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NO. 69316-6-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

SEATTLE PUBLIC SCHOOLS,
a local government entity,

Defendant/Respondent.

BRIEF OF RESPONDENT SEATTLE SCHOOL DISTRICT NO. 1

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I. INTRODUCTION

This is a defamation case brought by appellants Drake and Antoinette Sisley ("the Sisleys'") against respondent Seattle School District No. 1 ("the school district") for statements made by a third person, *i.e.,* a high school student. Specifically, the Sisleys claim the school district is liable for failing to protect them from the student's allegedly defamatory statements published in a high school newspaper, as follows:

> A fixture on the landscape of Roosevelt, the "Sisley Slums" are the run-down houses located on the block west of 15th and 65th. Also endearingly referred to as the "crack shacks" or "ghetto houses", these buildings are rental houses owned by the infamous landlords Drake and Hugh Sisley. The Sisleys own more than forty pieces of property in Northeast Seattle, and have a bad reputation amongst both locals and city officials. In fifteen years these brothers have acquired 48 housing and building maintenance code violations, and have also been accused of racist renting policies.[1]

The Sisleys' novel liability theory against the school district for failing to protect them from a student's speech fails as a matter of law because school districts owe a tort duty to protect students from foreseeable harm, but do not owe an unprecedented tort duty to protect non-students from harm caused by students. As a governmental entity, public school

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[1] Drake Sisley's brother Hugh Sisley previously sued the school district regarding the same newspaper article. Summary judgment dismissing that case was affirmed by this Court in *Sisley v. Seattle School Dist.,* __ Wn. App. __, 286 P.3d 974 (2012) (plaintiffs' petition for discretionary Supreme Court review currently pending).

districts are constitutionally prohibited from censoring or otherwise curtailing students' First Amendment rights to free speech unless censorship is reasonably related to legitimate educational concerns. Although school districts may be liable to students for violating their First Amendment rights by inappropriately censoring their speech, no authority holds school districts liable to non-students for failing to censor students' speech. Further, students are not agents or employees of school districts for whom school districts may be vicariously liable for students' intentional torts, including defamation.

Alternatively, or in addition, even if the Sisleys could prove public school districts owe an actionable tort duty within the confines of the First Amendment to protect the general public from students' alleged defamation, they are unable to prove the elements of defamation. There would have been no reason to censor the student's report not only because the student's article did not disrupt the educational environment, but also because the student did not defame plaintiffs. For example, the gist of the report that Hugh and Drake Sisley are "infamous landlords" who had been "accused of racist renting policies" is an expression of opinion that is not actionable as defamation. The Sisleys are also unable to meet their burden of proving the school district was at fault for the student's speech. For any or all of these reasons, the trial court's dismissal of this lawsuit on

summary judgment should be affirmed.

II. ASSIGNMENTS OF ERROR

The school district does not assign error to the trial court's summary judgment rulings and respectfully requests affirmance of the trial court's dismissal of this case on six alternative grounds. *See* CP 232-34 (granting summary judgment on six grounds, but denying summary judgment on three other grounds). The Sisleys assign error to four of the trial court's summary judgment rulings. Brief of Appellants ("BA"), pp. 1-2. They do not assign error to the following two rulings: (1) "As a matter of law, defendant Seattle School District is not vicariously liable for a student's allegedly defamatory speech;" and (2) "Plaintiffs are unable to prove plaintiff Antoinette Sisley was a target of the alleged defamation." *Compare* CP 232-34 *to* BA, pp. 1-2. Accordingly, the school district treats these two unchallenged conclusions of law as the law of the case (*see* RAP 10.3(g)), but briefly addresses the vicarious liability issue to confirm the trial court correctly held the district is not vicariously liable for the student's speech.

III. COUNTER-STATEMENT OF THE ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

A. Did the trial court correctly rule as a matter of law that public school districts owe a special relationship duty to protect their students

from foreseeable harm, but do not owe an actionable tort duty to protect the general public from harm caused by students' alleged defamations?

B. Did the trial court correctly rule as a matter of law that students are not employees or agents of public school districts for whom school districts may be vicariously liable for alleged intentional torts, including defamation?

C. Did the trial court correctly rule as a matter of law that public school districts are barred by the First Amendment from censoring student speech unless censorship is reasonably related to a valid educational purpose, and the Sisleys failed to make that showing here?

D. Did the trial court correctly rule that challenged portions of the student's article are non-actionable opinions that are not defamatory as a matter of law?

E. Did the trial court correctly rule the Sisleys are unable to prove the public school district was at fault for the student's speech under a negligence standard because they did not show the school district knew or should have known the student's report was false?

IV. STATEMENT OF THE CASE

A. The Property Manager for Some of Drake and Hugh Sisley's Rental Properties Was a Convicted White Supremacist

Since at least 1998, plaintiff Drake Sisley and his brother Hugh

Sisley have been known as being among the worst "slumlords" in the Seattle area, and for using a convicted white supremacist, Keith Gilbert, to manage some of their rental properties. CP 48-55, 75-76, 82-87. A May 1998 article from the "Seattle Weekly" reported the Sisley brothers were among the worst "slumlords" in Seattle; employed Keith Gilbert, a member of the Aryan Nations convicted of multiple racist hate crimes to manage their properties; quoted a city official as saying Mr. Gilbert and the Sisley brothers "run roughshod over people constantly"; stated prosecutors charged Mr. Gilbert with "harassing or retaliating against a tenant"; and listed other instances of Mr. Gilbert's abusiveness toward tenants residing on the Sisleys' properties. *Id.; see also* CP 61-63, 95-96 (April 1999 article from the "Seattle Weekly" reporting that Drake and Hugh Sisley "own 54 rental homes in the Roosevelt area"; "racked up 80 citations for violating land use codes" since 1990; "[s]ome of their homes, crumbling structures that surround Roosevelt High School on two sides, are overseen by Keith Gilbert, a former member of the Aryan Nations with a ... history of assault"; and "[f]or years the Sisleys and Gilbert have been cited for failing to maintain their properties, and accused of locking tenants out of their homes").

Mr. Gilbert was convicted in 1988 of interfering with people's housing rights through force or threat of force based on multiple incidents

of racial harassment. As published in *United States v. Gilbert,* 884 F.2d 454, 455-56 (9th Cir. 1989), *cert. denied,* 493 U.S. 1082 (1990), Mr. Gilbert's conviction was affirmed based on the following facts:

> Keith Gilbert was once a member of the Aryan Nations. He left that group to form his own white supremacist hate group. Evidence at Gilbert's trial showed that he was a racist and a bigot, that he believed White Aryans should not be in contact with any other race, that he believed children born to parents of differing races were not human, and that he embraced some Nazi doctrine. Gilbert told a college newspaper reporter that there were "seventeen niggers" [footnote omitted] in Kootenai County, the county in which he resided, and that by the time his group was through there wouldn't be any.
>
> In December of 1980, Gilbert mailed a letter and several posters to Susan Smith. Smith was the founder and an employee of an adoption agency that, among other things, placed minority children with white families. The letter "condemned" Smith's actions and warned her to "keep [her] human trash off [his] property." The posters were similar. "The Death of the White Race" poster discusses miscegenation and urges "whiteman" to "fight for your own kind." "The Black Plague/Death to Rapists" poster implies that black men are rapists and urges that they be hung. The "He May Be Your Equal, But He Sure Isn't Mine" poster implies that crime is committed by blacks. The "Race Traitor" poster speaks of a "Second Revolution" and warns that "[w]hite persons consorting with blacks will be dealt with according to the Miscegenation Section of the Revolutionary Ethic ... [miscegenation] will be punished by Death, Automatic by Public Hanging. Negroes involved in Miscegenation will be shot as they are apprehended." The final poster, "Official Runnin' Nigger Target," is a caricatured silhouette of a black man.
>
> In July of 1982, Gilbert drove his car at Lamar Fort in an attempt to intimidate Fort. Fort was a black child that had

> been adopted by a white family. Fort avoided being struck by Gilbert's car only by moving out of the way at the last moment.
>
> Between the summer of 1982 and March of 1983, Gilbert verbally harassed Scott Willey, Fort's white stepbrother. In March of 1983, Gilbert stated to Willey, "How are thee today? Thou shall not live long." In August of 1983, Gilbert sicced his large St. Bernard, whom he called "Nigger Eater," on Amanda Morrison. Morrison was a black child who lived with her adoptive white family across the street from Gilbert.

Mr. Gilbert's harassment and violence towards others continued after he became associated with the Sisley brothers. *See, e.g., Dawson v. City of Seattle,* 435 F.3d 1054, 1058, 1067 (9th Cir. 2006) ("DPH [Seattle-King County Department of Public Health] and the police were also concerned because these boardinghouses were owned by Hugh Sisley, whose associate, Keith Gilbert, previously had threatened DPH employees during their inspections of other Sisley properties. In light of Gilbert's violent criminal history, the police and DPH considered the possibility that Gilbert might try to disrupt the inspection, or even assault a member of the inspection team.").

The Sisley brothers' linkage to Mr. Gilbert is reflected in several other newspaper articles in addition to the 1998 and 1999 "Seattle Weekly" articles. For example, a February 2005 article in "The Seattle Times" newspaper, entitled "Two play key role in white supremacist's rise,"

reported "[a] key to Gilbert's influence in the [Roosevelt] neighborhood was his relationship with Hugh and Drake Sisley, two brothers who own dozens of properties in the area." CP 55-60, 89-90. The article quoted the former president of the Roosevelt Neighborhood Association as saying the Sisley brothers gave Mr. Gilbert "a position of responsibility and allowed his thuggishness to essentially represent them." CP 89. According to former Seattle City attorney Mark Sidran who also was quoted in the article, Hugh and Drake Sisley are "legendary" for their run-down properties, and Mr. Gilbert's racially-based criminal background "introduced a level of fear and intimidation into the relationships with tenants and with the neighbors." *Id.* The article noted other people had commented on Mr. Gilbert's "confrontational personality and his racist beliefs. Other descriptions are even worse." CP 90. Drake Sisley was quoted as acknowledging that Mr. Gilbert is "ornery," "obnoxious" and "an in-your-face kind of guy" and that "[w]hen he was taking care of my properties, he shoveled the problems aside, combined them and multiplied them." CP 89. Mr. Sisley testified he was accurately quoted in this article, with the exception that he believes he said "property" not "properties." CP 58, 60.

A March 2007 article in "The Seattle Times" newspaper reported on Mr. Gilbert's prior convictions for possession of 1,400 pounds of stolen

dynamite he intended to use to blow up a California stage where Martin Luther King, Jr. was scheduled to speak, and for shooting a motorist after insulting the motorist's race. CP 60-61, 93-94. The article stated Mr. Gilbert was "a racist and a bigot" who "became the property manager for a number of rental homes owned by well-known Roosevelt-area landlords Hugh and Drake 'Ducky' Sisley. Neighbors and former tenants said Gilbert was a bully who was known for his strong-arm tactics during evictions and other actions related to the rental properties." *Id.*

An October 2007 article in the "Seattle Weekly" reported "Drake Sisley ... along with his brother, Hugh, rank as two of the most notorious landlords in the city. The brothers own an empire of shabby buildings in the University District ..., and ceded management of many of those to an even shadier figure, Keith Gilbert, a former Aryan Nation member convicted last year of illegally selling and possessing dozens of guns." CP 65-66, 99-100.

Drake Sisley acknowledges that Keith Gilbert managed one of his properties located about a mile from Roosevelt High School. CP 43-45. He admits he gave Mr. Gilbert the power to select, manage and evict tenants residing on his rental property for at least a nine month period. *Id.* He admits that he has received over 40 notices of violations from the City of Seattle regarding his rental properties. CP 80-81. He also admits that

as a result of the above-summarized newspaper articles from 1998 to 2007, he had a bad reputation in the community, whether deserved or not, as having hired a racist white supremacist who bullied and used strong-arm tactics to evict tenants in run-down properties he owned in the area around Roosevelt High School. CP 56-58, 60-62, 65-68. He denies, however, that he owns any rental properties within a mile of Roosevelt High School. CP 51.

B. The Student's Newspaper Article at Issue

The March 2009 edition of "The Roosevelt News," the school newspaper for Roosevelt High School, contained an article by a student reporter, Emily Shugerman, entitled "Sisley Slums Cause Controversy." CP 126, 129. The article appeared on page 7 of the paper. *Id.* The focus of the article was on rumors the Sisleys' rental homes surrounding the school might be torn down and re-developed with a tall building, and the neighbors' reaction to that possibility. *Id.*

The introductory paragraph of Ms. Shugerman's article, which is the portion the Sisleys allege was defamatory in part, reads as follows:

> A fixture on the landscape of Roosevelt, the "Sisley Slums" are the run-down houses located on the block west of 15th and 65th. Also endearingly referred to as the "crack shacks" or "ghetto houses", these buildings are rental houses owned by the infamous landlords Drake and Hugh Sisley. The Sisleys own more than forty pieces of property in Northeast Seattle, and have a bad reputation amongst

> both locals and city officials. In fifteen years these brothers have acquired 48 housing and building maintenance code violations, and have also been accused of racist renting policies.

CP 129; *see also* CP 2 (Plaintiffs' Complaint, ¶ V).

In researching her article, Ms. Shugerman went online to read various articles about the Sisley brothers and their rental properties, including articles in "The Seattle Times" and various blogs. CP 127. She also attended a meeting of the Roosevelt Neighborhood Association where the potential development was discussed, and interviewed two community members and a representative of the potential developer. *Id.* She no longer can recall precisely where she learned the Sisley brothers had been accused of racist renting policies, but believes she either read about the accusation in one or more of the articles she read online, or heard it during the meeting she attended. *Id.; see also* CP 115-16.

C. The School District's Role in Production of "The Roosevelt News"

"The Roosevelt News" is a student-run newspaper. CP 106, 108. The reporters and editors are all students at Roosevelt High School. *Id.* Production of the newspaper occurs during an elective class called "Advanced Journalism," and after school hours. CP 107, 110-11.

There is one faculty advisor assigned to the newspaper, Christine Roux, who is available to answer the students' questions and assure

deadlines are met, but has no role in editing or censoring the newspaper. CP 106-10, 112-14. Other than Ms. Roux, no school district employee plays any role in connection with the school newspaper. CP 107.

Once the student reporters and editors have created final drafts for their articles, they bundle the articles as PDF files and send them to an off-campus private business to print the newspaper. CP 111-12. About 1200 copies of the newspaper are printed for each issue. CP 114. These copies are distributed outside classrooms at the high school, and the remaining 100 to 150 copies are mailed to subscribers. CP 115.

The newspaper is "fully self-funded," meaning all revenue received from the newspaper, including advertisements, is used to pay the costs of producing the newspaper and purchasing equipment. CP 112-13. The school district does not pay for or receive any money from the school newspaper. *Id.*

The faculty advisor does not recall reading Ms. Shugerman's article before it was published. CP 115. However, she discussed the article with Ms. Shugerman after she learned the Sisleys filed a tort claim against the school district concerning the article. CP 115-18. Ms. Shugerman told Ms. Roux she did a "Google" search of the Sisley brothers online, attended a neighborhood meeting, and interviewed a few people when researching her article. *Id.*

D. The Trial Court's Summary Judgment Ruling

After discovery was completed, the school district moved for summary judgment on nine alternative grounds. CP 10-33, 214-19. The Sisleys opposed the motion. CP 130-47. In part, they relied on conclusory denials without submitting admissible evidence to meet their burden of proof on essential elements of their defamation claim. For example, Drake Sisley denied he owned rental properties within a mile of Roosevelt High School, but other than his denial, provided no admissible evidence that only his brother Hugh Sisley owns those properties. *See id.* Similarly, the Sisleys submitted no evidence to support their conclusory denials that Drake Sisley's properties have been "endearingly referred to" as the "crack shacks," "ghetto houses," or "slums," and that he has been "accused of racist renting policies." *See id.*

The trial court denied summary judgment on three grounds. First, the trial court ruled the Sisleys were not collaterally estopped under the virtual representation doctrine from re-litigating the seven issues decided in Hugh Sisley's prior lawsuit (CP 121-23), in which Drake Sisley appeared as a witness. CP 233. Second, the trial court ruled genuine issues of material fact precluded summary judgment on the issue of whether the student reporter's newspaper article was false. CP 234. Third, the trial court ruled genuine issues of material fact precluded

summary judgment on the issue of whether the student reporter's article caused damage to Drake Sisley's reputation. *Id.*

The trial court granted summary judgment on six alternative grounds. First, the trial court ruled as a matter of law that public school districts owe a duty to protect students from foreseeable harm, but do not owe a duty to protect non-students, such as the Sisleys, from a student's alleged defamation. CP 233. Second, as a matter of law, public school districts are not vicariously liable for a student's allegedly defamatory speech. *Id.* Third, as a matter of law, the Sisleys are unable to prove that, consistent with the First Amendment, the school district should have censored the student reporter's speech. *Id.* Fourth, 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 233-34. Fifth, the Sisleys are unable to prove the school district was at fault for the student's speech, and knew or should have known the student's speech was false. CP 234. Finally, the Sisleys are unable to prove plaintiff Antoinette Sisley was a target of the alleged defamation. *Id.*

The Sisleys timely appealed the trial court's summary judgment order. As indicated above, the Sisleys do not assign error to the trial court's rulings that (1) school districts are not vicariously liable for

students' alleged defamations, and (2) Antoinette Sisley's defamation claim was properly dismissed because she was not a target of the alleged defamation. BA, pp. 1-2. However, they do assign error to the other four grounds supporting dismissal. *Id.*

V. ARGUMENT

A. Standard of Review

Appellate courts engage in the same CR 56 inquiry as the trial court when reviewing summary judgment orders. *Reid v. Pierce County,* 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Summary judgment should be affirmed if there is no genuine issue of material fact, viewing the facts in the light most favorable to the non-moving party, and the moving party is entitled to judgment as a matter of law. *Id.*

A defendant is entitled to summary judgment when "that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue." *Las v. Yellow Front Stores,* 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Summary judgment plays a "particularly important role" in defamation cases because "[s]erious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if

unwarranted lawsuits are allowed to proceed to trial." *Mark v. Seattle Times,* 96 Wn.2d 473, 485, 635 P.2d 1081 (1981). When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing specific, material facts that would allow a jury to find every element of defamation exists. *LaMon v. Butler,* 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

B. Public School Districts Owe a Duty to Protect Students from Foreseeable Harm, but Do Not Owe a Duty to Protect the General Public from Harm by Students

Washington law squarely holds public school districts do not owe an actionable tort duty to protect members of the public from harm by students. *Jachetta v. Warden Joint Consolidated Sch. Dist.,* 42 Wn. App. 819, 824, 176 P.3d 545 (2008) (school districts owe a duty to protect students from foreseeable harm, but do not owe a duty to protect non-students, including parents of students). Liability to students is based on the special relationship schools have with students in their custody. *McLeod v. Grant County Sch. Dist.,* 42 Wn.2d 316, 319-20, 255 P.2d 360 (1952). Students are compelled to attend school and to obey school rules. *Id.* As a result of this custodial relationship, school districts have a duty to protect students from foreseeable harm. *Id.*

This special relationship duty to protect students in a school's custody is an exception to the general rule. "As a general rule, there is no

duty to prevent a third party from intentionally harming another unless 'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.'" *Niece v. Elmview Group Hm.,* 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (quoting cases). Exceptions where a special relationship duty may arise are: (1) the defendant has a special relationship duty to protect the victim of a tortfeasor's conduct; or (2) the defendant has a special relationship duty to control a tortfeasor's conduct. *Id.*

A school's duty to protect students in its custody from intentional harm by third parties is a product of the special relationship arising from "the placement of the student in the care of the defendant with the resulting loss of the student's ability to protect himself or herself." *Niece,* 131 Wn.2d at 44.

> Other relationships falling into the general group of cases where the defendant has a special relationship with the victim are also protective in nature, historically involving an affirmative duty to render aid. The defendant may therefore be required to guard his or her charge against harm from others. Thus a duty may be owed from a carrier to its passenger, from an employer to an employee, from a hospital to a patient, and from a business establishment to a customer.

Id.

Schools do not have a special relationship duty to protect non-student, third persons in the community because, unlike students in the

school's custody, third persons in the community have not been placed in the school's care and custody with the resulting loss of ability to protect themselves. *See id.* Therefore, as the *Jachetta* court held as a matter of law, school districts do not owe a duty to protect non-student, members of the public from harm caused by school students. *Jachetta,* 142 Wn. App. at 824. The duty to protect is owed only to students. *Id.*

The other special relationship exception, in which the defendant has a special relationship duty to control a tortfeasor, is also inapplicable. "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Aba Sheikh v. Choe,* 156 Wn.2d 441, 448, 128 P.3d 574 (2006) (quoting *Restatement (Second) of Torts* § 319). However, "[t]he mere existence of some ability to control a third party is not the dispositive factor in determining whether a take charge duty exists; rather, the purpose and extent of such control defines the relationship for purposes of tort liability." *Id.* at 453. For example, the purpose and extent of control criminal justice agencies have over charged or convicted criminals is to protect the public from harm by criminals known to be likely to cause harm if not controlled, so parole and probation officers who "take charge" of criminals may have a duty to control those criminals from committing

further criminal acts. *Id.* at 448-54 (explaining *Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992), and its progeny).

In contrast, the purpose and extent of control the Department of Social and Health Services ("DSHS") has over dependent children placed in its custody by court order is to protect the safety of those children, not to protect the public from harm caused by those children. *Id.* at 453-54. Thus, the *Aba Sheikh* court held DSHS owes no duty to protect third persons from intentional torts committed by dependent children.[2] *Id.*

The same is true here. The purpose and extent of control school districts have over students is to use reasonable care to protect the safety of students while temporarily in the schools' custody, not to protect the public from harm caused by those children. *See Jachetta,* 142 Wn. App. at 824. The relationship between school students and school officials is substantially different than the relationship between criminals on parole and their parole officers. The teacher-student relationship does not exist because a child has a history of harming members of the community that is likely to be repeated if not controlled, unlike the relationships at issue

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[2] The question of whether a defendant owes a duty to prevent a third person from causing harm to a plaintiff is analyzed under the two common law "special relationship" exceptions imposing either a protective duty to prevent harm to a plaintiff in the defendant's custody, or a supervisory duty to control a dangerous third person the defendant has "taken charge" of, rather than under the public duty doctrine applicable to government regulatory functions. *See, e.g., Aba Sheikh,* 156 Wn.2d at 448; *Niece,* 131 Wn.2d at 43-44; *Taggart,* 118 Wn.2d at 218 n.4.

in *Taggart* and progeny. All of the Washington cases imposing a "take charge" duty to control involved situations where a law enforcement officer had the authority and ability to seek further confinement of criminals placed in the officer's custody by court order due to past misconduct. *See Terrell C. v. Dep't of Soc. & Health Servs.,* 120 Wn. App. 20, 28, 84 P.3d 899, *review denied,* 152 Wn.2d 1018 (2004) (citing cases). Indeed, to establish liability in such cases, the plaintiff must prove not only breach of the duty to control, but also that the plaintiff's assailant would have been confined at the time the plaintiff was damaged had the duty to control been met, thus the harm would not have occurred. *Estate of Borden v. Dep't of Corrections,* 122 Wn. App. 227, 240-44, 95 P.3d 764 (2004), *review denied,* 154 Wn.2d 1003 (2005).

The purpose and extent of control school districts have over students does not support finding a "take charge" relationship akin to the relationship between criminals on parole and their parole officers. *Cf. Aba Sheikh,* 156 Wn.2d at 453. As was similarly held in *Aba Sheikh,* the purpose and extent of school districts' ability to control students is to prevent foreseeable harm to those children, not to protect the general public from harm by those children. *See id.*

Additionally, for public policy reasons, schools should not be subject to potential liability for failing to treat students as criminals by taking

significant steps to restrict their freedoms in order to protect the public from harm by students. *Cf. Aba Sheikh,* 156 Wn.2d at 451-52 (analyzing similar public policy concerns in the context of dependent children). Further, imposing a duty on public school districts to control student speech to protect the public from students' alleged defamations would open the proverbial floodgates because children often say cruel things about others. *Cf. Bratton v. Calkins,* 73 Wn. App. 492, 502, 870 P.2d 981, *review denied,* 124 Wn.2d 1029 (1994) (imposing liability on school districts for intentional torts of employees would be a "far-reaching" expansion of liability that "is more appropriately the function of the Legislature").

First Amendment law is in accord. Public school districts may be liable to students for attempting to control or censor students' speech in violation of their First Amendment rights. *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (school district liable to students for requiring removal of black arm bands in protest of Vietnam War). But no authority holds public school districts may be liable to non-student members of the public for failing to control or censor students' First Amendment protected speech. The trial court correctly ruled, therefore, that "[a]s a matter of law, public school districts owe a duty to protect students from foreseeable harm, but do not owe a duty to protect non-students, such as [the Sisley] plaintiffs,

from a student's alleged defamation." CP 233.

On appeal, the Sisleys address this duty issue by claiming the *Jachetta* court did not decide whether school districts owe a duty to protect non-student members of the public from harm caused by a student in the school's custody. BA, pp. 28-29. Yet, the *Jachetta* court affirmed dismissal of two of the three plaintiffs' claims (*i.e.,* the parents of a student allegedly harmed by another student), squarely holding they "are not students ... [a]nd the School District therefore has no duty to protect" them, but the school district did owe a duty to protect the plaintiff student from foreseeable harm. *Jachetta,* 142 Wn. App. at 824. The *Jachetta* court went on to hold the risk of harm to the plaintiff student by another student was unforeseeable. *Id.* at 825-27. Thus, the Sisleys are mistaken that *Jachetta* "focused entirely on foreseeability ...." BA, p. 28.

The Sisleys' only other argument in support of creating an unprecedented tort duty to protect the public from students' intentional torts is that the Legislature waived sovereign immunity for school districts in RCW 4.96.010, making school districts liable for their tortious conduct to the same extent as private persons or corporations. BA, p. 29. But this statute does not alter a plaintiff's burden to prove the elements of whatever tort is alleged. *See LaPlante v. State,* 85 Wn.2d 154, 159, 531 P.2d 299 (1975) (a statutory waiver of sovereign immunity "merely provides a

remedy. It does not, in and of itself, establish a right to recover. The basic elements of an alleged tort must still be established before" a governmental entity is deemed liable). Thus, a waiver of sovereign immunity does not absolve the Sisleys of their burden to establish the school district owed them an actionable tort duty to prevent a student from committing an alleged intentional tort. The Sisleys' reliance on RCW 4.96.010 is misplaced.

C. The Sisleys Are Unable to Prove the School District Is Vicariously Liable for a Student's Speech

The Sisleys did not sue the person who allegedly defamed them - - *i.e.,* the student who wrote the article.[3] Instead, they sued only the school district, suggesting the school district is either directly liable for failing to protect the Sisleys from the student reporter's alleged defamation, or vicariously liable for the student's alleged defamation under the *respondeat superior* doctrine applicable in agency law.[4]

As discussed above with respect to the school district's alleged direct liability for harm caused by another, the trial court correctly ruled

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[3] There is a two year statute of limitation for defamation actions. RCW 4.16.100(1). The article at issue was published in March 2009. CP 126. Thus, a lawsuit against the student author is now time-barred.

[4] Drake Sisley testified the student reporter was used as "a tool" or manipulated by someone in the school district or the City who wants to take over the Sisleys' rental properties. CP 70-71. On appeal, however, the Sisleys state vicarious liability "was not really an issue in the case" and assign no error to the trial court's ruling that the school district is not vicariously liable for the student's alleged defamation. BA, pp. 1-2, 12.

school districts do not owe an actionable tort duty to protect the general public from alleged harm caused by students. CP 233. With respect to vicarious liability for harm allegedly caused by students, the trial court also correctly ruled school districts are not vicariously liable for students' alleged torts. *Id.* To the extent vicarious liability remains an issue despite the Sisleys' decision not to assign error to this ruling, the trial court's rejection of vicarious liability in this context should be affirmed.

As a matter of law, school students are not agents or employees of a school. *See Rhea v. Grandview School Dist.,* 39 Wn. App. 557, 561, 694 P.2d 666 (1985); *Owasso Indep. Sch. Dist. v. Falvo,* 534 U.S. 426, 433, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002). Vicarious liability fails on this ground alone.

Even if students were deemed agents of school districts, there is no school liability for students' intentional torts. Defamation is an intentional tort. *Corey v. Pierce County,* 154 Wn. App. 752, 760, 225 P.3d 367 (2010). As a matter of law, an employer or principal is not vicariously liable for an employee's or agent's intentional torts because commission of an intentional tort that serves no interest of the principal is outside the scope of the agent's employment. *Bratton,* 73 Wn. App. at 502 (holding as a matter of law that a school district "is not vicariously liable for the intentional tortious actions" of school teachers). The student's article provided no

benefit to the school district because the student newspaper is "fully self-funded" with no revenue going to or from the school district. CP 112-13. Therefore, this Court should affirm the trial court's uncontested ruling that "[a]s a matter of law, defendant Seattle School District is not vicariously liable for a student's allegedly defamatory speech." CP 233.

D. The Sisleys Are Unable to Show Censorship of the Student's Speech Would Have Served a Valid Educational Purpose

The Sisleys' liability theory still fails even if the law were expanded to impose a duty on school districts to protect the public from students' intentional torts. Public school districts are governmental entities. *See, e.g.,* Title 28A RCW. When the government is a defendant in a defamation action, First Amendment interests are pronounced because the government may not regulate speech based on its substantive content or the message it conveys. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). This axiom applies in the public school setting. Public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506.

Public schools are distinguishable from private media companies, which can be vicariously liable for defamation by their hired reporters. Private media companies have a right to control their employees' speech

because they may censor their reporters' articles without running afoul of the First Amendment, unlike governmental entities such as public school districts, which are constrained from censorship by the First Amendment. *See, e.g., Single Moms, Inc. v. Montana Power Co.,* 331 F.3d 743, 746 (9th Cir. 2003) ("The United States Constitution protects individual rights only from *government* action, not from *private* action." [emphasis in original]). Professional reporters are paid employees for whom private media companies may be vicariously liable for failing to exercise the companies' right to control their employees' speech, while public school newspaper reporters are unpaid students whose speech is subject to First Amendment protection.

A public school district may restrict students' First Amendment rights only in very limited circumstances. Ordinarily, a student's freedom of speech "may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse v. Frederick,* 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (quoting *Tinker,* 393 U.S. at 513). In the context of school newspapers, a different test is applied: public school districts may not censor the content of student speech unless the district can show censorship is "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562, 98

L.Ed.2d 592 (1988) (affirming students may sue school district for censoring school newspaper, but holding censorship of an article regarding student pregnancies was related to a valid educational purpose because the identities of pregnant students could be ascertained from the article given the small number of pregnant students at the school). If censorship would serve "no valid educational purpose," a public school district is constitutionally prohibited from censoring a student's article in the limited public forum of a school newspaper. *Id.*

The Sisleys submitted no evidence showing censorship of the student's report would serve a valid educational purpose. Instead, the Sisleys argue on appeal the school district should have censored the student's speech because it was an "invasion of the rights of others," specifically some unspecified "rights" of the Sisleys. BA, pp. 14-21. However, U.S. Supreme Court precedent more narrowly holds that school censorship is permitted if student speech would "impinge upon the rights of other students." *Tinker,* 393 U.S. at 509. In other words, the "others" referred to in the *Tinker* case relied on by the Sisleys are "other students" not "other members of the general public" outside of the school environment. *Id.* The *Tinker* Court was focused on disruptions of the school environment, not disruptions among the general public. *See id.* There is no showing censorship in this case was necessary to prevent

interference with "the rights of other students."

The cases the Sisleys rely on all involve the "rights" of other students, not the "rights" of members of the general public. *See* BA, pp. 17-21. The Sisleys cite no authority holding that public school districts may, consistent with the First Amendment, censor students' speech to prevent interference with the "rights" of non-student members of the general public who have no connection to the educational environment.

Moreover, the U.S. Supreme Court's test for determining the propriety of censoring public school newspaper articles is whether a school district can show censorship is "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist.,* 484 U.S. at 273. The Sisleys are wrong to suggest this Court should apply a different test: *i.e.,* school officials have a duty to censor student speech if they believe a non-student member of the public potentially could bring a tort action against the school if a student's newspaper report is not censored. This Court should affirm, therefore, the trial court's ruling that the Sisleys "are unable to prove that, consistent with the First Amendment, defendant Seattle School District should have censored the student's speech." CP 233.

E. Even if the School District Could Be Liable for a Student's Alleged Defamation, The Sisleys Are Unable to Prove the Elements of Defamation

Even if tort law were expanded to allow members of the general

public to sue school districts for failing to censor students' exercise of First Amendment rights, the Sisleys are unable to prove the essential elements of their defamation claim. The elements of defamation are falsity, an unprivileged communication, fault, causation and damages. *Schmalenberg v. Tacoma News, Inc.,* 87 Wn. App. 579, 587, 943 P.2d 350 (1997).

1. The Sisleys failed to prove the student's report is capable of defamatory meaning

The determination of whether a statement is capable of defamatory meaning is a question of law. *Hoppe v. Hearst Corp.,* 53 Wn. App. 668, 672, 770 P.2d 203 (1989). A statement must be provably false for there to be liability for defamation. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19-20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must first prove the words constituted a statement of fact, not opinion. *Robel v. Roundup Corp.,* 148 Wn.2d 35, 55, 59 P.3d 611 (2002).

Because expressions of opinion are protected under the First Amendment, they are not actionable as defamation. *Camer v. Seattle Post-Intelligencer,* 45 Wn. App. 29, 39, 723 P.2d 1195 (1986) (affirming summary judgment for the defendant where a news article referred to the plaintiffs as "nuisance suers"). The determination of whether a statement is

one of fact or non-actionable opinion is a question of law. *Camer,* 45 Wn. App. at 39. To determine whether a statement should be taken literally as conveying a fact, rather than an opinion, the Court should consider the "totality of the circumstances" surrounding the statement, including the medium and context of the statement, the audience, and whether the statement implies "undisclosed facts." *Robel,* 148 Wn.2d at 55-56.

Accusations that a person is a "racist" have been held to be First Amendment protected non-actionable opinions that can not form the basis of liability for defamation. For example, in *Stevens v. Tillman,* 855 F.2d 394, 402 (7th Cir. 1988), *cert. denied,* 489 U.S. 1065 (1989), the court held as follows: "Accusations of 'racism' no longer are 'obviously and naturally harmful.' The word has been watered down by overuse, becoming common coin in political discourse. ... In daily life 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back .... It is not actionable unless it implies the existence of undisclosed, defamatory facts ...." *See also, e.g., Standing Comm. on Discipline v. Yagman,* 55 F.3d 1430, 1440 (9th Cir. 1995) (citing *Stevens* with approval and holding that calling a judge "anti-Semitic" is a non-actionable opinion); *Smith v. Sch. Dist. of Philadelphia,* 112 F.Supp.2d 417, 429 (E.D. Pa. 2000) (although a statement that a plaintiff is "racist" would be "unflattering, annoying and embarrassing, such a statement does

not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric"); *Raible v. Newsweek, Inc.,* 341 F.Supp. 804, 806-07 (W.D. Pa. 1972) ("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").

Calling a person an "infamous landlord" is similarly non-actionable "name-calling" as a matter of law. *E.g., Wahrendorf v. City of Oswego,* 72 A.D.3d 1604, 1605, 899 N.Y.S.2d 502, 503 (2010) (calling plaintiffs "slumlords" and "sociopaths" "amounted to no more than name-calling or ... general insults" and "are not actionable [defamation] as a matter of law"); *Rasky v. Columbia Broadcasting Syst., Inc.,* 103 Ill.App.3d 577, 581-82, 431 N.E.2d 1055, 1058-59, *cert. denied,* 459 U.S. 864 (1982) (calling plaintiff a "slumlord" is not defamatory as a matter of law),

Applying this law to the facts yields the same result here. Reporting the Sisley brothers are "infamous landlords" who have "been accused of racist renting policies" is equivalent to reporting that others have engaged in non-actionable "name-calling." An accusation is not reasonably perceived as a statement of fact. By definition an "accusation" is an allegation that should be inquired into further to determine its truth. *See Black's Law Dictionary* 21 (5th ed. 1979). Readers of the student newspaper would understand the student reporter was not stating as a

matter of fact that the Sisley brothers actually engaged in racist renting policies, but rather only that someone had "accused" them of doing so. The "sting" of the report was that someone had made this accusation against the Sisley brothers and they had received some notoriety as landlords, not that the Sisley brothers actually engaged in racist renting policies. *See Sisley v. Seattle Sch. Dist.*, __ Wn. App. __, 286 P.3d 974, 978 (2012) (so holding).

On appeal, the Sisleys focus on the student's report that the Sisley brothers (1) had been "accused of racist renting policies" and (2) owned rental homes "endearingly referred to as the 'crack shacks.'" BA, pp. 27-28. Yet, the *Sisley* court held that the same Seattle newspaper articles in evidence in this case (CP 75-90, 93-96) establish "the Sisley brothers *had been* accused of being racist landlords" and thus the "sting" of this report was true. *Sisley,* __ Wn. App. at __, 286 P.3d at 978-79 (emphasis in original). Although here the trial court concluded there are questions of fact regarding falsity (CP 234), the trial court correctly ruled the student's report that the Sisley brothers 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 233-34).[5]

[5] A trial court's judgment may be affirmed if the result, even if based on erroneous grounds, is sustainable by any legal reason supported by facts in the record and applicable law. *Curtiss v. YMCA,* 82 Wn.2d 455, 465, 511 P.2d 991 (1973). Accordingly, this Court could affirm dismissal on the ground that the sting of the student's report was true, as was held in *Sisley,* __ Wn. App. at __, 286 P.3d at 978-79,

Turning to the Sisleys' challenge to the article's reference to "crack shacks," the student reporter put quotation marks around the phrases "crack shacks" and "ghetto houses." CP 129. Ordinary people reading the student's report that the Sisleys' rental homes are "endearingly referred to as the 'crack shacks' or 'ghetto houses,'" would not interpret this statement as implying an undisclosed fact that the Sisleys were guilty of operating drug houses. *Contra* BA, p. 27. Ordinary people would interpret the article as merely reporting that people sometimes refer to the rental homes around Roosevelt High School as "ghetto houses" or "crack shacks." This report of other people's name-calling is no more defamatory than reporting the brothers are "slumlords" or "infamous landlords ... accused of racist renting policies."[6] The Sisleys conceded as much to the trial court, stating that "[c]alling someone's property a 'garbage heap' or 'pigpen' or even calling someone a 'racist,' can be in the totality of the circumstances, a non-actionable opinion." CP 144. Accordingly, the Sisleys failed to establish the student's challenged statements are capable of defamatory meaning.

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even though the trial court in this case ruled there are questions of fact concerning falsity (*see* CP 234).

[6] As in the prior *Sisley* case, the Sisleys in this case offered no evidence, other than a bare allegation of falsity, to controvert the sting of the report that the Sisley brothers had been "accused of racist renting policies." *See Sisley,* __ Wn. App. at __, 286 P.3d at 979. Nor did they offer any evidence to controvert the sting of the report that people sometimes "endearingly" referred to the rental homes around the high school as "crack shacks" or "ghetto houses."

2. The Sisleys failed to prove fault - - *i.e.*, the school district should have known the student's report was false

The third essential element for proving defamation is fault. *Schmalenberg,* 87 Wn. App. at 587. The requisite degree of fault depends on whether the plaintiff is a private individual or public figure. *Caruso v. Local Union No. 690 of the Intern. Broth. Of Teamsters,* 100 Wn.2d 343, 352, 670 P.2d 240 (1983). A negligence standard of fault applies to private individuals, while an actual malice standard applies to public figures. *Id.* Assuming the Sisleys are private individuals, they have to prove "the defendant knew, or in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect." *Taskett v. KING Broadcasting Co.,* 86 Wn.2d 439, 445, 546 P.2d 81 (1976) (emphasis added).

The Sisleys offered no evidence the school district knew or should have known it was false that the Sisley brothers (1) were "infamous landlords" who had been "accused of racist renting policies" or (2) their rental homes had been "endearingly referred to as 'crack shacks.'" All they offered was inadmissible hearsay concerning an alleged conversation with an unnamed person six years before the high school student wrote the article challenged in this case, during which Drake Sisley claims he denied ownership of any rental homes immediately adjacent to Roosevelt High

School. BA, pp. 23-25.[7] Yet, Drake Sisley testified at his June 7, 2012 deposition that the rental homes adjacent to Roosevelt High School were reasonably well maintained, not eyesores or run-down. CP 69. Thus, an allegedly inaccurate report that Drake Sisley owns what he considered to be relatively well maintained rental homes could not be considered defamatory, even if the allegation of ownership was proven false.[8]

In any event, Mr. Sisley does not allege in his declaration that he told this unnamed person years ago that he and his brother had never been accused of racist renting policies, or that no one ever referred to the rental homes near the school as "crack shacks" or "ghetto houses." *See* CP 157. Thus, the Sisleys failed to present admissible evidence showing the school district knew or should have known the challenged portions of the student reporter's article were false. Additionally, this Court previously held the

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[7] Drake Sisley admits to having owned approximately 20 rental properties over the years, several of which were a little over a mile from the high school. CP 42, 160. The Sisleys do not take issue with the student reporter's statement that the Sisley brothers "own more than forty pieces of property in Northeast Seattle, and have a bad reputation amongst both locals and city officials" (CP 129). Nor do they take issue with her report that "[i]n fifteen years these brothers have acquired 48 housing and building maintenance code violations" (CP 129). *See, e.g.,* BA, p. 27.

[8] In his August 3, 2012 declaration (signed shortly after this Court's opinion was issued on July 30, 2012 in *Sisley v. Seattle Sch. Dist.*), Drake Sisley contradicted his prior deposition testimony by stating the rental homes adjacent to the high school "are in miserable and horribly maintained condition." CP 157. "[G]enuine issues of material fact cannot be created by a declarant who submits an affidavit that contradicts his or her own deposition testimony." *Selvig v. Caryl,* 97 Wn. App. 220, 225, 983 P.2d 1141 (1999), *review denied,* 140 Wn.2d 1003 (2004). The August 2012 declaration directly contradicts Drake Sisley's June 2012 deposition testimony about the quality of the rental homes (CP 69). Therefore, his later declaration cannot be relied on to defeat summary judgment on this point.

Seattle newspaper articles that are in evidence in this case (CP 75-90, 93-96) establish "the Sisley brothers *had been* accused of being racist landlords" and thus the "sting" of this report was true. *Sisley,* __ Wn. App. at __, 286 P.3d at 978-79 (emphasis in original). Since this portion of the student's report was true, the Sisleys are unable to prove the school district is at fault because the district knew or should have known this portion of the student's report was false.

What remains is the Sisleys' claim that the school district should have known the portion of the student's article stating Drake and Hugh Sisley owned "run-down houses located on the block west of 15th and 65th," was false because Drake Sisley previously alleged only his brother Hugh Sisley owned those houses. *See* CP 129. However, prior newspaper articles had reported Drake Sisley owned some of these houses. *E.g.,* CP 89 (*Seattle Times* 2005 report that "... Hugh and Drake Sisley, two brothers who own dozens of properties in the area" of "Seattle's Roosevelt neighborhood" and "the Sisley brothers owned three full blocks of the neighborhood"), 94 (*Seattle Times* 2007 report that "Gilbert later moved into the Roosevelt neighborhood and became the property manager for a number of rental homes owned by well-known Roosevelt-area landlords Hugh and Drake "Ducky" Sisley"), 95 (*Seattle Weekly* 1999 report: "Welcome to the small empire of Hugh and Drake Sisley, brothers who

own 54 rental homes in the Roosevelt area"). In light of these prior newspaper reports, the Sisleys are unable to prove the school district knew or should have known Drake Sisley did not own any run-down homes in the Roosevelt neighborhood. At most, the school district had conflicting information about the ownership of these houses.

Finally, the Sisleys are incorrect that the trial court misapplied the CR 56 summary judgment standard. They argue the trial court's ruling that "plaintiffs are unable to prove defendant Seattle School District was at fault" (CP 234) means the trial court recognized "a material and substantial issue" of fact exists regarding fault, but the court "predict[ed]" plaintiffs would be unable to prove fault at trial. BA, p. 25.

The Sisleys misunderstand the trial court's ruling. A defendant is entitled to summary judgment when "that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim." *Las,* 66 Wn. App. at 198. Here, the trial court merely ruled there was an absence of evidence supporting an essential element of plaintiffs' defamation claim - - *i.e.,* fault. CP 234. Thus, the Sisleys are incorrect that the trial court improperly made "predictions" on the outcome of genuinely disputed issues of material fact. The trial court's ruling that the Sisleys are unable to prove the school district was at fault for the student's speech should be upheld.

VI. CONCLUSION

Based on the foregoing reasons, the trial court's order granting summary judgment to the school district and dismissing the Sisleys' defamation claim should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of January, 2013.

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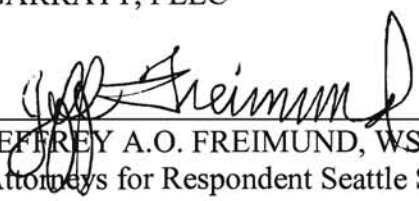

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 28th day of January, 2013.

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