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No. 69316-6-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

DRAKE H. SISLEY and ANTOINETTE L. SISLEY, husband and wife,

Appellants,

v.

SEATTLE PUBLIC SCHOOLS, a local government entity,

Respondent.

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

(NOTE: The trial court entered its findings in its Order Granting Defendant's Motion for Summary Judgment (CP 232-5) by placing an "X" next to the word "Granted" or "Denied".)

1. The trial court erred in finding that "As a matter of law, plaintiffs are unable to prove that, consistent with the First Amendment, defendant school district should have censored the student's speech." CP 233, l. 18.

2. The trial court erred in finding that "Plaintiffs are unable to prove defendant Seattle School District was at fault for the student speech, and knew or should have known the student's speech was false." CP 234, l. 6.

3. The trial court erred in finding that "The student's report that Hugh and Drake Sisley were 'infamous landlords' who had been 'accused of racist renting policies' is a non-actionable opinion that is not defamatory as a matter of law." CP 233, l 23. The error was compounded because it focused merely on the "racist" statement. The more important libel which the trial court ignored in this "non-actionable opinion" finding is the statement in *The Roosevelt News*: "crack shacks owned by the Sisley brothers." (CP 166.)

4. The trial court erred in finding that "as a matter of law, public school districts . . . do not owe a duty to protect non-students, such as plaintiff from a student's alleged defamation." CP 233, l. 10.

B. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. *Issues as to Assignment of Error No. 1*

(a) Is this finding of the trial court at variance with the First Amendment decisions of the United States Supreme Court particularly *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) and *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), where these cases specifically hold that conduct of a student which involves "invasion of the rights of others" is not immunized by the Constitutional guarantee of freedom of speech.

(b) Whereas here (as the trial court concluded in Finding No. 6 on CP 234, l. 2) that the alleged defamatory statement was false, does this constitute "invasion of the rights of others" within the *Hazelwood* and *Tinker* decisions.

(c) Does this "invasion of the rights of others" raise a substantial issue as to a material fact thereby precluding summary judgment.

2. ***Issues as to Assignment of Error No. 2.***

(a) Is the trial court by this statement surmising or predicting whether the plaintiff can prove fault or negligence or is it the court's duty on the other hand to determine whether a substantial issue as to such a material fact exists, and

(b) Do the facts in the record that there was a prior defamation published by the same newspaper in 2003 (CP 200) that was called to the attention of the school's principal together with a statement by the principal (CP 194, l. 9) that it would not happen again (CP 194, l. 13) raise a substantial issue as to a material fact whether the faculty at Roosevelt High School was negligent in permitting the publication and should have known that the student's speech was false.

3. ***Issues as to Assignment of Error No. 3.***

(a) If a statement that is normally opinion implies defamatory facts as the United States Supreme Court found in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L.Ed.2d 1, 110 S.Ct. 2695, is the finding of the trial court correct that it is a "non-actionable opinion" and not defamatory as a matter of law, and

(b) Should the issue of implication of defamatory statements in this statement couched in the form of an opinion, an issue that should have been presented to the jury and is it a substantial issue as to a material fact precluding summary judgment.

4. *Issues as to Assignment of Error No. 4*

(a) Is this finding of the trial court contrary to RCW 4.96.010 entitled RCW 4.96.010 entitled "Tortious Conduct of Local Governmental Entities – Liability for Damages," which provides as follows:

> (1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

(b) Has this statute quoted eliminated all school districts immunity for torts committed by the District and its officers, employees and volunteers, or can the District be liable for defamation of non-students.

C. STATEMENT OF THE CASE

1. Statement of Facts and Procedures

This is a libel case brought by plaintiffs Drake and Antoinette Sisley. It was filed because of false publication on two separate

occasions (CP 200 and CP 166) that plaintiffs were slumlords and owned "slums" and "run-down" residences in Seattle's Roosevelt neighborhood. The publications were particularly damaging to Drake and Antoinette because they have been active in the Roosevelt community, operate a small business there, and also because they have, for many years, owned and operated well-maintained apartment and rental properties (CP 198), primarily in the University District near the UW campus (CP 194, 202, 203, 205). Both of the defamatory articles were published in *The Roosevelt News*, the official, award-winning newspaper of Roosevelt High School. The first publication was in 2003, an article entitled "Questionable Landlord Perpetuates Roosevelt's Slums," (CP 200). In this article there is a reference to "the locally renowned brothers, Hugh and Drake Sisley," and "the Sisley brothers are the kings of the local slum," and "the houses that surround the school have once again begun to crumble back into a shamefully shanty existence," and "their monopoly on the run-down homes that surround Roosevelt is worth an estimated $14 million which ranks them among the top three slumlords in the city."

These statements were all false. Neither Drake nor Antoinette Sisley have ever, at any time, owned any interest in the run-down houses that surround Roosevelt High School (CP 194-212). It is true that these are slums, and "run-down houses" and "shameful shanties" but the sole owner of these is and at all times has been Hugh Sisley.

(CP 194.) Hugh is Drake's brother, but neither Drake nor Antoinette have any ability to control or do anything about his ownership, management or control of these slum properties. (CP 194-212.)

When Drake saw the 2003 article he was upset and concerned, and went to the school and spoke to the Roosevelt High School principal (CP 194) and explained the ownership of the slum properties. The principal took notes and promised that it would not happen again. Drake said to the principal, "if it happens again we'll sue you." (CP 194.)

In 2009 it happened again, and this article entitled, "Sisley Slums Cause Controversy," was even worse. It was published in *The Roosevelt News* in 2009. (CP 166.) This publication referred to "crack shacks" and "ghetto houses...owned by the infamous landlords, Drake and Hugh Sisley." The article continues, ". . . the brothers have acquired 48 housing and building maintenance code violations." Two photos of the houses bear the caption, "Sisley Slums."

Plaintiffs brought this suit against Seattle Public Schools ("the District"), a local government entity that by RCW 4.96.010 entitled, "Tortious Conduct of Local Governmental Entities – Liability for Damages," is liable for damages arising out of the tortious conduct of their past or present officers, employees or volunteers while performing their official duties to the same extent as if they were a private person or corporation.

Several points should be emphasized:

(a) The Washington cases define as libel per se a written publication "which tends to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive the person of the benefit of public confidence or social intercourse or to injure the person's business or occupation.[1]

(b) This libel was published. The printing company printed 1,200 copies, most of which were distributed to students and faculty, but 150 copies were mailed to the subscribers of *The Roosevelt News*. It was also on the Roosevelt High School website (Internet) and accessible by anyone without the necessity of a password. (CP 170.)

(c) *The Roosevelt News*, though a high school newspaper, is the official publication of Roosevelt High School. It is not an "underground" newspaper. The articles are written by the students for credit, and the classes are described in the school bulletin as "Advanced Journalism-1 1/2 credit each semester." (CP 176.)

(d) The fault standard which plaintiffs must prove is negligence and not malice, because plaintiffs are private persons and are neither "public figures" nor "limited purpose public figures," under the United States Supreme Court cases. As the court is aware,

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[1] *Spangler v. Glover*, 50 Wn.2d 473, 313 P.2d 354, 313 P.2d 354 (1957); *Caruso v. Local Union 690, 100 Wn.2d 343; 670 P.2d 240 (1983).*

beginning with *New York Times v. Sullivan* [2] case, a claim that a public figure has been defamed requires proof of actual malice. In the case at bar, plaintiffs attached to their brief a 5-page appendix entitled "Public Figure Issues" (CP 148-152) covering the issue in the event the defendants were to claim that plaintiffs were "limited purpose public figures." This appendix became unnecessary because defendant conceded that plaintiffs are private figures.

D. ALLEGED "LINKAGE" TO KEITH GILBERT

In a remarkable attempt to establish guilt by association, the defendant claimed repeatedly in its opening brief on the summary judgment motion that both Sisley brothers had retained as their property manager a convicted white supremicist, Keith Gilbert. Defense counsel had taken an extensive deposition of Drake Sisley on June 7, 2012, just a few weeks before preparing the brief on the summary judgment motion. In that deposition, defense counsel attempted unsuccessfully for 50 pages (CP 43-68) to "link" Drake Sisley to the felon white supremicist, Keith Gilbert. Drake explained at length that his dealings with Gilbert were minimal and that Gilbert had never served as a "property manager" for Drake, and that the only business dealings Drake had ever had with Gilbert was when Gilbert leased a building from Drake for a period of nine months, until Drake

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[2] 376 U.S. 254; 84 S.Ct. 710; 11 L.Ed.2d 686 (1964).

terminated the lease. See for example, the following from the Drake Sisley deposition:

By Mr. Freimund, CP 43:

Q: So other than being a tenant of yours, you had no other relationship with Keith Gilbert?

A: That is correct.

Q: Ok, what was the time period that Keith Gilbert rented this nine-room rooming house from you?

A: It was in the early 1990s. I'd have to get to my notes before I could tell you that.

Q: Was it for 10 years or more that he rented property from you?

A: Oh, no. It was less than a year.

By Mr. Freimund, CP 44:

Q: If you were dissatisfied with Mr. Gilbert as a tenant, even though he was paying the rent, and you didn't want him to live there, would you be able to give him 30-days notice and say 'you have to leave the premises, I don't need to tell you why, you're out of here'?

A: That happened.

Q: So you did have that authority.

A: Yes, I did.

Q: Now you exercised that authority, it sounds like.
A: Yes, I did.

Q: When did you exercise that authority?

A: When I discovered that he was getting paid from both sides. He was getting paid from the tenant. He was also collecting from the State for hard-to-place people from the Department of Corrections

and he got that and he was making twice as much money as I thought he should make and I called him on it.

Q: Approximately when did that happen, where you told him he needed to leave.

A: That was within a year of when I signed the lease. He wasn't there for a full year. Nine months, about.

Defense counsel remained unconvinced, and in its brief under the title "Property Manager for Some of Drake and Hugh Sisleys' Rental Properties was a Convincted White Supremicist," devoted four pages of outright falsehoods about this alleged "linkage" to Gilbert.[3]

See for example at CP 12: ". . . plaintiff Drake Sisley and his brother, Hugh, have been known as being among the worst 'slum lords' in the Seattle area *and for using a convicted white supremicist, Keith Gilbert*, to manage some of their rental properties." (Emphasis supplied.) And at CP 14: "Mr. Gilbert's harassment and violence toward others continued *after he became associated with the Sisley brothers*." (Emphasis supplied.)

At CP 16: "Drake Sisley acknowledges that Keith Gilbert managed one of his properties located about a mile from Roosevelt High School.

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[3] If defense counsel were offering this in an attempt to suggest that Drake Sisley's reputation had already been sullied by years of false reports that Drake was associated with Gilbert, that would be understandable. The problem is that defense counsel, despite the multiple denials of such a "linkage" with Gilbert, was telling the court without referring to the denials in Drake's deposition, that the "linkage" was a fact.

During this extensive deposition, Drake Sisley corrected Mr. Freimund so many times in his assertions that Gilbert was a "manager" for Drake Sisley, the following occurred at CP 68:

> Q: No, but you are linked to him as being your property manager, he being your property manager who engaged in these racist policies, correct?
>
> A: So, even you can't keep it straight. He never was my property manager. He was a tenant.

Plaintiffs believed that the necessary elements of falsity, unprivileged communication, fault and damages had been established and were prepared for jury trial.

Disagreeing, defendant District filed a motion for summary judgment based upon 9 separate arguments as follows:

(a) That pursuant to the doctrine of virtual representation/collateral estoppel the final dismissal of a separate libel action (*Hugh Sisley v. Seattle Public Schools*)[4] required dismissal of Drake and Antoinette's claim. (CP 21.) The trial court rejected this argument. (CP 233, l. 9.)

(b) That defendant Seattle Public Schools owes no duty to non-students, such as the plaintiffs to protect them from harm. The trial court accepted this argument. (CP 233, l. 14.)

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[4] Washington Court of Appeals, Division One Unpublished Opinion No. 67552-4-1. (Copy at CP 221-230.)

(c) That the defendant Seattle Public Schools is not vicariously liable for a student's defamatory speech. This was not really an issue in the case. Plaintiffs did not sue the student who had written the article, nor did plaintiffs at any point claim that the student was an agent of the District. The trial court accepted this defense argument. (CP 233, l. 17.)

(d) That the First Amendment rights of a student prohibit censorship of a student's speech unless it "disrupts the educational environment." The trial court accepted this defense argument. (CP 233, l. 22.)

(e) That expressions of opinion are protected under the First Amendment and not actionable as defamation. The trial court accepted this defense argument. (CP 234, l. 1)

(f) That plaintiffs are unable to prove the alleged libelous statements are false. The trial court rejected this defense argument. (CP 234, l. 4.)

(g) That plaintiffs are unable to prove that the District was at fault for the student's speech and knew, or should have known the speech was false. The trial court accepted this defense argument. (CP 234, l. 8.)

(h) That plaintiffs were unable to prove the article caused damage to plaintiffs' reputation. The trial court rejected this defense argument. (CP 234, l. 12.)

(i) That plaintiffs were unable to prove that plaintiff Antoinette Sisley was a target of the alleged defamation. The trial court accepted this defense argument. (CP 234, l. 15.)

E. STANDARD OF REVIEW

Summary judgment orders are reviewed *de novo* and the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (CR 56(c).) *Hansen v. Horn Rapids, O.R.V. Park*, 85 Wn.App. 424, 932 P.2d 724 (1997).

The burden is on the moving party to establish that there is no substantial material fact issue. *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997). The motion should be granted if, after review of the pleadings, depositions, admissions and affidavits and all reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion and (3) the moving party is entitled to judgment. *Island Air, Inc. v. LaBar,* 18 Wn.App. 129, 566 P.2d 972 (1977); *Bernal v. Honda Motor Co.*, 11 Wn.App. 903, 527 P.2d 273 (1974).

In ruling on the motion, the court's function is to determine whether a genuine issue exists, not to resolve existing factual issues. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964); *Ashcraft v. Wallingford*, 17 Wn.App. 853, 565 P.2d 1224 (1977). Mere surmise that the plaintiff may not prevail at trial is insufficient to sustain a grant of summary judgment. *Meadows v. Grant's Auto Brokers*, 71 Wn.2d 874, 431 P.2d 216 (1967).

F. ARGUMENT

1. Assignment of Error No. 1.

The District contended in its opening brief on the summary judgment motion that under the First Amendment, the rights of a student prohibited the District from censorship of the student's speech unless it "will materially and substantially disrupt the work and discipline of the school." (CP 26.) This was, in the opinion of plaintiffs' counsel, a distortion of United States Supreme Court decisions which permit, and even require such censorship if the student's publication is libelous and accordingly constitutes an "invasion of the rights of others." This important clause in both the *Hazelwood* and *Tinker* opinions, *supra*, "invades the rights of others" did not appear in the defendants' brief on the summary judgment motion. The trial court ruling on p. 2, lines 18-22 does not address this issue other than by adding an X to the word "granted" and finding that plaintiffs would be "unable to prove" that the District should have

censored the speech. (CP 233, l. 18.) The trial court did not address either the defendant's contention that censorship is not permitted unless the educational environment is disturbed or the plaintiffs' contention that the libelous statements invaded the rights of the plaintiffs and were thus outside the First Amendment. This is the first and most important issue to be discussed in this brief.

Right & Duty to Censor Libelous Material

The right of a District to control student conduct is covered in the Supreme Court decision in *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In that case, the students began a practice of wearing black armbands protesting the Vietnam War. This was considered offensive by school officials, who prohibited the armbands. The students' first amendment rights were upheld by the United States Supreme Court in *Tinker*, holding that it was an exercise of legitimate free speech. This *Tinker* decision did not limit its ruling to the proposition that a school district could not control student conduct unless it disrupted the educational environment. The *Tinker* decision concluded at p. 513:

> . . . conduct by the student, in class or out of it, which for any reason – whether it stems from time, place or type of behavior – materially disrupts class work or involves substantial disorder *or invasion of the rights of others* is, of course, not immunized by the constitutional guarantee of freedom of speech. (Emphasis supplied.)

A number of decisions, both in the United States Supreme Court and in the federal courts around the country have announced the rule that students have First Amendment rights that can be restricted if exercise of those rights disrupts the educational environment. But these decisions include, and the defendant's brief ignored, the additional qualification that the student rights can and should be limited if the exercise of those rights constitutes "invasion of the rights of others." See, for example, *Saxe v. State College Area Sch. Dist.,* 240 F.3d 200, 214 (3rd Cir.) (2001) where the court stated the rule (referring to two U.S. Supreme Court decisions, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

> Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule; it may be regulated only if it would substantially disrupt school operations *or interfere with the rights of others.* (Emphasis supplied.)

This rule was reaffirmed in *Hazelwood.* There the students prepared articles for the school newspaper, one of which articles mentioned pregnancy and divorce of other students. The article as originally written, named the students. One of the faculty removed the names before showing the proposed article to the principal. The

context, in the opinion of the principal, even with the names removed, would have permitted persons in the school to identify the students and he therefore removed entirely two of the pages of the article that contained the references to the students. The students filed a First Amendment civil rights case. The trial court held for the principal and the officials, ruling they were within their rights because of the possible harm to the students whose identity could be disclosed. The 8th Circuit reversed. On appeal, the United States Supreme Court restored the District Court decision, holding that the principal and the officials behaved reasonably because they were acting to protect the privacy of the individuals described in the article. The court ruled that the students have full First Amendment free speech rights, but not if the speech infringes upon the rights of others.

Thus the important issue is: what is required to constitute "invasion of the rights of others." The *Kuhlmeier* circuit decision[5] at 795 F.2d 1368, 1375 (8th Cir. 1986) stated the following:

> Very few courts have defined the parameters of 'invasion of the rights of others.' The Second Circuit held, over a convincing dissent, that the distribution to students of a sex questionnaire invaded the rights of others. *Trachtman v. Anker*, 563 F.2d 512 (2nd Cir. 1977). At least one Law Review Article suggests,

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[5] During oral argument on the summary judgment motion (Transcript p. 51), defense counsel objected to this reference to the Circuit opinion, stating that the Circuit decision was "reversed by the Supreme Court." It is of course correct that the Circuit decision was reversed, but the grounds for reversal were that the rights of others had been invaded, and citation to this quotation from the Circuit opinion was appropriate.

> however, that 'invasion of the rights of others' must refer only to a tortious act. Note: *Administrative Regulation of the High School Press*, 83 Michigan Law Review 625, 640 (1984). 'Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression. We are persuaded by this analysis and agree that school officials are justified in limiting student speech, under this standard, only when publication of that speech could result in tort liability for the school. Any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance.

Other decisions recognize the right of the school administration to censor or prohibit student publications that can result in tort liability, particularly libelous speech. In *Clark v. Board of Education*, *Belton High School Dist. 124,* 1987 U.S. Dist. LEXIS 15305, plaintiff high school students challenged the adoption by the school administration of a policy that governed student publications. The decision upheld the portion of the policy that permitted the school administrators to make the initial determination whether the publication was libelous. The opinion at p. 21-22 reads:

> Following the reasoning of the 8th Circuit in *Bystrom (Bystrom v. Fridley High School*, 822 F.2d 747 (8th Cir. 1987)) this court holds that the Belton policy is not unconstitutional simply because it allows school administrators to make, in the first instance, the determination whether a student publication is obscene as to minors or libelous.
>
> Finally, the court considers the policy provision which prohibits the students from distributing a publication that 'constitutes an invasion of another's right to privacy.' This language presumably emanates from the *Tinker* case wherein the Supreme Court held that a school

> policy or prohibition on otherwise protected speech is valid only when school officials can demonstrate that the prohibition is necessary to avoid material and substantial interference with school work or discipline or an 'invasion of the rights of others.' *Tinker,* 393 U.S. at 513.
>
> In *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368 (8th Cir. 1986), cert. granted 107 S.Ct. 926 (1987) the 8th Circuit construed the *Tinker* court's language to refer only to a tortious act and held in the context of a high school's official student paper, that written material could be forbidden or punished as an invasion of the rights of others 'only when publication could result in tort liability for the school.'
>
> As the 8th Circuit stated in *Kuhlmeier*, 'any yardstick less exacting than potential tort liability could result in school officials curtailing speech at the slightest fear of disturbance. *Kuhlmeier,* 795 F.2d at 1376.

In *Bystrom v. Fridley High School,* 822 F.2d 747 (8th Cir. 1987) the Fridley High School public authorities prepared a set of "guidelines" attempting to regulate the publication and distribution of written material prepared by the students. Guideline A prohibited material that was "obscene to minors." Guideline B prohibited "expression which is . . . libelous." The court ruled at p. 11 of the opinion:

> . . . we see no constitutional infirmity in defendants' guidelines. The First Amendment rights of students do not extend to expression that 'involves . . . invasion of the rights of others.' *Tinker v. Des Moines Independent Comm. School District*, 393 U.S. 503 and in *Kuhlmeier, supra* at 795 F.2d at 1376. We read the phrase as including only 'that speech which could result in tort liability.' The present policy is thus consistent with both *Tinker* and *Kuhlmeier.*

Another case that examined "invasion of the rights of others," is *Frasca v. Andrews*, 463 F.Supp. 1043, E.D. NY (1979). There the plaintiff student editors of the high school newspaper had printed in the newspaper a copy of a letter that had been written to the sports editor of the school, and the editor's reply, and also a document that was highly critical of a student who was then vice president of student government, this document asserting that the student had changed his own grades by typing over them on the computer, that he never showed up for meetings at which the vice president of student activities was required to attend and that he was a "total disgrace to the school."

The principal learned of this publication, read it, doubted its truth and accuracy and concluded that it was "substantially false." He confiscated all of the papers, stating that he believed the statements in the paper were false and libelous. The plaintiff editors sued, seeking a preliminary injunction on the ground that the principal's action in confiscating the newspapers violated the First and Fourteenth Amendments. At p. 1048 of the opinion, the court characterized the defense arguments:

> . . . defendants argue that they have not only the right, but the duty, to restrain publication of obscene, libelous, inflammatory, or substantially disruptive materials proposed to be included in the school paper, that they may do so even in the absence of written policies, guidelines, or regulations, and that under the circumstances here, there was a rational basis for Andrew's decision to restrain publication.

The court denied plaintiff's motion for preliminary injunction and dismissed the complaint.

Plaintiffs contend that a publication that is tortious on its face and contains false statements constituting libel *per se*, destroys any claim that the publication is entitled to a First Amendment privilege. It is not so privileged because it is clearly an invasion of the rights of others.

To be sure, the *Hazelwood* opinion pointed out that the ability of the school to censor a publication depends upon whether or not it is "school sponsored speech," and not a student "underground newspaper."

The *Hazelwood* discussion stands for the proposition that the control that educators are entitled to exercise over school-sponsored publications, theatrical productions and other expressive activities that might reasonably be perceived as bearing the imprimatur of the school, is greater than the control governed by the *Tinker* standard that refers to the level of control that educators can exercise over a student's personal expression that happens to occur on school premises.

To establish the "school sponsored" nature of *The Roosevelt News*, at the summary judgment hearing, plaintiffs submitted a copy

of the District's response to "Request for Admissions,"[6] which is Exhibit F to plaintiff's Answering Brief on Defendant's Motion for Summary Judgment (the brief begins at CP 130 - the Exhibit F begins at CP 173.)

These admissions and responses established that *The Roosevelt News* is published by the school in an elective course that is offered for credit, the application of the course is competitive, the faculty advisor in 2009 was Christine A. Roux and the published description of the course reads (CP 176):

> Advanced Journalism – Newspaper. 11-12 -- semester. 1 period, one half credit each semester. Prerequisite: successful application. These are the first, second and third semesters spent working on the staff of *The Roosevelt News.* Students sharpen their journalistic skills. They produce Roosevelt's award-winning newspaper.

It is not an "underground newspaper" in any sense of the term.

The faculty at Roosevelt High School had every opportunity to review and prevent the publication of the libelous material. There is no student's First Amendment issue involved in requiring that review. The faculty and officials at Roosevelt High School should not be permitted to claim at this time that they "did not edit" every article or "did not read every article." The point is they should have done so

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[6] At the hearing, defense counsel made a technical objection that the request for admissions had not been signed by defense counsel. However, he did not deny that the "X" marks filled in on the requests at "admit" and/or "deny" and the typed comments under "response" were prepared and submitted in that form by the defendant.

because under the Supreme Court decision there was no First Amendment prohibition on their doing that to prevent the violation of the rights of others including plaintiffs in this case.

2. *Assignment of Error No. 2 -- Trial Court Ruling that Plaintiffs Would be Unable to Prove Fault*

The second and equally incorrect ruling of the trial court was the conclusion at p. 3, lines 5-8 of the Order (CP 234, l. 6) that the plaintiffs would be unable to prove that the District "was at fault" for the student's speech and knew or should have known the student's speech was false.

The declarations before the court included the declaration of Drake Sisley that when the first false publication occurred in 2003, he went to the principal, pointed out the correct status of ownership of the slum properties, that the principal took notes and assured Drake Sisley that it would "not happen again." (CP 34 l. 2).[7] Appellants emphasize that the trial court has found that the plaintiffs will have no difficulty proving that the libelous statements in 2009 were false. Appellants assert that the evidence of the meeting with the principal in 2003, the discussions, the taking of notes, and the assurance that it would not happen again, all raise a material and substantial issue

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[7] Defense counsel has referred to this conversation Drake Sisley had with the principal as "hearsay." (pp. 19 and 47 of Transcript.) Not so. Drake Sisley merely notified the principal of the ownership of the slum buildings and the principal's response that "it won't happen again," is not hearsay but rather is an "admission by a party – opponent." ER 801(d)(2).

of neglect, negligence and fault on the part of the District, an issue that should be submitted to the jury for determination.

During the oral argument on the summary judgment motion, defense counsel stated that evidence relating to the 2003 publication is "time-barred" under the applicable statute of limitations. (CP p. 19 of transcript.) Evidence Rule 404(b) reads as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Plaintiffs contend that Drake Sisley's meeting with the principal after the 2003 publication and being assured that it would not happen again clearly establishes knowledge, absence of mistake and supports plaintiffs' claim that the District was negligent and at fault in 2009 with the libelous publication that was similar to the 2003 publication. The contention that a statute of limitations "time bars" ER 404(b) evidence is emphatically rejected in *Evidence,* 28 Am.Jur.2d, p. 472, Section 416 reading as follows:

> In order for evidence of other crimes, wrongs or acts to admitted, the other crimes must not be too remote in time from the charged offense. But there is no absolute rule regarding the time that can separate the extraneous acts from the charged offense; rather, the

court applies a reasonableness standard and examines the facts and circumstances of each case.[8]

More importantly, appellants contend that this trial court ruling framed as it is that "plaintiffs are unable to prove defendant Seattle School District was at fault" is insufficient under CR 56 to justify dismissal of the action. That is, by stating that plaintiffs are "unable to prove" an issue recognizes that the issue exists and, in this case a material and substantial issue. What the trial court did here by this finding is predict that the plaintiffs would be unable to establish fault. The trial court's prediction that a plaintiff may not prevail at trial is insufficient to sustain summary judgment. *Meadows v. Grants Auto Brokers*, *supra*. Also, the court's function under CR 56 is to determine merely whether a genuine issue exists not to attempt to resolve the issue of fact. *Fleming v. Smith, supra*, *Ashcraft v. Wallingford, supra.*

3. Assignment of Error No. 3

Appellants concede that an expression of an opinion can be stated in such a manner that it does not constitute actionable libel or slander. But appellants do not concede that the following statement of respondent's counsel in its memorandum submitted to the trial

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[8] The AmJur 2d quotation cites *United States v. McCollum*, 732 F.2d 1419 (9th Cir.1984) where a prior conviction 12 years earlier was held to be admissible on the issue of intent.

court on the summary judgment motion (CP 28) is an accurate statement. :

> Because expressions of opinion are protected under the First Amendment, they are not actionable as defamation.

A more correct statement of what appellants would describe as the "opinion rule," is found in the statement of the United States Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990):

> We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to insure the freedom of expression guaranteed by the First Amendment. The dispositive question the present case then becomes whether a reasonable factfinder could conclude that the statements in the *Diadiun* column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.

The *Restatement of Torts (2d)* at §566 reads:

> Expressions of opinion. A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

The determination of whether a communication is one of fact or opinion is a question of law for the court. *Benjamin v. Cowles Publishing Co.*, 37 Wn.App. 916, 923, 684 P.2d 739 (1984). In making this determination, the court should consider :

> (1) the entire article and not merely a particular phrase or sentence; (2) the degree to which the truth or falsity of a statement can be objectively determined without resort to speculation; and (3) whether ordinary persons

hearing or reading the matter perceive the statement as an expression of opinion rather than a statement of fact.

The trial court's finding referred merely to the "accused of racist renting policies" statement in making the finding of "non-actionable opinion." As our assignment of error points out, the more important statement in *The Roosevelt News* article that implied undisclosed defamatory facts is the statement in the 2009 article referring to "crack shacks owned by the Sisley brothers." (CP 166.) Appellants consider this an extreme form of libel. It may be one thing to call someone a slum lord and refer to dwellings as "slums" or "run-down houses." Such statements do not contain any implication of an undisclosed defamatory fact.

It is considerably different to make a statement that someone is an owner of a "crack shack." This implies an association with cocaine, either as a dealer, user or one who knows that the home is being used as a cocaine and/or drug facility. The same can be stated about the statement "accused of racist renting policies."

Both of these statements can be objectively determined to be true or false without resort to speculation. An ordinary person hearing or reading these statements would see that they imply defamatory facts relating to drugs, drug use, and intolerable racist renting policies. Appellants repeat that Drake Sisley operated a small business across the street from Roosevelt High School, in the Roosevelt neighborhood, relying on customers for that business,

causing economic loss in addition to the shame, humiliation and degradation associated with the statements in the article.

4. Assignment of Error No. 4.

With characteristic overstatement, defense counsel announced in its brief on the motion for summary judgment:

> Washington law squarely holds public school districts do not owe an actionable tort duty to protect members of the public from harm by students.

This appears in the defense brief at CP 23, citing *Jachetta v. Warden Joint Consolidated School Dist.*, 142 Wn.App. 819, 176 P.3d 545 (2008).

The *Jachetta* decision does not support counsel's broad statement. In that case, the parents of a student became overly concerned because he was allegedly being bullied at school. The alleged "bullying" consisted of two students writing a "2 Kill" list which included the names Goerge (sic) Bush, Bill Clinton, etc. and the Jachetta boy. The School District had the two bullies psychologically analyzed, who said it was a "joke," and permitted the Jachetta boy separate class studies. The District, however, did not agree to pay for a home-school tutor for the plaintiffs' child. The decision focused entirely on foreseeability, finding that the District acted reasonably and that measures necessary for protection of students depend on the foreseeability of a risk, and dismissed plaintiffs' case.

More important, is the statute removing immunity in the case at bar reading:

> (1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

This statute does not contain the limitation of liability that defense counsel seeks to impose. The test is simply tortious conduct, even including tortious conduct committed by a "volunteer." Tortious conduct is not defined in this statute and need not be.

G. CONCLUSION

The plaintiffs are justifiably upset about the falsehoods in these publications. They are clearly within the definition of libel per se – a written publication which tends to expose a living person to hatred, contempt or ridicule, or to deprive the person of the benefit of public confidence of social intercourse or to injure the person's business or occupation. Drake Sisley could have, and maybe should have, sued for libel when the 2003 article was published. Instead he took what he thought was a reasonable course being assured that it wouldn't happen again. In this case, Drake Sisley is required to prove with convincing clarity, false statements, negligence, absence of any privilege and damages. He has done so and should be entitled to a

trial. Summary handling of this case under the authorities cited is incorrect.

H. RELIEF SOUGHT

Reversal of the trial court order granting summary judgment dated August 24, 2012 (CP 233) and remand to the trial court for jury trial.

Respectfully submitted this 20th day of December, 2012.

Ray Siderius WSBA 2944
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Appellant/Plaintiff

Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I mailed via U.S. Mail, first class, postage pre-paid and/or sent by legal messenger a true copy of this document to:

Jeff Freimund
Attorney at Law
711 Capitol Way S., Ste 602
Olympia, WA 98501

Dated this 20th day of December, 2012.

Mary Berghammer