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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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

THE DEFENSE CLAIM THAT THE SCHOOL DISTRICT DOES NOT OWE ANY DUTY TO PROTECT MEMBERS OF THE PUBLIC FROM HARM CAUSED BY STUDENTS
(Reply to District Brief, pp. 16 ff)

From the beginning, the defense has attempted to characterize plaintiffs' claims as an objection to "conduct of a student," asserting that the student is not an "agent" of the District and that there is no "vicarious liability." As appellants have stated repeatedly, this is not an issue in this case. Appellants do not contend that the student who composed the libel was an "agent" of the District. Vicarious liability is not involved.

Appellants have not sued the student that wrote this libel. She is not a party to this lawsuit. Appellants' claim is against the District, its officers, directors and administrators for permitting, in the official school newspaper, the falsehoods and insults to Drake Sisley that were published. It does not matter who authored this false publication – it was published. It was distributed and placed on the internet by the School District, the defendant that appellants have sued.

The defense brief on p. 16 reads: "Washington law squarely holds public schools do not owe an actionable tort duty to protect

members of the public from harm by students."[1] A single case is cited in support of this statement, *Jachetta v. Warden Joint Consolidated School Dist.*, 142 Wn.App. 819, 176 P.3d 545 (2008).

The error in this broad statement by the defense is obvious. There can be many cases, such as the case at bar, where the wrong is not committed solely by the student – the District itself can also be a party to the wrong. For example, suppose a school district negligently maintains its school bus with a totally non-functioning braking system, and leaves the bus where a student has access to it. A student obtains control of the bus and takes a "joy ride," driving it through a marked crosswalk, seriously injuring an elderly pedestrian. An attorney representing the injured party sues the District, either joining or not joining the student driver as a defendant. Could the District claim in its own defense, as defense counsel claims here, that District owes no duty to protect non-students from harm "caused by students."

Of course not. The student is obviously liable. But the District is not free of fault. The District negligently maintained the braking

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[1] This statement by the defense, in identical words, also appeared in the brief the defense submitted to the trial court on the motion for summary judgment. See CP 23, line 10.

system on the school bus and negligently failed to lock the access to the bus, permitting the student to drive it away. The District should have foreseen both the possibility of a student taking the bus and the possibility of serious injury to a pedestrian.

This is why, if you add to the defendant's broad statement, the element of foreseeability, the statement becomes closer to what the cases decide. Even defense counsel recognizes this, by adding to caption B on p. 16 the two words: "foreseeable harm," but he still asserts that there is no duty to non-students such as the plaintiff parents in the *Jachetta* case. Untrue if, as in the case at bar, the harm to the non-students is foreseeable.

In *Jachetta*, the court simply ruled that the District could not foresee and would not be responsible to either the son or his parents as a result of the son developing PTSD allegedly as a result of contact by the other student.

The decision was based on foreseeability. The concluding sentence of the *Jachetta* decision at p. 826 reads as follows:

> The School District is liable only if 'the wrongful activities are foreseeable, and the activities will be foreseeable only if the District knew or in the exercise of reasonable care, should have known of the risk that

> resulted in their occurrence. Billy's PTSD, in light of the School District's response, was not foreseeable.

At this point the respondent's appeal brief takes an entirely different tack referring to cases involving special relationships giving rise to a duty to prevent *physical harm* to a third person. These special protection cases involving protection from physical harm were not cited below, but that does not matter. The cases have little or no relevance to the facts in the case at bar.

Restatement (2nd) of Torts at §315, covers the principle of these special protection/physical harm cases. The *Restatement* at §315 reads as follows:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct; or (b) a special relation exists between the actor and the other which gives the other a right to protection.

The cases cited by the defendant in this portion of its brief are *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); where plaintiff Dory Niece, a developmentally disabled resident of the defendant group home, sued the home because she had been sexually assaulted by a member of the staff, with the court concluding

at p. 427 of the opinion, that "a special relationship between a group home for the developmentally disabled and its vulnerable residents creates a duty of reasonable care, owed by the group home to its residents to protect them from all foreseeable harm and sexual assault by a staff member is not a legally unforeseeable harm."

On page 18 the response brief refers to the *Aba Sheikh v. Choe,* 156 Wn.2d 441, 128 P.3d 574, (2006) where the plaintiff sued the State of Washington and its Department of Social & Health Services because he was assaulted by 4 youths who had been placed in a foster home by DSHS with the claim that DSHS was guilty of "negligent placement." The Supreme Court dismissed all claims quoting Section 319 of the *Restatement.*

On page 20 of the brief there is reference to *Terrell C v. Dept of Social & Health Servcs*, 120 Wn.App. 20, 84 P.3d 899, review denied 152 Wn.2d 1018 (2004) where plaintiff mother sued the State of Washington and the Department of Social & Health Services because her son had been sexually assaulted by 2 boys who were being supervised by DSHS. All claims were dismissed because, as the court stated, the statutory scheme does not give DSHS workers

unfettered discretion to impose restrictions on a child or remove the child from the home.

Finally, on p. 20 of the respondent's brief, there is reference to *Estate of Bordon v. Dept. of Corrections*, 122 Wn.App. 227, 95 P.3d 764 (2004), review denied 154 Wn.2d 1003 (2005) where plaintiff decedent was killed by a drunk driver with the plaintiff's estate suing the Department of Corrections based upon the drink driver's history and criminal record.

These *Restatement §319* cases that involve physical harm and a special relationship are so factually distant from the facts in the case at bar they don't help in resolving the issues. The defense brief claims on p. 21 after reviewing these physical harm cases that "first amendment law is in accord," citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), but again ignoring the qualification in the *Tinker* opinion that there is no First Amendment privilege for conduct of a student that "invades the rights of others."

PRINCIPAL ISSUE ON APPEAL
(Reply to District Brief, pp. 25, ff)

To turn to the principal issue in this case. The defense brief attempts to characterize this issue as "whether censorship of the student's speech would have served a valid educational purpose." We frame the issue instead as "whether publication of a libel invades the rights of others defeating any claim that censorship is protected by the First Amendment." The United States Supreme Court in both *Hazelwood School District v. Kuhlmeier,* 484 U.S 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1998) and *Tinker, supra,* announced the rule. See *Tinker,* 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.)

The *Kuhlmeier* Circuit Court decision at 795 F.2d 1368, 1375 (8th Circuit 1986) adopted this *Tinker* standard while at the same time limiting the "invasion of the rights of others" to tortious acts, acts that could result in tort liability to the school. The Supreme Court, reviewing that limitation (requiring conduct that could result in tort

liability to the school) did not disagree, stating merely at p. 273 that it was not necessary to decide that issue. The important conclusion from both *Tinker* and *Kuhlmeier* is that if, as in the case at bar, the speech could result in tort liability to the school, the school officials are not prohibited from censoring the student's speech. Putting it simply, if it involves "invasion of the rights of others," and particularly if that invasion could result in tort liability to the school, the administration is not prohibited from censorship.

Here again we note the District's brief on appeal distorts and misconstrues the holdings of both *Tinker* and *Kuhlmeier*, asserting repeatedly, particularly at p. 26 of the brief that censorship is precluded unless the speech will materially and substantially disrupt the work and discipline of the school and censorship is precluded unless the censorship is "reasonably related to legitimate pedagogical concerns." In fact at p. 27, the District brief reads:

> If censorship would serve no 'valid educational purpose' a public school district is constitutionally prohibited from censoring a student's article in the limited form of a public forum of a school newspaper.

Absolutely wrong and flatly contrary to the holdings of both *Tinker* and *Kuhlmeier* by the Supreme Court. Finally, this distortion

is continued at pp. 27 - 28 of the District's brief, referring for the first time in either its brief to the trial court or its current brief to the clause "invasion of the rights of others" and going on to state that it refers to the rights of "other students" a limitation not found in either the Supreme Court decisions in *Tinker* and *Kuhlmeier* or in the *Kuhlmeier* circuit court ruling.

In summary, the issue between the parties to this litigation is squarely presented in the defendant's brief on p. 28 when they assert that Sisleys' position as follows is not sustainable:

> School officials have a duty to censor students' speech if they believe a non-student member of the public potentially could bring a tort action against the school if the student's newspaper report is not censored.

On the contrary, Sisleys are precisely correct in making that assertion. It merely adopts the rulings of the United States Supreme Court. Speech involved here was tortious, libelous, constituting libel per se under the Washington court decisions and there was no First Amendment privilege precluding censorship.

DEFENSE CLAIM THAT PLAINTIFFS ARE
UNABLE TO PROVE FAULT
(Defense Brief, pp. 34, ff)

On the issue of fault on the part of the District, the defense brief states the rule correctly that appellants are required to establish that the District knew, or in the exercise of reasonable care, should have known that statements in the publication were false. The record before the court shows a similar false publication appeared in *The Roosevelt News* in 2003 (CP 200) which reported that: (1) the Sisley brothers are the kings of the local slum; (2) that Keith Gilbert, convicted of 35 counts of welfare fraud and state-income tax evasion is "commonly believed" to be property manager for the locally renowned brothers, Hugh and Drake Sisley. The Sisleys, who with their monopoly on the run-down homes that surround Roosevelt, worth an estimated $14 million rank among the top 3 slumlords in the City; (3) the houses that surround the school have once again become the crumbled back into a shamefully shanty existence.

This publication was enough to upset Drake Sisley. He met with the principal, advising the principal of the non-ownership, with the principal taking notes and telling Drake Sisley "it won't happen again."

The first point appellants make here is that none of the above is controverted. There is no declaration offered from the principal who held that office in 2003. There is no declaration describing where notes of the type that the principal took would be kept. There is no declaration from anyone at the school that even suggests that this meeting between Drake Sisley and the principal in 2003 did not occur. In fact, there is nothing controverting this from the defense except that in the trial court and on appeal, there is a mistaken claim that this is "hearsay" which it is not. It is clearly an admission. Appellants cited the applicable evidence rule to which the respondent's brief has not made any response.

Prior to publishing the 2009 libel, the author, Emily Shugerman interviewed Drake Sisley. See p. 61 of Drake Sisley's deposition at CP 48 referring to this interview. Drake did not know what she intended to write about. The record does not show whether during the interview she asked Drake about the ownership and title to the properties. There is no declaration from Ms. Shugerman in this record.

It would it have been easy for the District or Ms. Shugerman to verify the ownership of the run-down houses. Records of ownership

are now all on line, the deeds, the ownership, the taxes, the assessed valuations, the taxpayer of record and encumbrances of record. Prior to publication of this article, did the District bother to check the ownership?

The record shows two false libelous articles, one in 2003 and one in 2009, both accusing Drake Sisley falsely, with an uncontroverted record that the principal was informed of the falsity and assured Drake that he did not have to worry about future publications. This record is sufficient to establish negligence on the District's part and raises an issue of a substantial material fact precluding summary judgment. The cases hold that it is not for the trial court to predict how such an issue will be resolved at trial.

KEITH GILBERT NEVER A "MANAGER" FOR ANY OF DRAKE SISLEY'S PROPERTIES
Reply to District Brief, p. 4.

The defense refuses to accept that at no time was Keith Gilbert ever a "manager" for any of Drake Sisley's properties. This is an attempt at guilt by association, but it is remarkable that the defense will not let this go, spending 7 pages of the appeal brief on this

claimed "linkage" that is not even an issue on this appeal.[2] At Drake Sisley's deposition, counsel tried in vain to establish some kind of "managerial" relationship, asking the following questions and receiving the following answers:

CP 43, p. 14

Q: What's your relationship with Keith Gilbert?

A: Oh, I didn't – I wouldn't say we had a relationship. He did rent a house from me at 5014 - 15th Avenue NE when I first bought it.

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

A: That is correct.

CP 43, p. 15:

Q: Was he managing that rooming house for you while he was renting from you?

A: He was the tenant. He had guests.

CP 44:

Q If somebody were to be evicted though, would Mr. Gilbert be the one who would make that decision as to whether he wanted these guests to be in that rooming house or would it be you?

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[2] It is at most a disputed fact issue. Appellants are tempted to identify this as a material fact issue requiring reversal of the summary judgment ruling and remanding for trial.

A: He had the tenant's right to do that. It wouldn't be me.

CP 44, p. 19:

Q: Approximately when did that happen? Were you told that 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.

CP 50, p. 69:

Q: Would you agree that at one time Keith Gilbert did manage the one property we spoke about earlier today before lunch?

A: The Acme residence club, yes.

Q: He did manage that property for you, did he not?

A: No. He did not manage that club before me. He was a tenant of mine.

Q: Ok. But he managed the property in which he operated that club that you rented to him, isn't that correct?

A: I'm going to object to "manage." He was not a manager. He was a tenant.

Q: Ok, as the tenant he chose who the residents of that house were, he chose who were not the residents of that house, and he managed the property. When complaints came in he fixed the appliances and so on as you previously testified. Am I correct?

A: No. The technology that you are talking about is a term applied to a manager and it is that I object to being called a manager. He managed his own affairs. I will

agree that he managed his own affairs but he did not manage for me.

CP 50, p. 70:

Q: How would you describe his role as manager of the property?

A: He wasn't a manager for the property. He was a manager of the residence club. He had other rules and other things that people needed to do as residents other than what the landlord would be concerned about.

CP 57, p. 97:

Q: You don't feel that you gave Mr. Gilbert a position of responsibility?

A: No sir.

Q: Ok. You don't agree that you allowed his thugginess to essentially represent you?

A: No. I do not.

CP 68, p. 142:

Q: No, but you were linked to him as 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.

Despite these repeated denials, we now see at p. 4 of the defense appeal brief the following:

> The property manager for some of Drake and Hugh Sisley's rental properties was a convicted white supremacist.

It is easy to see why the defense wishes to establish this "linkage." Mr. Gilbert's history is so despicable it could in fact establish guilt by association. The claim is simply not true. Defense counsel, being unable to provide any admissible evidence[3] of any such "linkage," misstates and falsely accuses Drake Sisley of Gilbert being his "manager." Defense counsel provides no admissible evidence in support of such a contention.

THE DEFENSE CLAIM THAT THE PUBLICATION INVOLVED WAS NOT CAPABLE OF A DEFAMATORY MEANING
(Reply to District Brief, pp. 29, ff)

Little need be said in reply to the District's contention that the statements in the 2009 *Roosevelt News* publication were not capable of a defamatory meaning. The District cites cases which, for the most part, involve short, critical statements, including a word or two alleged to be libelous. See, for example: *Standing Committee on Discipline of the United States District Court v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). Attorney Yagman was before the standing committee

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[3] The "evidence" that the defense relies on to establish this "linkage" to Gilbert is from newspaper articles which were poorly researched and inaccurate.

because he had written a criticism of United States District Judge William D. Keller which read as follows:

> Judge Keller has a penchant for sanctioning Jewish lawyers. . . . I find this to be evidence of anti-Semitism.

It should be noted that *Yagman* is not a libel case, instead it is an attorney discipline case. The difference between the two was pointed out in the *Yagman* decision at p. 1437 reading:

> . . . there are significant differences between the interests served by defamation law and those served by rules of professional ethics. Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice.

The District brief cites *Raible v. Newsweek, Inc.*, 341 F.Supp. 804 (W.D.P.A. 1972) where the defendant published plaintiff's picture (but not his name). The article was entitled "The Troubled American – A Special Report on the White Majority." Following review of the Pennsylvania statutes the court stated as follows at p. 807:

> The sum total of the words which plaintiff has concluded are descriptive of the persons considered in the article is 'bigot.' We hold that to call a person a bigot or other appropriate name descriptive of his political, racial,

> religious, economic or sociological philosophies gives no rise to an action for libel.

In its brief at p. 31, the defense cites an Illinois case, *Rasky v. Columbia Broadcasting System, Inc.*, 431 NE 2d 1055, cert. denied 459 U.S. 864 (1982). Illinois follows the "rule of innocent construction." Citing *Black's Law Dictionary* at p. 1058, the opinion pointed out that a "landlord" is the "owner of an estate in land or a rental property that has leased it to another person" and a "slum" is a "squalid run-down section of a city, town or village, ordinarily inhabited by the very poor and destitute classes." The court said that based on these definitions and applying the innocent construction rule, terms "slum landlord" and "slumlord" can be construed to mean that plaintiff owned buildings in a poor and dirty neighborhood, or that plaintiff was a landlord in a slum. At p. 582 of the opinion, the following appears:

> . . . the meaning of an allegedly libelous statement must be gathered not only from words singled out, but also from the context of the statement. It must be determined whether the "gist" or "sting" or the statement, taken as a whole, is capable of an innocent construction.

Appellants concede that there are some impolite, rude comments made orally or in print that do not rise to the level of libel. They are not actionable. Comments like, "his house is a garbage

pile," "her cooking would choke a horse," and even "I've seen his rentals, he's a slum lord," do not, by themselves constitute actionable libel. This is the kind of thing one bumps into in conversation. It is necessary to determine, for something to be libelous, to look at the totality of what is said. As stated in our opening brief at p. 26, *Benjamin v. Cowles Publishing*, 37 Wn.App. 916, 684 P.2d 739 (1984) makes this clear. In resolving the question of law whether a publication is libelous, *Benjamin v. Cowles* finds that 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.[4]

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[4] The District repeats in its appellate brief citing *Camer v. Seattle Post Intelligencer*, 45 Wn.App. 29, 723 P.2d 1195 (1986) at p. 29 the false statement that "expressions of opinion are not actioniable as defamation." In appellants opening brief at p. 26 on this appeal, appellants cited *The Restatement of Torts, 2nd, § 566* which clearly provides that expressions of opinion can be actionable if undisclosed defamatory facts are implied as the basis for the opinion.

Measured by these criteria, *The Roosevelt News* publication in 2009 is clearly libelous. It stated the fact of ownership of miserably run-down homes, repeating it throughout the article and not in a single phrase or sentence. The truth or falsity of ownership can be easily and objectively determined.

This is particularly true in the portions of the article referring to "crack shacks." What plaintiffs contend is that looking at the entire article that was published, it was mean, false, vicious, irresponsible and accused Drake Sisley of criminal behavior. To accuse him falsely of maintaining "crack shacks" (cocaine) and "ghetto houses," coupling that with a false statement that "the Sisleys own more than 40 pieces of property in northeast Seattle," meets the test of libel and the Washington cases so hold. We also note that the form for the ruling that was submitted by the defense to the trial court requested that there be a ruling that the plaintiffs could not prove falsity and the trial court rejected it. See CP 234, l. 2.

CONCLUSION

Drake Sisley and Antoinette Sisley are outstanding citizens. They have led exemplary lives. As landlords they have, for many years, owned and operated rental units which have been maintained

in first-class condition, appropriate for any neighborhood. Most of the repair and maintenance work on these units they have done themselves, with help from their son, John, who is licensed as an attorney and real estate broker. Drake Sisley for years has owned and operated his own hardware store business in the Roosevelt neighborhood, directly across the street from the high school. The condition of the rotten slums that Hugh Sisley owned in that neighborhood was an extreme concern to the Roosevelt area residents – customers and potential customers of Drake's business. It was irresponsible for the School District to permit this publication defaming Drake Sisley in 2009 having previously published the same falsehoods in 2003 and being warned about it.

The District's claim that it was constitutionally prohibited from censoring the publication is not supported by the Supreme Court decisions. In addition to business loss, the damage to Drake's well-being is obvious including exposing Drake Sisley to ridicule, contempt and depriving him of public confidence. Negligence on the part of the defendant presents a substantial and material fact issue for decision by a jury. Plaintiffs request reversal and remand.

Respectfully submitted this 25th day of February, 2013.

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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:

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Dated this 26 day of February, 2013

Mary Berghammer