 44, L. 2-5), probably because Ben broke up with Jesyca rather quickly after August 2 (R. Vol. II, P.371, p. 41-43, 44, L. 1), following Detective Martineau's long lecture to Ben about being "set up" by Jesyca to get in trouble (R. Vol. II, P. 228-229) and how Jesyca was setting her daughters up to be molested by her boyfriend (ibid, P. 229, p. 15, L. 1-4) along with Ben's admission that he was "...jaded..towards...the whole relationship..." and no longer wanted to be around Jesyca's children (ibid. L. 14-20). This illogical sequence of events, along with the direct evidence presented to the trial court, shows bad faith (dishonesty in belief or purpose), reckless disregard for the known facts, and reporting "knowing the same to be false" in violation of Idaho law (I.C. 16-1605,1606,1607).

f) "S.'s safety was at risk if she was left unattended with...Davidson." Self-serving, conclusory, speculative, inflammatory, assumes facts not in evidence, i.e. Jesyca has never provided the trial court with any proof that Davidson has ever been alone with S. or when Davidson had last had contact with S. during the summer of 2007 or at any other time (R. Vol. II, P.257, "...unknown when this child may have last seen her paternal grandfather" see also (R.

Vol. II, P. 205-206, para. 16, "There is no corpus delecti of any crime of child molestation against S.D."). Further, why would any caring parent allow Davidson to have contact with the children again under any circumstances, as Jesyca voluntarily stipulated to on Nov. 27, 2007 (R. Ex. 4, #13, #22-23) if she really believed that Davidson posed any type of threat to the children? **R. Ex. 13, #5.** ..."Renato ...and I were involved in divorce proceedings and a custody and visitation dispute regarding S."

a) Prima facie false. The divorce was final by stipulated agreement filed on March 9, 2007 (R. Vol. II, P. 231). Renato has joint physical and legal custody of his daughters, and they live in his home half the time (ibid. P. 232). There was no dispute as to visitation, and Jesyca has not provided any evidence of one, so this is an inadmissible fact outside of evidence thrown in to mislead the trial court into believing she was at all times concerned with Davidson having visitation with S., a bald claim which is undermined by the established facts of this case. Renato has sworn that he has never made any statements to anyone that he was afraid to have Davidson be alone with his daughters or that he feared Davidson harming the children in any way (R. Ex. 9, #17). What was actually being disputed by Renato at the time was that during the summer of 2007, Jesyca had disappeared from her mother's home in Nampa with the children, had suddenly and without consulting Renato pulled the children out of their daycare in Nampa, and was living at an unknown location somewhere in Boise, apparently in the company of a man named "Ben" whose last name and identity Jesyca was withholding from the girls' father (R. Ex. 7, #9-13). To make matters worse, Jesyca wound up going to jail for a week on a serious DUI charge that summer (R. Vol. I, P. 17, Statement of Facts, para. 1, she admits it in her answer, R. Vol. I, P. 48, Statement of Facts, XIV), another fact she attempted to hide from Renato. Jesyca also withheld the children from him during her incarceration, giving them instead to Kathy in violation of I.C. 32-1007 (R. Vol. II, P. 298, Kathy's Int. No. 8,9,10, also R. Ex. 7, #9-13). All of

that, combined with Renato's first hand knowledge of Jesyca's history of alcohol and drug abuse (R. Vol. II, P. 260) rekindled fears in Renato's mind that Jesyca's recurring erratic behavior would wind up injuring or even killing his daughters in a DUI crash, or worse. Those were the malicious and negligent actions of Jesyca which set the stage for Renato to file his Motion to Modify Custody seeking sole custody over his daughters on July 18, 2007. Jesyca told Renato about the false allegations of sexual abuse for the first time on July 19 (R. Ex. 7, #15-16), omitting, of course, the previous March 6 and June 26 reports, showing her utter contempt for CC Judge Southworth's authority (R. Vol. II, P. 244, "Supplemental Order"):

> "If anything of significance occurs concerning the health, education, or general welfare of the children while a custodian is exercising physical custody of the children, the custodian shall inform any other Custodian of such occurrence. Such events include, but are not limited to, any disciplinary contacts regarding the children by school, police, or court authorities, and any medical contacts and reports concerning the children."

R. Ex. 13, #6. "Based on my continued anxiety...I filed a report...with the Canyon County Sheriff's office on July 23, 2007.(emphasis added).

a) Prima facie false. This July 23rd date is not a typo or an inadvertent mistake. Jesyca wanted to mislead the trial court on this date for a very specific reason: Jesyca and Ben went to the CC Sheriff on July 19 at 6:17 P.M. (R. Vol. II, P. 222, "date and time reported" 7-19-07, 18:17) after having told Renato by phone of the so-called abuse of the girl around 4:00 P.M. that day and exchanging the children into Renato's custody at 6:00 P.M. in Nampa (R. Vol. I, P. 18, para. 7-11). Health and Welfare had already closed the books on the July 17th investigation at 11:21 that very same night (R. Vol. II, P. 257). On July 18 Renato, completely unaware of the fact that Jesyca had even made a report, filed his Motion to Modify Child custody in Canyon County (R. Vol. I, P. 18, para. 7-11, R. Ex. 7, #15). Jesyca admitted to Det. Martineau that she was served with that motion the morning of July 19, and she became shifty

on the topic when the detective tried to pin her down on the fact that even though Jesyca and Ben took the girl to the hospital on the 17th, they made their police report on the 19th after Jesyca had been served with the custody modification papers (R. Vol. II, P. 224, p. 2-4, P. 225, p. 5, L. 1, Ben confirms that, R. Vol. II, P. 227, p.7, L. 5-7). Note that Jesyca never informed the detective of any of her previous reports, let alone the fact that Health and Welfare had already closed their July 17th. investigation, as "unsubstantiated, insuff. evidence" just two days earlier. Jesyca swore under oath in her July 30, 2007 affidavit in Canyon County that she had talked to "Jessica" at H&W on July 19, and that "Jessica" supposedly told Jesyca to "contact the Caldwell Police Department" (R. Vol. II, P. 275, #6-7) which Jesyca claims to have done and was reassured by Caldwell Police that "they would conduct an investigation regarding these allegations" (ibid, #7). Very importantly however, note that the space for a "Law Enforcement Referral" is left blank in the July 17 H&W report (R. Vol. II, P. 255-257). That, combined with the fact that there is a distinct difference between the Caldwell Police Dept. and the Canyon County Sheriff (and an affiant should know which one they talked to) clearly suggests the purposeful falsity of Jesyca's affidavit concerning the circumstances of going to the police. The reasonable inference here is that Jesyca did talk to "Jessica" of H&W on or before the 19th, that Jesyca was told the H&W investigation was closed as "unsubstantiated, insuff. evidence, " and that she (Jesyca) was on her own if she wanted to pursue it further. That is a quite different scenario from the one Jesyca tried to portray in the July 30, 2007 affidavit to Judge Southworth, in which H&W ia supposedly making a direct investigative referral to Caldwell Police Dept. That makes the investigation seem extremely serious, instead of redundant and unnecessary, and was designed to deceive Judge Southworth into believing that there was substance behind Jesyca and Ben's allegations. In reality, Jesyca went, not to the Caldwell Police, but rather to the Canyon County Sheriff, not because of anything she was told by H&W, but in spite of it; thereby

throwing gasoline on the dying embers of this case, not "based on...continued anxiety" but rather, as a malicious reaction to having been served with Renato's modification motion sometime during the morning hours of July 19, 2007.

R. Ex. 13, #7. "I was later advised by the Canyon County Sheriff's office...polygraph..."

a) Inadmissible hearsay, prima facie false. The official police report by Martineau was not closed until 10-03-07 (R. Vol. II, P. 218) three months after the so-called investigation was begun. There has yet to be an explanation for the long delay in Martineau's sending the case over to the prosecutor. Under Idaho law, confidential police information may not be released to the public until an investigation is closed: I.C. 9-335(a)(b)(c) and (e). Since there were no victims in this case and no crime had even been committed, confidential police information about the internal workings of the investigation were at that time confidential. So, in order for Jesyca's statement to be true, Detective Martineau would have to be a lawbreaker. No evidence has been brought forward to support that theory. Unless she intends to proffer evidence that Det. Martineau intentionally breaks the law and doles out confidential police information during the course of an investigation, Jesyca has no personal knowledge, and is not competent to testify.

b) Polygraphs are inadmissible in Idaho civil cases absent a stipulated agreement (*State v. Perry*, 139 Idaho 520, *State v. Fain*, 116 Idaho 82). Jesyca has failed to bring forward into the record any stipulated agreement, so any speculation about polygraphs is inadmissible.

R. Ex. 13, #8. "Notwithstanding the fact that the Sheriff's office chose not to proceed with charges against Mr. Davidson, I continued to have anxiety, fears, and concerns about my daughter's well-being if left alone with him. "

a) Prima facie false, the Canyon County Prosecuting Attorney makes decisions about who gets charged or not (R. Ex. 4, #23), and since there has never been an offense in this case, that decision does not concern Jesyca, she is once again making allegations without first

hand knowledge, is incompetent to testify, no facts in evidence, therefore inadmissible.

b) See objection #4(f) above. Self-serving, speculative and conclusory.

R. Ex. 13, #9. Self-serving, speculative and conclusory

R. Ex. 13, #10. ..."this information was related to...Laura Davidson..."

a) Prima facie false. Self-serving, speculative and conclusory.

b) Contradicts Laura Davidson's 1st affidavit (R. Ex. 8, #19)"...absolutely nothing was ever said about the bogus child abuse issue until George filed the lawsuit against Jesyca...and Renato tried to get sole custody over his daughters..." Jesyca attempts to introduce this as new evidence without providing any foundation, therefore irrelevant, immaterial, inadmissible.

R. Ex. 13, #11. "I have had one conversation with my mother, Kathy Guthrie, about these matters."

a) Prima facie false. The false reports from March 6 and June 26 were made from Kathy's house in Nampa. Jesyca resided there at the time. In the March 6 report in particular, there were other unidentified persons involved besides Jesyca. It seems a reasonable inference that one of them was Kathy, or at least that Jesyca had talked with her mother about two separate reports she made from her mother's house, particularly considering the mother/daughter team was in constant communication during the pertinent period by their own admission (R. Vol. II, P. 285, No. 13, also P. 300, No. 13). Also, in Ben's deposition, he clearly states that while spending time with Jesyca out at Kathy's house, prior to July 17, 2007, he was being fed false anti-Davidson propaganda by Jesyca and Kathy concerning the supposed propensity of Davidson to engage in not only child abuse, but other imaginary criminal behavior as well (R. Vol. II, P. 369, p. 33, 35, 36, L.1-6, see also Ben's answer to Int. #29, R. Vol. II, P. 278, #14(a), R. Vol. II, P. 309-310, #15, R. Vol. II, P. 311). Note that most of Ben's responses start out with the phrase "Jesyca and Kathy told me..." It simply defies credulity and rejects the evidence to

believe that Jesyca and Kathy were not constantly communicating co-conspirators in this case.

b) "I had that conversation because I was uncertain about my responsibilities as S.'s mother and wanted the advice of my mother as to what I should do." Prima facie false, contradicted by the evidence, self-serving, speculative and conclusory. The July 17 appearance at the hospital was Jesyca's third, and the July 17 H&W report her fourth try at false reporting, even omitting her earlier try at accusing her own father of raping her in Malheur County, Oregon, circa 2001 (R. Ex. 9, #5). If practice makes perfect, Jesyca didn't need her mother's advice; she already well knew by then how to make a false report. Jesyca tried to spin this same tale past Det. Martineau on Aug. 2, 2007, when responding to the question "Why did you wait two days to file a police report?" with the incredible answer "Because I was waiting to hear back from social services. I didn't know how this works" (R. Vol. II, P. 224, p. 4, L. 13-16, emphasis added). The record already shows that H&W had closed the 7-17-07 investigation the same night it began, without any law enforcement referral (R. Vol. II, P 256-257). Further, it is undisputed that Kathy gave Jesyca the order to take the girl to the hospital and demand a vaginal exam on July 17 (R. Vol. II, P. 227, p. 5, L. 18-24). As it turned out, Kathy told Jesyca to do something if not illegal, then at least extralegal and frowned upon by the authorities; i.e. an "other person" reporter under I.C. 16-1605 is not supposed to launch their own independent investigation to try to verify if abuse happened or not. That duty belongs to Health and Welfare or the police according to Atty. Troupis' own research (R. Vol. III, P. 424, para. 1- P. 425). Det. Martineau told Jesyca she had done something wrong by taking S. to the hospital for an exam with no legal authority, and not to do that again (R. Vol. II, P. 218, Case Overview). The reasonable inference is that not only was Kathy's advice bad, but it went against Idaho law (I.C. 16-1605) and the overzealousness demonstrated shows a malicious desire to injure Davidson no matter what.

R. Ex. 13, #12. "At no time have I acted out of malice or ill will towards George Davidson or

anyone else..."

a) Prima facie false, self-serving and conclusory, strongly contradicted by the Second Affidavit of George Davidson (R. Ex. 17, #8, 9, 11, 12, 13, 14, 15; contrary to the conclusion most people would reach, the trial court incredibly found these examples of malicious harassment of Davidson supported a "reasonable belief" that sexual abuse of S. had occurred, see R. Vol. III, P. 438D, L. 15-19). Also, the Affidavit of Seneca Crow (R. Ex. 5) was offered by Davidson as both supporting a specific allegation in the complaint (R. Vol. I, P. 20, para. 26) and as an example of how Jesyca and a friend of hers named "David" maliciously spread false allegations of child abuse about Davidson to private individuals who are not Health and Welfare or law enforcement. The reasonable inference in favor of Davidson is that Jesyca told her stories to numerous private individuals for malicious purposes not in any way related to "protecting the children." Jesyca has never disputed Seneca's affidavit, nor offered any evidence of having acted in good faith in that incident.

Why the Affidavit of Kathy Guthrie is presumably unreliable, inadmissible, and creates material factual disputes:

R. Ex. 14, #2. "...Jesyca Davidson told me...Jesyca said...that is how she referred to George Davidson..."

a) Inadmissible hearsay, speculative, conclusory as to who was referred to.

R. Ex. 14, #3. "More than five years ago, Jesyca told me...she said...she believed...we discussed Renato's claims at length...the issue was dropped until the incident with S. occurred."

a) Inadmissible hearsay, no personal knowledge, incompetent to testify.

b) "...discussed...at length..." Prima facie false. Contradicts the Affidavit of Laura Davidson (R. Ex. 7, #16): "Kathy laughed and said she would not even be there if she really believed George was a child molester, that she accepted Renato's explanation, and then asked

what was to eat." That hardly sounds like discussing anything "at length" or that Kathy was even concerned. Kathy herself knew how drunk and stoned the two minors were on the night in question, because she had provided them the alcohol and drugs which fueled all this drama in the first place. That's probably why Kathy thought the whole thing so amusing, since she had instigated all this trouble and gotten away with it, as she fully wishes to do in the instant case.

c) "...the issue was dropped until the incident with S. occurred." Same objection as to Jesyca's #3 above, except in addition, hearsay since only Jesyca said there was any "incident."

R. Ex. 14, #4. "Jesyca told me...I told her...that she had to report this to government authorities."

a) Inadmissible hearsay.

b) Same objection as to Jesyca's #11(b).

R. Ex. 14, #5. Self-serving and conclusory, inadmissible hearsay as to any reports Jesyca made. It seems obvious that Kathy's inadmissible affidavit was only introduced as a weak attempt to add weight to Jesyca's affidavit, since 95% of it was simply cut and pasted from Jesyca's affidavit with lots of "Jesyca said's" and "Jesyca told me's" inserted at the beginning of each line. This entire affidavit should have been stricken, yet its inclusion, and the reliance upon it by the trial judge tends to add weight to Davidson's argument that the conspiracy between mother and daughter is real and that the duo needs to answer for their intentionally tortious behavior.

CONCLUSION

Misplaced priorities: The trial court in this case was concerned with everything but Davidson's reputation and his injuries caused by the defamatory statements and conduct of the Defendants. The trial court failed to conduct objective hearings, instead letting paid lawyers misstate the facts, misstate the law, and mischaracterize everything about this case, thereby creating maximum confusion, delay, and stagnation. The trial court neglected to utilize proper legal standards and precedents, instead improvising new ones which went against established

precedent. The trial court claimed itself "too busy" to timely and efficiently rule on motions or to correctly decide threshold issues such as relevancy and admissibility of evidence.

The trial court found it too burdensome and disruptive of government for Health and Welfare workers to be subpoenaed as deposition witnesses or to produce relevant, unprivileged documents. The trial court was overly concerned with the reputations and privacy of individuals who gave alcohol and drugs to seventeen and eighteen year old kids, who launched their own unauthorized investigations to try proving who got abused, and who were perfectly willing to maliciously spread slander per se concerning Davidson for purposes of revenge and oppression.

As a result of standing up for himself and his family, Davidson has had to tolerate being treated and spoken to in court like a convicted child molester, when in fact, no such crime has even occurred, let alone been attributed to him. In the nearly two years since the filing of this action, no Defendant save John Prior (once) has even had to show their face in a courtroom, while Davidson has made dozens of appearances at his own expense, only to be thwarted at nearly every turn on the flimsiest of legal pretenses and a one-sided application of the laws. As a private person suing for defamation over matters of private concern, Davidson had expected better from his courts. The U.S. Supreme Court has said in one of their best-known cases on the subject:

> "...a private individual...has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery." (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323,331, emphasis added, see also GosneyTr. P. 65-67, L. 5).

The trial court was overly concerned with "casting a chill" on reporting actual instances of child abuse. Yet the federally compiled statistics clearly show that over 61% of all reports nationwide are screened out at the first level as "Unsubstantiated" (*Child Maltreatment 2007 Report*, National Child Abuse and Neglect Data System, "Reports," Ch. 2, P. 8,

www.acf.hhs.gov/programs/cb/systems/). In 2007 in the State of Idaho, there were 7089 reported cases of child abuse. 6013 of those reports (including all of the ones made by the Defendants in this case) were screened out as "Unsubstantiated and Unfounded." That left only 1064 substantiated cases of abuse requiring further investigation in Idaho in 2007 (ibid, P. 16). Instead of an "epidemic of child abuse" as Jesyca and Ben and their lawyers would like the trial court to believe, the statistics actually suggest an epidemic of false reporting such as that evidenced by the case at hand. "Divorce court is now the arena in which most false allegations of abuse or molestation occur" (www.Falsely-accused.net, 2007). It is now common knowledge on the street that molestation claims made in a custody dispute are to be viewed with skepticism.

The trial court ignored the will of the people of Idaho by refusing to allow this case to go to a jury. In Davidson's view, I.C. 16-1605, 1606, 1607, contain a carrot and a stick; the carrot is that a true reporter of child abuse, abandonment, or neglect does not have to worry about any criminal or civil liability under the immunity provision. The stick is that the bad faith or malicious reporter should be very worried about the liability created under the statute. The only way for that to happen in reality is for there to be more suits like Davidson's. Since the trial court correctly perceived this as a case of first impression, whereas Title 16 has been on the books for over 20 years, the "slippery slope" argument carries no weight. In fact, as recently as 2007, the Idaho Legislature amended 16-1607 to increase the minimum statutory penalty for false reporting from $500.00 to $2500.00 (House Bill No. 174). Originally, an increase to $5000.00 was sought. The Legislature explained their penalty increase as follows:

Statement of Purpose - RS 16903 - "This amendment increases the penalty of a crime that has become more difficult to prosecute because of the electronic means of communication and helps provide a deterrent that has more meaning in today's society than $500.00." (emphasis added).

This case should be remanded back to the trial court with specific instructions:

1) Immunity under I.C. 16-1606 was wrongly granted. Davidson proved material factual disputes concerning bad faith or malice sufficient to overcome the immunity of Jesyca. Ben only made a report of a child answering a question; he knew he had no personal knowledge of any offense or danger within the meaning of I.C. 18-5413(1), therefore he should never have been considered for immunity as he was negligent per se in reporting to the CC Sheriff. But, even if Ben was found to have made an actual report under I.C. 16-1605, he still was shown to have acted in bad faith or with malice and so immunity as to him should have been denied in either case.

2) The scope of the immunity was too broad. Even if otherwise granted properly, the immunity never should have covered "related actions" such as the child custody case or domestic violence petitions as these did not "result from" Title 16 action as the statute anticipated.

3) Atty. Prior should not have been granted absolute immunity. The trial court should have drawn all reasonable inferences from the complaint in Davidson's favor. Also, *Malmin v. Engler* only applies to defamatory statements made in connection with judicial proceedings, not intentionally tortious conduct. Davidson should be allowed to bring forth his evidence against Prior. Also, Davidson's six month time limit on service should be waived for good cause so Davidson can complete personal service on Prior as soon as possible after this Court's decision.

4) Summary judgment standards are the same for all cases. Cases may not be given disparate treatment just because the subject of child abuse is involved. The evidence and all reasonable inferences therefrom must be liberally construed in favor of the nonmoving party. If material factual disputes are present, the case needs to go to a jury trial, regardless of subject matter.

5) The trial court should have held a timely hearing on the threshold issues of admissibility/ inadmissibility of so-called evidence contained within Defendants' affidavits, including taking the testimony of Renato Davidson and Laura Davidson, and made written findings of fact and

conclusions of law on its decision.

6) The trial court should have allowed Davidson to discover evidence of prior false allegations of sexual abuse made by Jesyca against her father, under the standards of both I.R.E. 404(b) and 405(b). Her hearsay about it to Renato should be allowed in under I.R.E. 801(d)(2).

7) Davidson should have been allowed to amend his complaint to include newly discovered instances of slander per se. Permission to amend should have been granted liberally and a ruling should have been made in a timely and efficient manner without weighing the new evidence.

8) Davidson should have been allowed to depose the Health and Welfare agents who took the false reports, as Title 9 and the I.R.E. trump administrative regulations. The unredacted inactive investigatory documents should have been ruled "not privileged" and should have been produced by Health and Welfare, and questions answered therefrom.

9) Any and all remaining claims voluntarily dismissed by Davidson on May 12, 2009 in order to undertake this appeal should be fully reinstated upon remand.

10) Upon remand, re-assign this case to a judge with much more district court experience and who will not exhibit the same biases and prejudices as the existing trial court judge.

To the best of my knowledge and belief, this Appellant's Brief is a true and accurate statement of the facts and the law pertaining to this case.

Signed and Dated this 8th day of DECEMBER, 2009.

George Davidson - Plaintiff/Appellant pro se