

3-2-2010

# Davidson v. Davidson Respondent's Brief 3 Dckt. 36535

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE DAVIDSON,  
Plaintiff-Appellant,

v.

JESYCA HOOD DAVIDSON,  
BENJAMIN PUCKETT,  
KATHY GUTHRIE,  
and JOHN PRIOR,  
Defendants-Respondents.

)  
)  
)  
)  
) **Supreme Court No. 36535**

) **BRIEF OF RESPONDENT**  
) **JOHN PRIOR**  
)  
)  
)  
)

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

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**HONORABLE TIMOTHY HANSEN, District Judge.**

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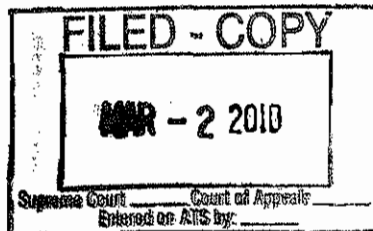
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## STATEMENT OF THE CASE

### A. COURSE OF PROCEEDINGS

The filing of George Davidson's complaint against Jesyca Davidson, Kathy Guthrie, Benjamin Puckett and John Prior on February 19, 2008 commenced this lawsuit. George Davidson's complaint alleged that the Defendants had falsely reported to government authorities that he had sexually abused his granddaughter, and had made similar statements to third parties, and in court proceedings regarding a custody dispute between Jesyca Davidson and her ex-husband Renato Davidson, George Davidson's son. R. Vol. I, p. 13. On March 10, 2008, this Respondent John Prior filed a Motion to dismiss the claims against him. On May 21, 2008, the Court issued a Memorandum Decision and Order granting this Respondent John Prior's dismissal of all claims against him. R. Vol. I, p. 56.

On August 26, 2008, George Davidson filed a Motion for leave to amend his complaint to state a new claim against this Respondent. This respondent never received notice of this motion or hearing. On February 5, 2009, the Court issued a Memorandum Decision and Order denying the Motion with respect to an amended claim against this Respondent. George Davidson filed his notice of appeal on May 26, 2009. R. Vol. III, p. 473. Pursuant to Idaho Appellate Rule 35(g), John Prior adopts by reference the Statement of the Case as set forth in the Brief of Respondents' Jesyca Hood Davidson and Kathy Guthrie. This Respondent further asserts that the claims against this respondent are from his role as attorney for Respondent Jessica Hood Davidson in the course of litigation in a custody dispute. That all actions complained by George Davidson

toward respondent are in the filing of documents in a judicial proceeding and in argument made in the course of a judicial proceedings.

## **ISSUES ON APPEAL**

1. Whether the district court properly dismissed the claims by George Davidson against John Prior.

## ARGUMENT

### I

This matter comes before this court on an appeal by Mr. George Davidson from a dismissal of his claim against this Respondent on a 12(b)(5), (6) motion. The allegations set forth in Mr. George Davidson's complaint allege five counts Intentional Infliction of Emotional Distress, Abuse of Process, Slander per se, Conspiracy, and Negligence. The Complaint's allegation against John Prior can be found in paragraph 5, in which it is alleged:

"5 Defendant John Prior (Mr. Prior) has been Jesyca's counsel of record since November 2006. Mr. Prior's role was to push matters through court with no regard for law, evidence, or the truth." R. Vol. 1, p. 16.

Under the Statement of Facts portion of Mr. George Davidson's complaint the only reference to this respondent is found under paragraph 15 in which it is alleged:

"15. On July 30, Mr. Prior filed several motions with the Third Judicial District, the primary one being for Emergency Temporary Custody, effectively taking control of the hearing already set for August 9, 2007." R. Vol. 1 p. 19.

In Malmin v. Engler, 124 Idaho 733 (Ct App. 1983) the court noted "defamatory matter published in the due course of a judicial proceeding , having some relation to the cause , is absolutely privileged." Mr. Davidson's complaint alleges that as a result of filing "several motions " that I engaged in the alleged five counts. These actions complained of in Mr. Davidson's complaint are the filing of legal documents, the appearance in court in a custody case on behalf of Ms. Jesyca Hood Davidson and presenting argument in court in support of her case.

There is a common law rule of absolute immunity from civil liability which is set forth in the Restatement of Law (Second) of Torts section 586.



**Restatement of Law (Second) of Torts section 586:**

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The conduct complained of by Mr. George Davidson are actions taken in court.

District Judge Timothy Hansen viewed the actions complained of by Mr. George Davidson as being completely attributed to judicial proceedings and as such were absolutely privileged. The allegation in Mr. Davidson's complaint alleging Slander per se is absolutely privileged based upon the ruling in the Malmin case. In Mr. Davidson's complaint alleging Intentional Infliction of Emotional Distress it is alleged that I filed documents and represented Jesyca Hood Davidson in court. He further alleged that I "pushed matters through court with no regard for law, evidence or the truth." R. Vol. p. 16. It is this respondent's contention that his actions taken in court are absolutely privileged under the ruling in the above noted Malmin case. If an attorney can be sued in a subsequent proceeding for Intentional Infliction of Emotional Distress for filing legal documents and advocating for a client's position in court in a custody proceeding there will be a chilling effect upon all attorneys who want to strongly advocate for their client's position if they know there is a potential lawsuit waiting. The ability of an attorney to advocate for his client must be preserved. Mr. George Davidson's Complaint fails to identify in his complaint any specific allegation against this respondent under the heading of Intentional Infliction of Emotional Distress. R. Vol. 1, p. 13. In Idaho, the elements of IIED are: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the emotional distress was severe.

*Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003). The requirements noted above have not been sufficiently plead in this case. Although the court withdrew its opinion in *Cunningham v. Jensen et al* Docket Number 31332 (Idaho Supreme Court, September 14, 2005) it set forth the level of conduct to go forward on this type of claim. It noted “The defendant's conduct must be more than simply unjustifiable, and must rise to a level of atrocious conduct, beyond all possible bounds of decency, so that it would cause an average member of the community to believe it was outrageous. Other courts have said that the conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. *See Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999); *Trujillo v. Northern Rio Arriba Elec. Co-op, Inc.*, 41 P.3d 333, 343 (N.M. 2001); *Computer Pub lns., Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002); *Harris v. Jefferson Partners*, 653 N.W.2d 496, 500 (S.D. 2002); *Finlan v. Dallas Indep. Sch. Dist.*, 90 S.W.3d 395, 411 (Tex. App. 2002); Restatement (Second) of Torts § 46, cmt. d (1965).” If you look at the allegations against this respondent the only allegations are the filing of papers and advocating in court. In *Overman v. Klein* 103 Idaho 795 (S.Ct 1982) 654 P2d 888, p. 800 the court discussed the issue of absolute immunity as it extends to a party, an advocate and a judge when it cited the following case:

“ In *Butz v. Economou*, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978), the Court stated:”The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall., at 348-349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. *Pierson v. Ray*, 386 U.S., at 554 [87 S.Ct. 1213, 18 L.Ed.2d 288]. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses

can perform their respective functions without harassment or intimidation. [p] At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision making process, there is a less pressing need for individual suits to correct constitutional error."

In regards to the allegation against this respondent for Abuse of Process, the claims stem again from Mr. George Davidson's allegations that respondent in some way had an ulterior motive because of a small claims case and a bar complaint. As noted at the hearing before Judge Hansen I have yet to hear from the State Bar regarding a complaint. . Transcript p. 16 line 5. I had no knowledge of a bar complaint while I was representing Ms Davidson and I have still received no notification that I am being investigated for a bar complaint some two years later. In regards to the Conspiracy, I have no information in the complaint that links this conspiracy to any of the other allegations against me. It is difficult to assume which allegation is coupled with the conspiracy charge. This conspiracy allegation only notes a leveling of false allegations. R. Vol. 1 p. 15. If the allegation were that my role in judicial proceedings was to push the false allegations through court there would be absolute immunity for this respondent under the ruling in the Malmin case.

In regards to the Negligence claim, there is also some confusion on the part of this respondent as to the allegations. In Mr. George Davidson's complaint it is alleged that "Defendant John Prior, an attorney had an ethical and legal duty not to present


misleading information to a tribunal and not allow his client to proceed on a course of action he knew or should have known was without just cause". R. Vol 1. p. 15-16. I am unclear what negligence claim and what duty would be placed upon this Respondent to Mr. George Davidson. The allegations he complains of stem from a custody dispute between Mr. George Davidson's son Renato Davidson and Renato's ex-wife Jesyca Davidson, my client at the time. I cannot foresee any duty that is owed to George Davidson as the father of one of the parties to the litigation. Furtherer there is no allegation that my representation was the causation for his alleged damages.

In regards to the dismissal of this action pursuant to Idaho Rule of Civil Procedure 12(b)(5) the Appellant in this action George Davidson did not personally serve me with a copy of the Summons and Complaint. Service as required by Idaho Rule of Civil Procedure 4(d)(2) was not accomplished. Respondent objects to the extension of any time to effectuate service on this respondent.

### CONCLUSION

The decision of the District Court should be affirmed in all respects. The District Court properly granted dismissal of the claim against this respondent John Prior pursuant to Idaho Rule of Civil Procedure 12(b)(5) and 12(b)(6). The District Court properly applied the Malmin case to this case and properly ruled that this respondents actions in filing documents and representing a client in a custody dispute are absolutely privileged,

Dated: March 1, 2010.

  
John Prior  
Respondent

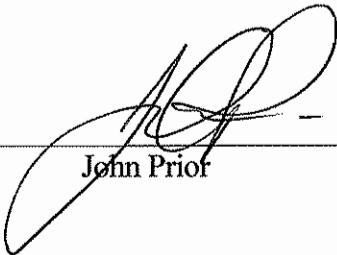
**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of March 2010, I served two (2) true and correct copies of the foregoing Brief of Respondent John Prior on each of the parties herein by US Mail, postage prepaid and addressed as follows:

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John Prior