3-2-2010

# Davidson v. Davidson Respondent's Brief 2 Dckt. 36535

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| GEORGE DAVIDSON,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>JESYCA HOOD DAVIDSON, BENJAMIN PUCKETT, KATHY GUTHRIE, and JOHN PRIOR,<br><br>Defendants-Respondents. | ) | SUPREME COURT DOCKET NO.: 36535-2009<br><br>BRIEF OF RESPONDENT BENJAMIN PUCKETT |

**Appeal from the District Court of the Fourth Judicial District of the State of Idaho In and for the County of Ada**

**HONORABLE TIMOTHY HANSEN, District Judge.**


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## TABLE OF CONTENTS


Table of Contents 2

Table of Authorities 3

Statement of the Case 5

Issue Presented on Appeal 6

Argument: 7

The trial court properly granted summary judgment on behalf of Benjamin Puckett. 7

A. The trial court properly determined that the issue of immunity was to be decided by the court rather than a jury. 7

B. Under the ICPA, George Davidson bears the burden of proving that Benjamin Puckett acted in bad faith or with malice. 8

C. Even under the traditional standards of summary judgment, the trial court properly granted summary judgment in favor of Benjamin Puckett. 12

Conclusion 16

## TABLE OF AUTHORITIES

### CASES


*Baldwinn County Hospital Authority v. Trawick*, 233 Ga. App. 539, 504 S.E. 2d 708 (Ga. App. 1998) 14

*Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006) 13

*Dobson v. Harris*, 352 N.C. 77, 530 S.E. 2d 829 (N.C. 2000) 8, 12

*Forrest v. Berlin Central School District*, 815 N.Y.S.2d 774 (2006) 13

*Heinrich v. Conemaugh Valley Memorial Hospital*, 436 Pa. Super. 465, A.2d 535 (Pa. Super. 1994) 13

*Howe v. Andereck*, 882 So. 2d 240 (Miss. App. 2004) 12

*Jones v. Synder*, 714 A.2d 453 (Pa. Super. 1998) 13

*Kempster v. Child Protective Services,* 130 A.D. 2d 623, 515 N.Y.S.2d 807 (1987) 12

*Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977) 11

*May v. Southeast Wyoming Mental Health Center*, 866 P.2d 732 (Wyo. 1993) 7, 12

*O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134 (Idaho App. 1990) 13

*Pace v. Hymas*, 111 Idaho 581, 726 P. 2d 693, 726 P.2d 693 (1986) 11

*Petricevich v. Salmon River Canal Co.* 92 Idaho 865, 452 P.2d 362 (1969) 13

*Rees v. Dept. of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006) 7, 10

*Warner v. Mitts*, 211 Mich. App. 557, 536 N.W.2d 564 (Mich. App. 1995) 13

*Wisconsin v. Kenneth Big John*, 432 N.W. 2d 576 (Wis. 1988) 11

**STATUTES**


| | |
|---|---|
| Idaho Code §16-1601 | 10 |
| Idaho Code §16-1605(1) | 9, 11 |
| Idaho Code §16-1605(2) | 9 |
| Idaho Code §16-1606 | 9, 10, 11 |
| Idaho Code §16-1607 | 9, 10, 11 |
| Idaho Code §18-101(4) | 14 |


**COURT RULES**


| | |
|---|---|
| Idaho Appellate Rule 35(g) | 5, 7 |


**TREATISES**


| | |
|---|---|
| K. Broun, *McCormick On Evidence* § 337 (6th ed) | 11 |

## STATEMENT OF THE CASE

Pursuant to Idaho Appellate Rule 35(g), Benjamin Puckett adopts by reference the Statement of the Case as set forth in the Brief of Respondents Jesyca Davidson and Kathy Guthrie. Mr. Puckett supplements the Course of Proceedings with the statement that on November 7, 2008 Mr. Puckett filed his Motion for Summary Judgment.

## ISSUES ON APPEAL

Whether the trial court properly granted summary judgment on behalf of Benjamin Puckett?

## ARGUMENT

### The trial court properly granted summary judgment on behalf of Benjamin Puckett.

#### A. The trial court properly determined that the issue of immunity was to be decided by the court rather than a jury.

Pursuant to Idaho Appellate Rule 35(g), Mr. Puckett adopts by reference Argument IV A, C, and D of the Brief of Respondents Jesyca Davidson and Kathy Guthrie.

In addition to the authorities cited by Jesyca Davidson and Kathy Guthrie in their Argument IV A, Mr. Puckett directs the Court to *May v. Southeast Wyoming Mental Health Center*, 866 P.2d 732 (Wyo. 1993). In *May* the Wyoming Supreme Court indicated that the question of immunity should be decided by the trial court.

> The well-known standard of review for summary judgments has only minimal significance here. Rather, the summary judgments in this case can be upheld on the basis of immunity. Therefore, we need not search the record to see if there are disputed material facts, nor need we examine in detail the materials in support of summary judgment or in opposition.

*May, supra* at 738.

Mr. Davidson cites *Rees v. Dept. of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006) for the proposition that a trial court should not vary from the traditional summary judgment standards when considering issues of immunity. In *Rees* the plaintiff sued the Idaho Department of Health and Welfare and a department social worker for negligence. The Department and the social worker claimed immunity under the Idaho Tort Claims Act [*hereinafter* "ITCA"]. The trial court did not deviate from the traditional summary judgment standards in remanding the matter for trial because there existed sufficient evidence to create genuine issues of material fact as to whether the Department or the social worker were negligent. *Id.* at 408. In not varying from the traditional standards for summary judgment the Court noted that liability is the rule and immunity is the exception under the ITCA.

> The purpose of the ITCA is to provide "much needed relief to those suffering injury from the negligence of government employees. The ITCA is to be construed liberally, consistent with its purpose, and with a view to "attaining substantial justice." **Therefore, under the ITCA liability is the rule and immunity is the exception**.

*Id.* at 406 (citations omitted)(emphasis added).

*Rees* and cases based upon the ITCA are not persuasive of the standard to be used in determining immunity under the Idaho Child Protective Act, Idaho Code §16-601 *et seq.* [*hereinafter* "ICPA"]. The policy considerations which drive the ICPA are different from those which drive ITCA. Under the ITCA liability is the rule and immunity is the exception. Under the ICPA, which seeks to protect vulnerable children, immunity is the rule and liability is the exception. See Argument B *infra*.

With regard to immunity under the ICPA the trial court should decide early on in the legal proceedings whether there is immunity or not. The spectre of a reporting party being forced to go through a long and expensive trial will have a chilling effect upon the reporting of child abuse. *Cf Dobson v. Harris*, 352 N.C. 77, 530 S.E. 2d 829 (N.C. 2000) (In underscoring the purpose of summary judgment using traditional standards the North Carolina court stated, "This purpose is well served when the movant, who has reported child abuse or neglect in accord with statutory mandate, is accused of defamation for having done so, for there can be no disincentive to report greater than the spectre of the length and expense of a lawsuit." *Id.* at 77, 530 S.E. 2d at 835.)

### B. Under the ICPA, George Davidson bears the burden of proving that Benjamin Puckett acted in bad faith or with malice.

With respect to Argument IV B in the Brief of Respondents Jesyca Davidson and Kathy Guthrie, Respondent Benjamin Puckett argues that the issue is not whether Jesyca Davidson and Benjamin Puckett acted in good faith, but whether George Davidson established, for purposes of withstanding summary judgment, that Jesyca Davidson and Benjamin Puckett acted in bad faith or with malice.

Under the ICPA any "person having reason to believe, that a child under the age of 18 years of age has been abused" has the duty to report such abuse to the proper law enforcement agency or the Idaho Department of Health and Welfare. Idaho Code §16-1605(1). Failure to report is a misdemeanor. Idaho Code §16-1605(2).

Any person, who has reason to believe a child has been abused and reports the abuse as required under Idaho Code §16-1605, has immunity from any liability for so reporting.

> **Any person who has reason to believe that a child has been abused, abandoned or neglected and, acting upon that belief, makes a report of abuse, abandonment or neglect as required in section 16-1605, Idaho Code, shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed.** Any such participant shall have the same immunity with respect to participation in any such judicial proceeding resulting from such report. Any person who reports in bad faith or with malice shall not be protected by this section. Any privilege between husband and wife, or between any professional person except the lawyer-client privilege, including but not limited to physicians, counselors, hospitals, clinics, day care centers and schools and their clients shall not be grounds for excluding evidence at any proceeding regarding the abuse, abandonment or neglect of the child or the cause thereof.
>
> Idaho Code §16-1606 (emphasis added).

This section does not apply to any individual who reports in bad faith or with malice and the following section gives an individual who has been reported against in bad faith or with malice a statutory cause of action for actual or statutory damages.

> **Any person who makes a report or allegation of child abuse, abandonment or neglect knowing the same to be false or who reports or alleges the same in bad faith or with malice shall be liable to the party or parties against whom the report was made for the amount of actual damages sustained or statutory damages of two thousand five hundred dollars ($2,500), whichever is greater, plus attorney's fees and costs of suit.** If the court finds that the defendant acted with malice or oppression, the court may award treble actual damages or treble statutory damages, whichever is greater.
>
> Idaho Code §16-1607 (emphasis added).

Under the ICPA, in contrast with the ITCA, immunity is the rule and liability is the exception. The purpose of the ICPA is to protect abused children. Idaho Code §16-1601. In *Rees v. Dept. of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006), the Idaho Supreme Court stated:

> Our legislature has made clear that health and safety of reportedly abused children is the focus of the ICPA. I.C. § 16-1601. This is not a general duty; rather it is a duty running to a narrow class of persons-abused and neglected children-who are particularly vulnerable because they allegedly suffer abuse in the privacy of their homes and cannot protect themselves. Additionally, the ICPA and IDAPA make clear this state's policy to protect the life, health and welfare of children endangered by abuse or neglect by taking mandatory actions to prevent further abuse and neglect. Our legislature has created a duty owed to a narrow, easily identified class of persons to be protected from a particular harm.

*Rees v. Dept. of Health and Welfare, supra* at 18, 137 P.3d at 405.

Consistent with this policy of protecting vulnerable children, the ICPA protects reporting individuals from liability by granting them immunity. If there were no immunity, these individuals would be reluctant to report suspected abuse. This immunity, however, is not absolute. Because of a secondary goal of protecting reported individuals from bad faith or malicious reporting, the ICPA creates a cause of action for reported individuals who can prove that a reporting individual acted in bad faith or with malice. Thus, in the present case, Mr. Puckett, the reporting party is entitled to immunity under Idaho Code §16-1606 and Mr. Davidson, the reported party, has a cause of action under Idaho Code §16-1607, but he bears the burden of proving that Mr. Puckett acted in bad faith or with malice.

This division of the burden under the statute is consistent with the principal that the exception to the statutory duty falls upon the individual proving the exception.

> In allocating the burdens, courts consistently attempt to distinguish between the constituent elements of a promise or of a statutory command, which must be proved by the party who relies on the contract or statute, and matters of exception, which must be proved by its adversary. Often the result of this approach is an arbitrary allocation of the burdens, as the

> statutory language may be due to a mere casual choice of form by the draftsman. However, the distinction may be a valid one in some instances, particularly when the exceptions to a statute or promise are numerous. If that is the case, fairness usually requires that the adversary give notice of the particular exception upon which it relies and therefore that it bear the burden of pleading. The burdens of proof will not always follow the burden of pleading in these cases. However, exceptions generally point to exceptional situations. If proof of the facts is inaccessible or not persuasive, it is usually fairer to act as if the exceptional situation did not exist and therefore to place the burden of proof and persuasion on the party claiming its existence.
>
> K. Broun, *McCormick On Evidence*§ 337 (6th ed); *Wisconsin v. Kenneth Big John*, 432 N.W. 2d 576, 583 (Wis. 1988).

Under the ICPA the duty to report and immunity for reporting are set forth first in Idaho Code §16-1605 and §16-1606. This is the rule. The exception to the rule of immunity is subsequently set forth in Idaho Code §16-1606 and then in Idaho Code §1607: if a reporting party reports in bad faith or with malice he has no immunity under Idaho Code §16-1606 and the reported party may sue to recover actual or statutory damages under Idaho Code §16-1607.

In addition, this division of the burden of proof is consistent with the principal of placing the burden on the party required to prove the affirmative of a fact and not the negative. *Pace v. Hymas*, 111 Idaho 581, 585 – 586, 726 P. 2d 693, 697 – 698 (1986); *cf Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406 – 407, 565 P.2d 1360, 1363 - 1364 (1977). Under the ICPA the relevant fact to be proven with respect to immunity is whether Mr. Puckett's report was made in bad faith or with malice. This is an affirmative fact for Mr. Davidson, i.e. Mr. Puckett's report was made in bad faith or with malice. It is a negative fact, however, for Mr. Puckett, i.e. the report was **not** made in bad faith or **not** with malice. Therefore, Mr. Davidson should bear the burden of proof.

Finally, this placement of the burden upon the reported party is similar to the statutory scheme in other jurisdictions. A number of other jurisdictions have provided

the reporting party with a presumption that they have acted in good faith and required the reported party to rebut this presumption. *Howe v. Andereck*, 882 So. 2d 240 (Miss. App. 2004); *Dobson v. Harris*, 352 N.C. 77, 530 S.E. 2d 829 (N.C. 2000); *May supra*; *Kempster v. Child Protective Services*, 130 A.D. 2d 623, 515 N.Y.S.2d 807 (1987). These statutory schemes parallel the IPCA in that the burden of going forward initially lies with the party claiming they were reported party against in bad faith or with malice. It differs in that under the IPCA, the burden of persuasion always remains with the party claiming that they were reported against in bad faith or with malice.

### C. Even under the traditional standards of summary judgment, the trial court properly granted summary judgment in favor of Benjamin Puckett.

In addition to the authority cited by Jesyca Davidson and Kathy Guthrie in Argument IV D of their brief, Mr. Puckett directs the Court to the *Petricevich v. Salmon River Canal Co.*, which more fully sets out the "mere scintilla of evidence or only slight doubt" standard.

> This court has recently rejected the 'slightest doubt' test in Tri-State Nat. Bank v. Western Gateway Storage Co., 92 Idaho 543, 447 P.2d 409 (1968), stating:
>
> '* * * the rule (I.R.C.P. 56(c)) itself, in permitting summary judgment where 'no genuine issue of any material fact' appears, plainly requires more to forestall summary judgment than the raising of the 'slightest doubt' as to the facts.' 447 P.2d at 412.
>
> In our opinion the better rule is that summary judgment will be granted whenever on the basis of the evidence before the court a directed verdict would be warranted or whenever reasonable men could not disagree as to the facts. ... 3 Barron & Holtzoff, Federal Practice and Procedure, & [sic] 1234, p. 133 (Rules ed. 1958), citing cases, states that
> 'Flimsy or transparent contentions, theoretical questions of fact which are not genuine, or disputes as to matters of form do not create genuine issues which will preclude summary judgment. Neither is a mere pleading allegation sufficient to create a genuine issue as against affidavits and other evidentiary materials which show the allegation to be false. A mere

> scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely. A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried.' (Emphasis added.) (at pp. 132-133).
>
> *Petricevich v. Salmon River Canal Co.* 92 Idaho 865, 871, 452 P.2d 362, 368 (1969) (citations omitted).

To withstand a motion for summary judgment the non-moving party claiming bad faith or malice must produce objective evidence of the same. Conclusory allegations of improper motives or maliciousness are insufficient. *Jones v. Synder*, 714 A.2d 453 (Pa. Super. 1998); *Heinrich v. Conemaugh Valley Memorial Hospital*, 436 Pa. Super, 465, 648 A.2d 53, 58 (Pa. Super. 1994); *Forrest v. Berlin Central School District*, 815 N.Y.S.2d 774 (2006). There must be direct or circumstantial evidence that the reporting party acted with bad faith or malice. *Cf Jones supra.* The alleged animosity of the reporting party towards the reported party does not make the report a bad faith report. *Warner v. Mitts*, 211 Mich. App. 557, 560, 536 N.W.2d 564 (Mich. App. 1995).

Black's Law Dictionary (7th ed. 1999) defines bad faith as "[d]ishonesty in belief or purpose." *quoted in Cobbley v. City of Challis*, 143 Idaho 130, 135, 139 P.3d 732, 737 (Idaho, 2006). In *O'Neil v. Vasseur* the Idaho Court of Appeals, while discussing the tort of bad faith, stated that "[b]ad faith embodies a dishonest purpose and breach of the known duty of good faith and fair dealing through some motive of self-interest or ill-will." *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134, 139 (Idaho App. 1990).

The Georgia Court of Appeals provided a similar definition of bad faith in the child protection context:

> 'Bad faith' is the opposite of 'good faith,' generally implying or involving actual or constructive fraud; or a design to mislead or deceive another; or a neglect or refusal to fulfill some duty, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. 'Bad faith' is not simply bad judgment or negligence, but it imports a dishonest

> purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will.
>
> *Baldwinn County Hospital Authority v. Trawick*, 233 Ga. App. 539, 541. 504 S.E. 2d 708 (Ga. App. 1998)

Idaho Code §18-101(4) defines malice as a "wish to vex, annoy or injure another person, or an intent to do a wrongful act."

In summary, to withstand Mr. Puckett's motion for summary judgment, Mr. Davidson had the burden of showing by means of direct or circumstantial evidence, sufficient evidence to withstand a motion for a directed verdict, that Mr. Puckett acted in bad faith or with malice. Mr. Davidson provided no such objective evidence and the trial court correctly granted Mr. Puckett's motion for summary judgment.

Mr. Davidson's Statement of Facts does not identify any facts which indicate that Mr. Puckett acted in bad faith or with malice. His Statement of Facts merely states that on July 17, 2007 Jesyca Davidson and Benjamin Puckett went to the St. Luke's emergency room because the minor child "S" had touched herself and said "Grandpa," that St. Luke's could find no physical evidence of abuse, and that the following day, July 18, 2007, Renato Davidson, the father of "S", filed a motion for full custody of "S". Mr. Davidson's Statement of Facts makes no other references to Mr. Puckett. This is no showing of bad faith or malice on the part of Mr. Puckett. The reporting of suspected child abuse which cannot be corroborated by physical evidence does not show that an individual has acted in bad faith or with malice.

Mr. Davidson argues that because Mr. Puckett has a strong emotional reaction to people he believes may be guilty of child sexual abuse, that Mr. Puckett's reporting was with malice. His strong emotional reaction is no such evidence, but rather substantiates his claim that he was reporting in good faith. If Mr. Puckett did not have a good faith belief that "S" was referring to Mr. Davidson when she said "Grandpa," he would not have had the emotional reaction that he had regarding Mr. Davidson. Malice requires more than a strong negative emotional reaction to facts that one believes are true. If that

were the case, anyone who reported child abuse and had a strong negative emotional reaction to child abuse would be liable under Idaho Code §16-1607.

Mr. Davidson also argues that Mr. Puckett's statements in his affidavit in support of his motion for summary judgment are inadmissible because they are not based upon personal knowledge or they create material factual dispute because they differ with other statements made by Mr. Puckett or statements made by Jesyca Davidson or Kathy Guthrie. These arguments do not provide any evidence that Mr. Puckett acted in bad faith or with malice.

The fact that Mr. Puckett did not see "S" expose herself and place her finger in her vagina is not relevant to his state of mind. Mr. Puckett was told by Jesyca Davidson that that was what "S" was doing, and based upon that information Mr. Puckett asked "S", "Who taught you that?" to which she replied "Grandpa." Mr. Puckett's affidavit establishes that he had a good faith basis for believing that "S" may have been abused. The fact that he did not see "S" place her finger in her vagina provides no evidence that he acted with bad faith or malice. Moreover, these minor variations in Mr. Puckett's account of what happened on July 17, 2007 provide no evidence that he acted in bad faith or with malice.

## CONCLUSION

Mr. Davidson has the burden of proof, but he has provided no objective evidence that Mr. Puckett acted in bad faith or with malice and the trial court correctly granted summary judgment in favor of Mr. Puckett. For the reasons set forth above, the Court should affirm the decision of the trial court in granting summary judgment on behalf of Mr. Puckett.

Dated this 2nd day of March, 2010.

MICHAEL E. DUGGAN
Attorney for Respondent
Benjamin Puckett

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

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