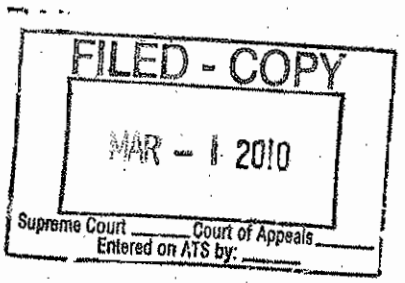
3-1-2010

Davidson v. Davidson Appellant's Reply Brief Dckt. 36535

IN THE SUPREME COURT OF THE STATE OF IDAHO

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



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

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ATTY. TROUPIS SHOULD BE SANCTIONED FOR FRIVOLOUS FILING. CASE SHOULD BE REMANDED WITH SPECIFIC INSTRUCTIONS.

ARGUMENT

I) ATTY. TROUPIS CONTINUES HIS PATTERN OF PURPOSEFUL MIS-CONSTRUCTION, MISSTATEMENT OF THE FACTS, AND FAILS TO SUPPORT ARGUMENTS WITH AUTHORITY OR ADDRESS THE ISSUES RAISED ON APPEAL.

Atty. Troupis in his Respondent's Brief, Argument IV claims generally that the trial court properly granted summary judgment, yet cites no authority in support of that opinion other than the *Rosenberger* decision which Davidson has thoroughly contended is inapposite (Appellant's Brief, Argument I, P. 6-10). Troupis does nothing to reclaim *Rosenberger*, except raise moot points about the trial judge's authority and timing of summary judgment, apparently attempting to substitute churning of words and phrases, unneeded quotations, and more lawyer mumbo jumbo for legal argument. Davidson may be an "ignorant" pro se, but it is evident that Troupis' brief continues to ignore all basic facts and law which are inconvenient for Defendants.

As but one example, two conflicting issues are intentionally convoluted, as if one provides support for the other: first, that immunity is granted or denied by the trial judge as part of the summary judgment process, which is not disputed (Appellant's Brief, Argument I, P. 4, L. 2), and second, leaping to the unwarranted conclusion that the trial court had authority to abandon established procedures and seize control of fact finding at summary judgment, this without citing a single relevant precedent (Respondent's Brief, IV-D, P. 28, L. 3-9). In fact, the instant case was to be tried to a jury (R. Vol. I. P. 17) and the summary judgment standards should have been the ones appropriate for that situation regardless of the label "immunity" being applied (Appellant's Brief, Argument I, P. 11, L. 23-P. 14, L. 8). No second set of "immunity standards" is shown by Troupis to exist in Idaho law, only the standards of I.R.C.P. 56 *et seq.*

In Argument IV-B, Troupis unnecessarily quotes I.C. 16-1607 and then quotes the trial court's use of a definition of bad faith from a contract case without making any point about it

whatsoever. Davidson has previously challenged the use of that definition in his Motion for Reconsideration (R. Vol. III, P. 454) as it contains irrelevant elements such as the implied covenant of good faith and fair dealing and is merely a general assumption of the law of contracts. Once again, Troupis points to no authority in Idaho to support that particular definition in regards I.C. 16-1606, 1607, yet steadfastly avoids referring to the off-point Wyoming case law depended upon by the trial court (Appellant's Brief, Argument I, P. 4, L. 9-P. 6, L. 11) or to his earlier position misleading the trial court that good faith was a presumption requiring rebuttal and granting of immunity automatic under I.C. 16-1606 (Appellant's Brief, Argument I, P. 1, L. 17-25).

On the other hand, the contract standard of bad faith does share one key element in common with the Black's Law Dictionary definition relied upon by Davidson, and that is the "dishonest purpose" which even the trial court found the Defendants possessed in this case (Appellant's Brief, Argument I, P. 11, L. 8-22). Although Idaho law contains little precedent on the issue, California courts have held that bad faith can be proven through circumstantial evidence and that a "pattern and practice of similar misconduct" (in the instant case, serial unsubstantiated and unfounded reports of child abuse naming Davidson as the alleged perpetrator) may be used to prove the element of bad faith (*Colonial Life and Accident Ins. Co. v. Superior Court*, 647 P.2d 86). Once again, no mention by Troupis of Jesyca and Kathy's proven serial false reporting , as Defendants want to keep up the charade that the only report was to CC Sheriff on 7-19-2007.

As to the criminal code definition of malice depended upon by the trial court, a "wish to vex, annoy, or injure another person" (Respondent's Brief, IV-B, P. 19, L. 1-3) is exactly what Davidson proved about Jesyca and Kathy by evidence through his affidavits (Appellant's Brief, Argument III, P. 44, L. 2-13). If a judge does not believe that having threatening violent gestures and vicious epithets screamed out at them from a passing car is malicious, then that judge is completely devoid of human empathy. The mere fact that the trial judge erroneously labeled

Jesyca's and Kathy's malice toward Davidson "acrimony" disproves no evidence proffered by Davidson; it only shows the trial court's blind determination to let the Defendants off the hook.

Further, Ben's testimonial statements to CC Sheriff plus his admissions (Appellant's Brief, Argument I, P.7, Argument III, P. 34, L. 9-13, P.42, L. 18-25), prove Jesyca and Kathy had convinced Ben through hearsay and falsity over several months that Davidson was (among other things) an "admitted child molester." Ben clearly articulated his malice toward Davidson in two separate recorded police interviews, culminating with a death threat against Davidson, a person Ben admits he has never even seen, let alone met (R. Vol. II, P. 361, p. 4, L. 20-25, P. 362, p. 5, L. 1-5). These are not "minor inconsistencies," they prove a hateful, spiteful mindset of ill will toward Davidson, raise material factual disputes, and a reasonable inference can be drawn from these facts that there were malicious actions directed toward Davidson in 2007 by the Defendants, call it "acrimony" or whatever. The existence of different inferences about a disputed set of facts calls for a jury trial under the laws and constitution of Idaho and the U.S.

Troupis raises another straw man on Page 19 of his brief, wasting three-fourths of a page with a single-spaced quote from the *Rees* case and baldly claiming (with no reference to the record) that the trial judge used this quote to "evaluate the immunity provision." The record shows the trial court actually just briefly cited *Rees* for a general reiteration of I.C. 16-1606, which "grants immunity to any person who makes a good faith report..." (R. Vol. III, P. 438C, L. 3-5). In fact, the *Rees* case primarily stands for the proposition that Health and Welfare and its' agents have a statutory duty to perform a competent investigation, and if they don't, they can be sued. In the instant case, all investigations showed no abuse took place so "the policy underlying the C.P.A." is without jurisdiction. This case is about false reporting, so Davidson merely cited to *Rees* for its final conclusion that the presence of material factual disputes concerning specific elements of statutory immunity (here malice or bad faith, in *Rees*, the negligence of the investigator) is the

standard of proof required for the district court to deny summary judgment and immunity. That directly opposes the trial court's improvised, newly-created standard that was especially aimed at Davidson and this one particular case alone (Appellant's Brief, Argument I, P. 10, L. 7-16).

In section C (Respondent's Brief, IV, P. 20) Troupis attempts to pretend the trial court actually ruled on the admissibility of evidence. Only one cite to the record is made in which the trial judge referred to part of a police report consisting of a few pages (R. Vol. II. P. 218-223). However, the evidence put into the record by Davidson goes from P. 218 to 350; that equals 132 pages of relevant documentary evidence, including 3 Health and Welfare reports, 2 medical reports, testimonial statements Jesyca and Ben made to police, perjured petitions for domestic violence protection orders by Jesyca, perjured affidavits by Jesyca and John Prior, depositions, admissions, etc., not to mention 12 Plaintiff's affidavits from various material fact witnesses (R. Ex. 4,5,6,7,8,9,11,12,17,19,21,25) none of which was ever ruled inadmissible by the trial court, and none of which was ever objected to or refuted. The trial judge in this case was "too busy" to review or rule on evidence (Appellant's Brief, Argument III, P. 32, para. d). That is not the same as Troupis' unsubstantiated claim that Davidson's proof has been ruled deficient in any way.

The above referenced exhibits were filed with the trial court in Opposition to Summary Judgment which included a 28 page brief (R. Vol. II, P. 189). None of the arguments, nor the disputed material facts, nor the evidence was ever addressed or ruled on in any way by the trial judge, other than "inconsistencies" in the police report. Instead, the trial court merely para-phrased the untested affidavit of Jesyca, deemed her version of events "established facts" and granted immunity. The trial court admitted material factual disputes exist in the case, but elevated Jesyca and Ben's drug addled (R. Vol. II, P. 335, p. 10,11) claim of subjective "belief" to the level of convincing proof, while ignoring all evidence to the contrary and moving the goal post since material factual disputes no longer count under the new rules freshly-minted by the trial judge.

The trial court never ruled on evidence (Respondent's Brief, IV, P. 21, L. 17-23, see also Appellants Brief, Argument III). Simply presuming Davidson guilty with no proof, making prohibited, thinly-disguised credibility determinations, and adding an impossible to overcome presumption of good faith to I.C. 16-1606 is not ruling on admissibility of evidence and widely deviates from the established procedures for summary judgment and all available Idaho precedent.

II) ATTY. TROUPIS' ARGUMENTS I AND II ARE NOTHING BUT RED HERRINGS AND ARE PUT FORWARD ONLY TO NEEDLESSLY INCREASE COSTS.

Atty. Troupis spins out more falsehood and misleading claims in his Arguments I and II. For example, on P. 11, L. 24 and 25, he premises his argument on the falsehood that "George Davidson claimed that Kathy and Jesyca made a statement to Seneca Crow..." concerning alleged child abuse. The record proves that prima facie false (R. Vol. I, P. 20, para. 26): "...Jesyca went unexpectedly to visit an acquaintance, Seneca Crow, of Boise, and told him a totally distorted version of the events described herein, in front of two other witnesses..." (See also, the Affidavit of Seneca Crow, R. Ex. 5). The witnesses were "David" and "Jake" not Kathy Guthrie, nor did Kathy have any prior knowledge of Jesyca's actions in the Seneca Crow incident, nor does Troupis point to any record to support Kathy's involvement in that incident in any way.

Troupis does correctly point out that Kathy's role in this case was as the instigator and material supporter of the civil conspiracy (Respondent's Brief, Argument I, P. 11, L. 13-16). As Davidson correctly pointed out to the trial court on May 7, 2009, whether or not Kathy had officially been granted immunity or summary judgment along with Jesyca and Ben, all claims against her had been disposed of at summary judgment (GosneyTr. P. 319, L. 20-25, P. 320, L. 1). The only claim that remained for trial was the previously noted Seneca Crow incident which only implicated Jesyca, and at least one element of proof of each one of the torts in that case had been implicitly ruled inadmissible by the trial judge's granting of immunity, i.e. there was no longer

admissible evidence to support any remaining claim of slander per se (falsity contained in the serial unsubstantiated and unfounded reporting and perjury), I.I.E.D. (Seneca Crow incident despicable, but probably not outrageous, and emotional distress claim cannot stand without slander per se, *Uranga v. Federated Publ. Inc. DBA The Idaho Statesman*, 138 Idaho 550), abuse of process (no longer allowed to talk about the process), or negligence (no more statutory duty to refrain from false reporting). The conspiracy, active participation in which made Kathy jointly and severally liable, fails without a tort to support it (*McPheters v. Maile,* 138 Idaho 391). The trial court had noted in its' Memorandum Decision granting summary judgment, that Kathy "...Guthrie may have disclosed more to her partner than she claimed in her affidavit" (R. Vol. III, P. 438D, L. 8-11). Yet a reading of Davidson's complaint shows no claim against Kathy for that; her "partner" did not respect a duly-issued subpoena and failed to appear for a deposition and so apparently refuses to testify as to anything Kathy told her, and at any rate, the trial judge cannot create a cause of action for Davidson that was not in the complaint, and neither can Troupis.

To fully understand the actions of the trial court on May 7, 2009, one needs to read the entire passage in the record (GosneyTr. P. 319, L. 20- P. 327, L. 17) concerning the dismissal agreed to only in order to undertake this appeal. In Troupis' out of context snippet the trial judge is heard to state: "...I would simply dismiss the balance of the case but he [Davidson] would reserve the right to go ahead and appeal any decisions I had made concerning immunity or probably any other issues that I had addressed as well." (emphasis added, Respondent's Brief, Argument I, P. 12). The language employed by the trial judge clearly indicates that he, along with Davidson, Troupis, and Duggan all shared the viewpoint that the dismissal of the remaining claim was conditioned upon what, if any, action this Court took in the way of remand after appeal. Troupis even responded "I think I understand it the same way." (ibid). The trial judge made his view of the dismissal crystal clear when he said "If the Supreme Court were to reverse me and

say that I should not have granted immunity...it would come back for trial and the dismissal with prejudice would be gone anyway and it would be subject to retrial. If they affirm me, I think it is res judicata at that point and it is dismissed with prejudice so I am not sure it makes a lot of difference." (GosneyTr. P. 326, L. 17-25 P. 327, L. 1, emphasis added). After Davidson expressed his perception of the conditional dismissal, the trial judge reiterated his belief that "...I think we can dismiss with prejudice given that and because again, I don't think it in the long run will make any difference one way or the other" (ibid, P. 327, L. 14-17).

Troupis, with this utterly frivolous judicial estoppel argument, is attempting to stop an appeal from taking place on certain issues unspecified by him, but res judicata is not intended to do that: "...a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." (*Hindmarsh v. Mock*, 138 Idaho 92). The trial judge, by his own admission on the record, only considered it res judicata if he was affirmed by the Supreme Court, but that all other claims in the case would be reinstated for "retrial" upon a remand. Even if there was any procedural objection raised to a reinstatement of the claim dismissed in the action, it could easily be overcome by I.R.C.P. 60(b) (ibid. P. 141); judgments can be vacated by the trial court for good cause at any reasonable time.

Obviously, this dismissal was conditional as per the judge's order under I.R.C.P. 41(a)(2), not voluntary. While Troupis self-servingly labels the dismissal voluntary, he does not cite the authority of I.R.C.P. 41(a)(1), probably because he already knows this situation does not meet the terms and preconditions of a voluntary dismissal as described in that rule. As if further proof was needed, Davidson himself said the dismissal was not voluntary: "So if you want to, even though I am not saying this voluntarily as if oh, gee, you know I should have never filed this in the first place. No, absolutely not...I think this is an important case...I think the Supreme Court should be allowed to have a crack at this case and let's see what they think about it because then

I think we can come back and have the trial where I actually am allowed to present the merits of my case with evidence" (GosneyTr. P. 324, L. 10-24, emphasis added). Clearly, Davidson was aware the merits of his case had never been reached, and was seeking expedient appellate review without any further unnecessary delays (GosneyTr. P. 317, L. 16-25, trial court indicating it did not have time to hear argument or make a ruling on Davidson's Motion for I.R.C.P. 54(b) certificate even though that motion was noticed up for hearing that day - see R. Vol. 1, R.O.A. 5-7-2009).

III) ATTY. TROUPIS' ARGUMENT III IS BASED UPON A FALSE PREMISE AND DOES NOT CITE TO THE RECORD OR ANY RELEVANT LEGAL AUTHORITY.

The Memorandum Decision and Order (R. Vol. I, P. 53) purportedly dismissing John Prior under 12(b)(6) and *Malmin v. Engler* has nothing to do with granting immunity to Jesyca, nor does Troupis direct this Court to the portion of the record that supposedly says it does. The trial court itself wrongly convoluted slander per se with abuse of process (Appellant's Brief, Argument 2, P. 16, L. 15-21), and Davidson has maintained all along that all of the Defendants shared equal responsibility for all of the torts through conspiracy. Co-conspirators do not even have to actually commit a tort if they (like Kathy) have provided a tortfeasor material support and encouragement to commit the tortious acts (*Restatement, Second, of Torts,* Sec. 876). Nor does every member of the conspiracy have to commit every tort or need to know the details of every action or word of every other member of the conspiracy in order to be found liable (ibid).

John Prior was not the primary actor in defamation. Instead, he was the primary actor in the abuse of process tort and was negligent per se in his duties as a lawyer. He was responsible for the I.I.E.D. and the slander per se through supporting and encouraging Jesyca to further her torts so he could gain leverage over the Davidsons in the small claims suit and the child custody action. The trial court mistakenly identified Prior as a primary actor in the slander per se: "...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" (R. Vol. I, P. 56, L. 6-8, emphasis added). Notice there is no mention of Jesyca and her participation in the abuse of process tort with Prior, let alone her defamation. Troupis is just making things up and trying to put words in the trial judge's mouth to try racking up more exorbitant lawyer fees.

CONCLUSION

Speaker of the U.S. House of Representatives Tip O'Neil once famously said "You are entitled to your own opinion, but you are not entitled to your own facts." If Jesyca and Kathy and their paid lawyer would heed that basic advice, this controversy would not now be raging. Troupis has instead done in this Respondent's Brief precisely what Davidson expected him to do and what he has done in this case from day one, and that is to heed the cynical advice of the Roman Senator Cicero from 100 B.C.: "If you do not have the facts on your side, argue the law. If you do not have the law on your side, argue the facts. If you do not have the facts or the law on your side, SLANDER THE PLAINTIFF!"

Respondent's brief is the definition of frivolous under I.A.R. 11(1). It does not respond to Appellant's Brief, nor contain one cogent legal argument, has little basis in fact, is filled with irrelevant, unnecessary "bullet point" cites and quotations, and ultimately resorts to the same overused presumption of guilt, slander the Plaintiff gibberish that has passed for a defense with Jesyca and Kathy ever since Troupis began representing them. Troupis should be sanctioned. To the best of my knowledge and belief, this Appellant's Reply Brief is a true and accurate statement of the facts and the law pertaining to this case.

Signed and Dated this 1ST day of MARCH, 2010.

George Davidson

George Davidson - Plaintiff/Appellant pro se

CERTIFICATE OF SERVICE

I, GEORGE DAVIDSON, THE APPELLANT IN THIS CASE, DO HEREBY CERTIFY THAT I DID CAUSE TO BE SERVED ON THE RESPONDENTS A TRUE AND ACCURATE COPY OF THIS APPELLANT'S REPLY BRIEF BY DEPOSITING IT POSTAGE PREPAID WITH THE POSTMASTER AT NAMPA, IDAHO ON MARCH 1, 2010,

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