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ORIGINAL

NO. 67552-4-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

HUGH K. SISLEY and MARTHA E. SISLEY,
both individually and on behalf of their marital community,

Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1,
a public corporation,

Respondent.

BRIEF OF APPELLANTS

SKELLENGER BENDER, P.S.
Jeffrey C. Grant, WSBA #11046
Attorneys for Appellants Hugh and Martha Sisley
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
206-623-6501

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INTRODUCTION

This is an appeal from the Superior Court's decision granting summary judgment in favor of Respondent Seattle School District No. 1—a decision that was made despite the existence of a number of critical questions of material fact.

ASSIGNMENTS OF ERROR

The Superior Court erred in granting summary judgment and in failing to rule on Appellants' Motion in *Limine*.

STATEMENT OF THE CASE

Hugh and Martha Sisley have lived in the Seattle area for more than five decades. Mr. Sisley, together with his wife Martha, own property in the Roosevelt neighborhood and near the School District's Roosevelt High School.

Roosevelt High School offers an elective class—styled “Advanced Journalism”. This class is the vehicle for the creation and distribution of Roosevelt High School's newspaper—*The Roosevelt News*. In order to enroll in the class, students must apply; because the course is a three year commitment, students apply as sophomores (10th grade). The pedagogical methodology appears to be, in part, modeled as a *practicum*. The students perform under the supervision of the assigned Faculty Advisor, who guides them through the logistical mechanics of publishing

the School's newspaper—"brainstorming" for the articles to appear in future issues (usually, next month's issue), assigning reporters to research and write the articles, editing and re-writing of each article (generally, no less than three re-writes and three reviews), packaging and printing, and distribution of the final edition—including homage to deadlines, at least in theory.¹

In March 2009, Christine Roux was the School District's Faculty Advisor for *The Roosevelt News*. It was on her watch that the School District's defamatory statement appeared, in March 2009. Ms. Roux, however, had only appeared on the School District's behalf in the prior school year, 2008-2009, and then in mid-year (January 2008). When she first began working with the students in the School District's Advanced Journalism, Ms. Roux discovered that *The Roosevelt News* was so "student-run" that it was "a problem."²

It took time, and effort, to remedy the situation she was faced with, such as having to work with the students who had already been selected—even at the time of the issue in question, in March 2009. Ms. Roux, who was "dealing with the hand [she] had been dealt", was doing the best she

¹ CP 120-123 (Christine Roux Deposition). Ms. Roux was the School District's Faculty Advisor for Roosevelt High School's Advanced Journalism class and *The Roosevelt News*. A copy of the transcript of Ms. Roux's deposition can be found at CP 116-131.

² CP 120 (C. Roux Deposition).

could, apparently.³

Slowly, but surely, Ms. Roux began to implement some structure to the process—“brainstorming” and assignment of articles, investigation and research, writing and peer review editing, marketing, printing, and distribution.

Although, apparently, Ms. Roux and her class had made some progress, in March 2009 Roosevelt High School and its newspaper made a serious mistake. In an article titled “Sisley Slums Cause Controversy”, the School District asserted that Hugh Sisley had “been accused of racist renting policies.”⁴ That statement was false. There were 1,200 copies of the March 2009 issue of *The Roosevelt News* published and distributed throughout the wider community.

The content, tone, and implication of the School District’s false allegation are, and were, individually and collectively improper. *First*, the content—the allegation that Mr. Sisley had “been accused of racist renting policies”—is false; he had not, and has not since, been so accused (moreover, he has not engaged in “racist renting policies”). *Second*, the article—that accusations of specific, and illegal, acts had occurred—

³ CP 126 (C. Roux Deposition).

⁴ A copy of the March 2009 newspaper article can be found at CP 140.

carried an authoritative tone that it was a factual assertion, that the allegation that Mr. Sisley had “been accused” could be verified independently. *Third*, the implication—that Mr. Sisley had been accused of, or had committed, racism, a particularly inflammatory and odious allegation—was particularly defamatory.⁵

Shockingly, the School District had no basis to publish its allegation—a fact that the School District has acknowledged in its responses to the formal discovery served by Mr. and Mrs. Sisley. The School District’s reporter—Emily Shugerman—could not identify where she heard or read that Mr. Sisley had “been accused of racist renting policies.”⁶ In fact, Ms. Shugerman could not even recall writing the offending language.⁷ The School District’s Ms. Roux was not any more helpful on its behalf. It is uncertain whether she ever read Ms. Shugerman’s article, at least until it was brought to her attention sometime after she learned that Mr. Sisley had submitted his Notice of Claim.

It is, perhaps, not unexpected that Mr. Sisley would encounter such a cavalier attitude from the School District, given its prior dealings with him. As the owner of several properties near Roosevelt High School,

⁵ See Declaration of Hugh Sisley, Declaration of Drake Sisley at CP 290-293 and CP 240-243, respectively.

⁶ CP 236 (Emily Shugerman Deposition).

⁷ CP 236 (E. Shugerman Deposition).

Hugh Sisley often encountered the School District's resistance at development. As illustrated by the tone of its March 2009 newspaper, the School District had often been a vocal critic of Mr. Sisley. Indeed, it can fairly be said that, as a result of his earlier disputes with the School District, Mr. Sisley was a victim of a campaign to pressure and intimidate him to agree to the demands of the School District and Roosevelt High School—a campaign which eventually resulted in the false allegation published in the School District's March 2009 newspaper article.⁸

Indeed, March 2009 was not the first time the School District had used the power of its newspaper to publish false claims. In 2003, *The Roosevelt News* published an article about Drake Sisley, Hugh Sisley's brother and the other person accused in the March 2009 edition of having "been accused of racist renting policies", which contained false and libelous statements. Drake Sisley called the then Faculty Advisor and told him that the article contained statements which were false and libelous. Based on this discussion, Drake Sisley understood that this would not happen again. Unfortunately, this turned out to not be the case.⁹ This prior experience certainly raised a question of material fact on the issue of whether the School District's publication of its March 2009 statement was

⁸ CP 290-293.

⁹ CP 240-243.

malicious.¹⁰

In its belated attempt to now defend its conduct, the School District has relied on 11 newspaper articles—none of which it wrote.¹¹ Moreover, none of these articles contained a claim, allegation, or even an inference that Mr. Sisley had “been accused of racist renting policies.” Rather, the articles focus on the earlier conduct of a third party, Keith Gilbert, and the controversy surrounding the condition of properties owned by Mr. and Mrs. Sisley. Although the articles present an unflattering view of Mr. Gilbert, they do not contend that he had engaged in “racist renting policies.”¹² Regardless of the precise legal relationship between Mr. Sisley and Mr. Gilbert, the nature of which there is little agreement between the parties in this case, the School District can find no basis to support its allegation against Mr. Sisley by pointing to Mr. Gilbert.

In summary, the School District’s widespread publication of its allegation that Hugh Sisley had “been accused of racist renting policies” was false. Moreover, it was an allegation that has caused injury—

¹⁰ CP 240-243.

¹¹ These 11 newspaper articles can be found at CP 83-114. In a separate, but related, filing, Mr. and Mrs. Sisley filed a Motion in *Limine* with respect to these newspaper articles. As explained more fully below, the Superior Court did not address the Motion in *Limine*—thereby committing additional error.

¹² Mr. Gilbert was taken into federal custody in 2005, on charges wholly unrelated to this case or Mr. Sisley. The School District published its defamatory article in March 2009, four years later. The connection between Mr. Sisley and Mr. Gilbert was tenuous, as Mr. Gilbert had been a tenant of Mr. Sisley.

particularly given the repulsive nature of the allegation. As a consequence, the School District's Motion for Summary Judgment must be denied.

ARGUMENT

Underpinning the law of defamation is the principle that one's reputation should be protected from unjustified and inaccurate attack.

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

...

The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Rosenblatt v. Baer, 383 U.S. 75, 92-93, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) (Stewart, J., concurring).

Even more fundamental in this case, however, is the procedural context in which this case presents itself—dismissal by summary judgment, despite the existence of several questions of material fact.

The Seattle School District No. 1's Motion for Summary Judgment should have been denied because its allegation that Hugh Sisley had "been accused of racist renting policies" is false. Mr. Sisley had never been

engaged in, let alone “been accused” of, this type of conduct and the School District had no basis to make this odious and spurious allegation. Given the existence of the factual record presented to the trial court, these statements must be accepted as true.

Similarly, the School District’s reliance on the several “technical defenses” it asserted should have been rejected because they were inapposite, mischaracterized, or trumped by the factual record.

The School District is liable, individually, for the defamatory accusation which was published in its newspaper. And, because the article was written as part of the School District’s academic curriculum, during one of its classes, and under the supervision of its Faculty Advisor, the School District is also liable for the conduct of the student reporter who wrote the offending article which appeared in the School District’s newspaper, *The Roosevelt News*.

The School District’s argument that it could not “censor” student speech is misplaced—and, in this instance, in error. The School District’s argument that impugning a person as a “racist” is both off the mark, given the facts in this case, and, quite frankly, shockingly in error. The contention that the School District can escape responsibility because it merely published an “opinion” is wrong, both factually and legally. Moreover, the argument that Hugh Sisley is a public figure, even one for a

“limited purpose”, is wide of the mark and in error. Finally, Martha Sisley, Hugh Sisley’s wife, has an actionable claim against the School District.

Summary Judgment Was Not Appropriate

It is worth observing at the outset that this appeal is presented within the context of the trial court’s order granting summary judgment.¹³ The standard for granting summary judgment is high—all questions of material fact, and the inferences from those facts, must be drawn in favor of the non-moving party (here, Mr. and Mrs. Sisley). If a reasonable juror could be persuaded, then a Motion for Summary Judgment must be denied.

As if to reinforce this fundamental and favorable principle, the standard remains the same on appeal—as summary judgment orders are reviewed on appeal *de novo*. We review summary judgment orders *de novo*. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). This concept, and its rationale, was recently reaffirmed by this Court:

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

¹³ It is also worth noting that the School District’s Motion for Summary Judgment was filed on the eve of trial—and after the case had been pending for over 14 months.

party is entitled to a judgment as a matter of law.” CR 56(c). We consider facts and reasonable inferences in the light most favorable to the nonmoving party. *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). We are reluctant to grant summary judgment when “material facts are particularly within the knowledge of the moving party.” *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001). In such cases, the matter should proceed to trial “in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.” *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986).

Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 661-62, 240 P.3d 162, 169 (2010) *review denied*, 171 Wn.2d 1012, 249 P.3d 1029 (2011).

Within this procedural context, it is clear that the trial court committed error in granting summary judgment. The admissible evidence presented to the trial court demonstrated that there were questions of material fact, and reasonable inferences to be drawn from that evidence, which mandated that this dispute be resolved by the trier of fact.

As the moving party, the School District was obligated to demonstrate that there were no disputed issues of material fact and that summary judgment was warranted. Although the School District’s motion failed to do so, Mr. and Mrs. Sisley, nevertheless, provided the trial court with substantial evidence concerning the falsity of the damaging accusation, the School District’s legal liability, and the injuries suffered by

Mr. and Mrs. Sisley. The record presented to the trial court easily satisfied the criteria this Court has repeatedly outlined.

A material fact is one upon which all or part of the outcome of the litigation depends. The moving party must initially meet the burden of showing no material fact issues remain, with the trial court resolving all reasonable inferences in favor of the nonmoving party. This burden is met when the trial court is convinced reasonable persons could reach but one conclusion or could not differ about the alleged fact. When this burden is met then the burden shifts to the nonmoving party to properly relate specific facts indicating an issue for trial. The nonmoving party's burden is not met by responding with conclusory allegations and/or argumentative assertions regarding the existence of unresolved factual issues.

Hill v. Cox, 110 Wn. App. 394, 402-03, 41 P.3d 495, 501 (2002) (internal citation omitted).

Simply stated, summary judgment was not appropriate and this Court should reverse the trial court and remand this action for a trial on the merits.

The School District's Allegation Was and Is Defamatory

A statement is defamatory if it is false, unprivileged, and has caused damages, a truism the School District has readily acknowledged.¹⁴ In this case, within the context of summary judgment, the School District committed the tort of defamation.¹⁵

¹⁴ CP 18.

¹⁵ See Declaration of Hugh Sisley, Declaration of Drake Sisley at CP 290-293 and CP 240-243, respectively.

Remarkably, the School District claimed that its statement that Mr. Sisley had “been accused of racist renting policies” is not defamatory.¹⁶ This contention is remarkable, given that inherent within this allegation is the conclusion that such conduct is illegal. RCW 49.60.222 (unlawful to engage in renting policies which discriminate on the basis of race, creed, color, or national origin); *see also* Seattle Municipal Code 14.08.040. It is well established, of course, that allegations of criminal or illegal conduct constitutes libel *per se*. *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 100 Wn.2d 343, 670 P.2d 240 (1983), *appeal after remand*, 107 Wn.2d 524, 730 P.2d 1299 (1987), *cert. den.*, 484 U.S. 815, 108 S. Ct. 67, 98 L.Ed.2d 31 (1987).

The School District also relied on *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988), for the dubious proposition that accusing one of being a “racist” is protected by the First Amendment as non-actionable opinion.¹⁷ This dicta from *Stevens* can be understood, if at all, by examining the context within which it was written. Relying on Illinois law, the Court examined the use of the word “racist” within the context of “political discourse”, which it claimed had been “watered down by overuse”. *Id.* at

¹⁶ CP 19.

¹⁷ CP 19.

402. What the Court noted was that when the accusation of being a “racist” occurred, it was done so in the context of “playing racial politics...rather than of believing in segregation or racial superiority.” *Id.* at 402. The Court then concluded that although this “may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning.” *Id.* at 402. In other words, even in Illinois, albeit before *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), the allegation that one is a “racist” is actionable if “it implies the existence of undisclosed, defamatory facts”. *Stevens v. Tillman*, 855 F.2d at 402.

Absent this analysis, it is difficult to square the dicta from *Stevens* which the School District relied upon with *Taylor v. Carmouch*, 214 F.3d 788 (7th Cir. 2000) or *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 674 A.2d 1050 (1996). For example, the Court in *Taylor* (like *Stevens*, also from the Seventh Circuit), observed:

But whether a given supervisor is a racist, or practices racial discrimination in the workplace, is a mundane issue of fact, litigated every day in federal court. “Felton is a racist” is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the first amendment. Whether that penalty is delivered in a slander action, in a perjury prosecution, in an award of attorneys' fees for making unsubstantiated allegations, or in the workplace by a suspension, is immaterial to the Constitution. What matters is that defamation of a co-worker may be punished, and as

we pointed out in *Feldman v. Ho*, 171 F.3d 494, 497-98 (7th Cir.1999), whether a *particular* defamatory statement is true or false is not a question of constitutional moment, unless the target is a “public figure,” which Felton wasn't.

Taylor v. Carmouche, 214 F.3d at 793-94.

The Supreme Court of Pennsylvania has also recognized that a “charge of racism could clearly have such an effect [a tendency to harm the reputation of another so as to lower him in the estimation of community or to deter third persons from associating with or dealing with him] on the individual so charged. Where such a possibility exists, it is up to the jury as fact finder to determine its existence.” *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. at 127.

So, too, in this case—given the “possibility” that the injurious effect of the School District’s allegation, it is up to the jury to decide these issues.

The dicta of *Stevens* aside, there should be little dispute with the proposition that “the label ‘racist’ is a pernicious pejorative and is generally recognized as such.” *Racist*, Robert Steinbuch, 25 Harvard BlackLetter Law Journal 199, 203 (2009).

As noted earlier, neither the School District’s Faculty Advisor nor its student author are able to identify where their allegation that Mr. Sisley had “been accused of racist renting policies” came from or what it was based on. The School District cannot seriously argue that its publication

of this defamatory allegation, with no basis at all, was done so fault free. The School District's failure to have any basis to support its allegation is negligent and, given the School District's prior dealings with both Hugh Sisley and Drake Sisley, malicious.

The School District Is Liable for Content of Its Newspaper

The School District is legally responsible for the content of its newspaper, even if the student journalist who authored the defamatory article, was not individually sued.

The School District was properly sued, and can be held legally responsible, because of the role it played in creating, supervising, editing, printing, publishing, and distributing the March 2009 issue of *The Roosevelt News*, its newspaper.¹⁸ Ms. Shugerman, the student journalist, need not be the School District's employee for it to be liable for her actions. In this case, all of Ms. Shugerman's actions were performed as part of the responsibilities assigned to her as a student in the Advanced Journalism class. The class was developed and offered by the School District as part of its academic curriculum. The class was supervised by the School District's Faculty Advisor, a full time employee.

The School District argued that "no authority holds that school

¹⁸ CP 120-125 (C. Roux Deposition).

districts may be liable to members of the public for failing to censor students' speech.”¹⁹ In *State v. Hoshijo*, 102 Hawai'i 307, 76 P.3d 550 (2003), the Court held that the defendant university was liable for racial slurs directed at a member of the public by a student manager.²⁰ The student manager, who was neither an employee nor an officer of the educational institution, was acting as the school's agent because his conduct, offensive though it was, was the kind he was authorized to perform, occurred within the time and space authorized by the school, and occurred as part of an effort to benefit the school.

The parallel between the circumstances in *Hoshijo* and this matter is striking. The student manager in *Hoshijo* was a full time student who was supervised by school officials and performed various administrative functions on behalf of the school's basketball team, including contact with the public, a function which was “within the scope of his authority as an agent.” *State v. Hoshijo*, 76 P.3d at 554.

In this matter, the student journalist performed various functions on behalf of the School District—which included researching and writing the defamatory statements in question—while supervised and instructed by at least one School District's Faculty Advisor. Given that one of the

¹⁹ CP 267.

²⁰ CP 330-347.

critical functions the student journalist performed—communicating with the general public who were expected to read the School District’s newspaper—it is clear that, by writing and publishing her article, she was performing a function which was “within the scope of [her] authority as an agent.”²¹ The fact that both cases involve scurrilous racial epithets makes the parallel even more striking.²²

The School District also contended that it could not “censor” Ms. Shugerman, a conclusion at odds with the holding in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988), a case upon which it relied. Much like the circumstances in the School District’s Advanced Journalism class, the journalism course at Hazelwood High School was “a ‘laboratory situation in which the students

²¹ The School District’s contention that the categories of persons for whom it may be legally responsible is too narrow, and contrary to Washington law. The School District argued, for example, that it “can act only through its officers and employees”, citing WPI 50.18 (CP 266). The Comment to WPI 50.18 makes clear, however, that a “corporation can act only through its agents, and when its agents act within the scope of their actual or apparent authority, their actions are the actions of the corporation itself.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 50.18 (5th ed.) (citations omitted). The Comment also notes that corporate (or, here, the School District) liability “extends to the agents’ unauthorized acts whenever the corporation is deemed to have ratified those acts.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 50.18 (5th ed.) (citation omitted).

²² It is worth noting, only because the School District seemed to argue to the contrary, that defamatory comments by those acting on behalf of schools about members of the public at large are actionable. *Murray v. Watervliet City School Dist.*, 130 A.D.2d 830, 515 N.Y.2d 150 (1987) (school could be liable for slanderous statement made by teacher, during a class, about a former student).

publish the school newspaper applying skills they have learned in Journalism I.” *Id.* at 268. The Court recognized that these “activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants an audiences.” *Id.* at 271.

In *Hazelwood*, the Supreme Court went on to “hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. Accuracy in reporting factual information is fundamental to journalistic integrity and is a principle reasonably related to the School District’s legitimate pedagogical concerns.

In *Hazelwood*, the Supreme Court concluded that the school had acted reasonably when it concluded that the articles in question in that case should not be published in the school newspaper.

Any discussion concerning the School District’s “censorship” of the newspaper article in question in this case, however, is largely speculative. There is no evidence to even suggest that the use of the defamatory phrase—“accused of racist renting policies”—had been

questioned, before or after it was published. No request for verification of sources, no questions raised as to the wisdom or necessity of such an inflammatory allegation, no insistence that the use of this phrase be evaluated by any standard of journalistic rigor. None of these things occurred.

The factual record presented to the trial court demonstrated that failure to adhere to even these minimal, albeit fundamental, journalistic standards.

The School District Made a Factual Assertion, Not an “Opinion”

Relying on *Gertz v. Robert Welch, Inc.*, 418 U.S.323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and its progeny, the School District argued that, because “expressions of opinion are protected under the First Amendment, they are not actionable as defamation.”²³ This contention, in turn, appears to be based on the notion that “[u]nder the First Amendment, there is no such thing as a false idea.” *Id.* at 339.²⁴ This defense to a defamation case, however, has been seriously eroded since its pronouncement in *Gertz*. For example, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), the United States

²³ CP 18-19.

²⁴ Omitted from the School District’s quotation was the remainder of the text in *Gertz*, that “there is no constitutional value in false statements of fact.” *Id.* at 340 (footnote omitted).

Supreme Court observed:

Judge Friendly appropriately observed that this passage [“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-40.] “has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case [Gertz] did not remotely concern the question.” *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (2d Cir. 1980)). Read in context, though, the fair meaning of the passage is to equate the word “opinion” in the second sentence with the word “idea” in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes’ classic “marketplace of ideas” concept. See *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63. L.Ed. 1173 (1919) (dissenting opinion) (“[T]he ultimate good desired is better reached by free trade in ideas-... the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

Milkovich v. Lorain Journal Co., 497 U.S. at 18.

The *Milkovich* Court went on to hold that:

Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled “opinion.” See *Cianci, supra*, at 62, n. 10 (The “marketplace of ideas” origin of this passage “points strongly to the view that the ‘opinions’ held to be constitutionally protected were the sort of thing that could be corrected by discussion”). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of “opinion” may often imply an assertion of objective fact.

Milkovich v. Lorain Journal Co., 497 U.S. at 18.

In other words, the defense of “opinion” in defamation litigation has been seriously abrogated. As a consequence, reliance on any case which predates *Milkovich*, which was issued in 1990, as all but two of the cases cited by the School District in support of its “opinion” defense, is misplaced.²⁵

It is worth noting, however, that the School District’s published defamatory statement is a factual assertion—that is, it could be verified independently. The allegation that Mr. Sisley had “been accused of racist renting policies” is an assertion of fact—either he has been or he has not. In fact, of course, he has never been so accused—and the School District’s claim is false.

The School District’s “opinion” defense should have been rejected.

Hugh Sisley Is Not A “Public Figure”

The School District argued that Hugh Sisley is a “limited purpose” public figure and, therefore, the standard for fault should be “actual malice”, proven by clear and convincing evidence, rather than negligence, proven by a preponderance of the evidence.²⁶

²⁵ The two cases cited by the School District which post date *Milkovich* are inapposite. *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). *Smith v. Sch. Dist. of Philadelphia*, 112 F. Supp. 2d 417 (E.D. Pa. 2000).

²⁶ CP 22-23.

As an initial matter, it should be noted that this issue—that of Mr. Sisley’s status as a “limited public figure” (or not)—is one which should be decided by the trier of fact. And, in this case, there were questions of material fact on his status.

Secondly, it should be noted that Hugh Sisley’s status must be decided separately and independently of that of Drake Sisley. Hugh Sisley, unlike his brother, had not voluntarily injected himself into a public debate. For example, in none of the newspaper articles on which the School District relied is Hugh Sisley quoted.²⁷ Moreover, with one exception, all of the articles submitted by the School District were written years before the School District’s March 2009 defamation, some as long as 10 years before. The only exception is an article entitled “A very different ‘Sisleyville’ takes shape,” written more than a year *after* the School District’s March 2009 defamation, and describes the professionally managed process of urban planning occurring with many of the properties owned by Mr. Sisley.²⁸

In any event, this issue—that of a party’s status as “public figure” or “private figure”—is one which the trial court improperly usurped and invaded the province of the fact finder. As a consequence, this decision,

²⁷ CP 83-114.

²⁸ CP 113-114.

too, should be reversed.

Martha Sisley Was Defamed and Injured By the School District

The School District contended that it cannot be liable to Martha Sisley, Hugh Sisley's wife. The School District's argument that she is not mentioned by name is unavailing. Mr. and Mrs. Sisley have been married for decades—and, they are inseparable—and, in effect, she was defamed as well.

Although Mrs. Sisley recognizes that the allegation made against her husband is false—its defamatory effect spreads to her, as his wife, and has had damaging consequences, as confirmed by her deposition testimony.²⁹

The Trial Court's Failure to Rule on the Motion in Limine Was Error

The School District's motion was largely based on eleven (11) newspaper articles, and the deposition testimony based on those articles, none of which it authored or published.³⁰ Because the articles were inadmissible hearsay, unduly prejudicial, and otherwise not proper evidence, Mr. and Mrs. Sisley asked that the trial court exclude the articles

²⁹ This problem is one which the School District is not in a position to reject. It is the School District, after all, which has attempted to portray Mr. Sisley as a "racist" by association with Keith Gilbert.

³⁰ The 11 newspaper articles can be found at CP 83-114.

as proper evidence.³¹ Unfortunately, the trial court did not rule on the Motion in *Limine* (although it was apparent that the trial court relied on this inadmissible evidence).

In addition to the newspaper articles, the School District's Motion for Summary Judgment relied on the deposition testimony.³² As noted, none of the 11 newspaper articles were prepared, or published, by the School District. Moreover, none of the newspaper articles contain any information supporting its false claim that Hugh Sisley had "been accused of racist renting policies."

These documents are inadmissible hearsay—that is, they are "statements" of others offered as evidence to prove that the School District's defamatory statement—that Mr. Sisley had, in fact, "been accused of racist renting policies"—is true. Moreover, these documents also contain "hearsay within hearsay" or "double hearsay"—that is, statements from persons as reported by the authors of the various articles.

³¹ See Plaintiffs' Motion In *Limine* Regarding Certain Documents Submitted In Support Of Defendant's Motion For Summary Judgment. CP 258-264.

³² CP 145-218.

More problematic, however, is the fact that none of the newspaper articles assert that Mr. Sisley has “been accused of racist renting policies.” None.³³

Rather, it appears that the School District was attempting to argue that the conduct of a third party who is referred to in several of the articles, Keith Gilbert, justified consideration of this inadmissible hearsay. This attempt should have been rejected for at least three reasons—(1) none of the articles alleged that Mr. Gilbert had “been accused of racist renting policies”, the defamatory statement in question; (2) none of the articles alleged that Mr. Sisley was aware of, condoned, or agreed with any of the allegations made about Mr. Gilbert; and (3) the newspaper articles were irrelevant, unfair, and unduly prejudicial.

As a consequence, the trial court should have excluded, and not considered, the 11 newspaper articles, and the accompanying oral testimony about them, which the School District offered in support of its Motion for Summary Judgment. This Court should, on remand, order that these articles and the accompanying deposition testimony should be excluded.

³³ It is also worth observing that none of the articles allege that Mr. Sisley has been accused of, let alone engaged in, racially discriminatory conduct of any type.

It is well established, of course, that a “court cannot consider inadmissible evidence when ruling on a Motion for Summary Judgment.” *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) (citing *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973)). The 11 newspaper articles, and the accompanying oral testimony, are inadmissible evidence.

More problematic is that none of the articles or accompanying testimony provide any basis to support the School District’s earlier published allegation that Mr. Sisley had “been accused of racist renting policies.” Rather, the School District was attempting to tarnish Mr. Sisley through by “guilt by association,” by virtue of Mr. Sisley’s earlier relationship with a person who is not a party to this action and who is a person upon which Defendant relies to support its allegation that Mr. Sisley had “been accused of racist renting policies.”³⁴

The content of the newspaper articles is irrelevant and unduly prejudicial and, as a consequence, the articles are not admissible as evidence. ER 402, 403, and 404.³⁵

³⁴ It is worth noting that, although many of the comments made about Mr. Gilbert are not flattering, none of the articles asserted that Mr. Gilbert had “been accused of racist renting policies.”

³⁵ A Motion in *Limine* is designed to preclude improper testimony, the introduction of inadmissible evidence, and any reference to unduly prejudicial evidence. *Osborn v. Lake Washington School Dist.*, 1 Wn. App. 534, 462 P.2d 966 (1969).

The offending 11 newspaper articles, and the accompanying oral testimony, fall within one or more of these criteria and the trial court erred when it failed to grant Mr. and Mrs. Sisley's Motion in *Limine* and considered them (apparently) when it granted the School District's Motion for Summary Judgment.³⁶

CONCLUSION

It is respectfully requested, therefore, that this Court reverse the trial court's order granting School District's Motion for Summary Judgment, order that Mr. and Mrs. Sisley's Motion in *Limine* be granted, and remand this action back to the King County Superior Court with instructions to schedule the jury trial as promptly as possible.

DATED this 31st day of October, 2011.

SKELLENGER BENDER, P.S.

By s/ Jeffrey C. Grant
Jeffrey C. Grant, WSBA #11046
Attorneys for Appellants Hugh and Martha
Sisley

³⁶ It should be noted that the trial court's order granting summary judgment would be in error, even if this inadmissible evidence were considered.

ORIGINAL

NO. 67552-4-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

HUGH K. SISLEY and MARTHA E. SISLEY,
both individually and on behalf of their marital community,

Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1,
a public corporation,

Respondent.

PROOF OF SERVICE OF BRIEF OF APPELLANTS

SKELLENGER BENDER, P.S.
Jeffrey C. Grant, WSBA #11046
Attorneys for Appellants Hugh and Martha Sisley
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
206-623-6501

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STATE OF WASHINGTON
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Jule Sprenger declares, under penalty of perjury under the laws of the State of Washington, that the following is true.

1. I am employed by Skellenger Bender, P.S., counsel of record for Appellants Hugh and Martha Sisley in this action; a resident of the State of Washington; over the age of 18 years; and not a party to this action.

2. On October 31, 2011, I arranged for the filing of the Brief of Appellants and this Proof of Service with the Clerk of the Court of Appeals, Division One, and served Jeffrey Freimund, counsel for Respondent Seattle School District No. 1, by electronically sending a copy of the Brief of Appellants and this Proof of Service to:

Jeffrey Freimund: JeffF@fjtlaw.com

Jule Sprenger



Date and Place of Execution 10/31/2011 at Seattle, WA