Supreme Court No. 90118-0

Court of Appeals No. 69316-6-1

SUPREME COURT OF THE 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.

PETITIONERS' REPLY TO RESPONDENT SEATTLE SCHOOL DISTRICT'S ANSWER TO PETITION FOR REVIEW

Ray Siderius WSBA 2944
SIDERIUS LONERGAN & MARTIN, LLP
500 Union Street, Suite 847
Seattle, WA 98101
206/624-2800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I.

The Rules of Appellate Procedure (RAP) present a dilemma. RAP 13.4(d) states in part the following:

> If the party wants to seek review of any issue that is not raised in the Petition for Review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer.

RAP 13.4(d) also provides:

> A reply to an answer should be limited to addressing only the new issues raised in the answer.

With all due respect to opposing counsel, petitioners do not believe that the answering brief has raised any new issues within the meaning of this rule. The answering brief contains no discussion of these issues, cites no cases and merely refers to the points without analysis. On p. 15 of the answering brief, the following statement appears: ". . . the other six alternative bases for the trial court's summary judgment ruling would justify affirming summary judgment." The six bases are merely listed on p. 11 of the answering brief. The statement that these six grounds "would justify affirming the trial court's summary judgment ruling" is repeated on p. 2 of the answer.

This reply brief by RAP 13.4(d) must be limited to addressing only the new issues raised. Accordingly, we file the following reply to each of the six issues "x-ed" by the trial court as grounds for summary judgment ruling with the understanding that if this court agrees with petitioner that these new issues have not really been "raised" the rest of this reply brief can be ignored. Petitioners also have in mind RAP 13.7(b), "Scope of Review," which contains the following sentence:

> The Supreme Court may limit the issues to one or more of those raised by the parties.

Petitioners reply as follows to the six "issues."

1. ***First Alternative Basis for Trial Court Ruling.*** The trial court (CP 233) 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 plaintiffs from a student's alleged defamation.

The District has cited a single case in support of this conclusion, *Jachetta v. Warden Joint Consolidated School Dist.*, 142 Wn.App. 819, 176 P.3d 545 (2008). Respondent presented this identical argument to the trial court. (CP 23, l. 10.)

The *Jachetta* decision does not support counsel's broad statement. In that case, the parents of a student became overly concerned because he was

allegedly being bullied at school. The alleged "bullying" consisted of two students writing a "2 Kill" list which included the names Goerge (sic) Bush, Bill Clinton, etc. and the Jachetta boy. The School District had the two bullies psychologically analyzed, who said it was a "joke." The District permitted the Jachetta boy separate class studies, but did not agree to pay for a home-school tutor for him, and the parents sued the District. The decision focused entirely on foreseeability, finding that the District acted reasonably, that measures necessary for protection of students depend on the foreseeability of a risk, and dismissed plaintiffs' case. The *Jachetta* opinion concluded with the following:

> 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.

This *Jachetta* decision from Division Three of the Washington Court of Appeals has never been cited in any Washington Supreme Court or Appellate Court opinion.

More importantly, this trial court summary judgment conclusion, if it were accurate, would be contrary to RCW 4.96.010 entitled "Tortious Conduct of Local Governmental Entities – Liability for Damages," reading as follows:

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

2. ***Second Alternative Basis for Trial Court Ruling.*** The trial court ruled (CP 233): "As a matter of law, defendant Seattle School District is not vicariously liable for a student's allegedly defamatory speech."

From the beginning this has been a non-issue in this case. At no point did the petitioners allege that their case against the Seattle School District was based upon vicarious liability and/or that the student was an "agent" or "servant" of the District. The student who authored the article was not named as a defendant. Petitioners' allegations against the School District had nothing to do with vicarious liability. Such has never been claimed by petitioners. This alternative basis for the trial court ruling is irrelevant.

3. ***Third Alternative Basis for Trial Court Ruling.*** The trial court (CP 233) ruled that "as a matter of law, plaintiffs are unable to prove that, consistent with the First Amendment, defendant School District should have censored the student's speech."

The District contended in its opening brief on the summary judgment motion that under the First Amendment, the rights of a student prohibited the District from censorship of the student's speech unless it "will materially and substantially disrupt the work and discipline of the school." (CP 26.) This was, in the opinion of plaintiffs' counsel, a distortion of United States Supreme Court decisions which permit, and even require such censorship if the student's publication constitutes an "invasion of the rights of others." The trial court summary judgment ruling did not address either the defendant's contention that censorship is not permitted unless the educational environment is disturbed or the plaintiffs' contention that the statements invaded the rights of the plaintiffs and were thus outside the First Amendment.

The United States Supreme Court has held repeatedly that the First Amendment does not grant any protection to a student whose conduct amounts to an "invasion of the rights of others."

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

that a school district could not control student conduct unless it disrupted the educational environment. The *Tinker* decision concluded at p. 513:

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

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

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

This rule was reaffirmed in *Hazelwood.* There the students prepared articles for the school newspaper, one of which articles mentioned pregnancy and divorce of other students. The article as originally written, named the students. One of the faculty removed the names before showing the proposed article to the principal. The context, in the opinion of the principal, even with the names removed, would have permitted persons in the school to identify the students and he therefore removed entirely two of the pages of the article that contained the references to the students. The students filed a First Amendment civil rights case. The trial court held for the principal and the officials, ruling they were within their rights because of the possible harm to the students whose identity could be disclosed. The 8th Circuit reversed. On appeal, the United States Supreme Court restored the District Court decision, holding that the principal and the officials behaved reasonably because they were acting to protect the privacy of the individuals described in the article. The court ruled that the students have full First Amendment free speech rights, but not if the speech infringes upon the rights of others.

It is important that, in the case at bar, the libel is definitely "school sponsored speech." *The Roosevelt News* is published by the school in an elective course that is offered for credit, the application of the course is competitive, the faculty advisor in 2009 was Christine A. Roux and the published description of the course reads (CP 176):

> Advanced Journalism – Newspaper. 11-12 -- semester. 1 period, one half credit each semester. Prerequisite: successful application. These are the first, second and third

> semesters spent working on the staff of *The Roosevelt News*. Students sharpen their journalistic skills. They produce Roosevelt's award-winning newspaper.

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

The faculty at Roosevelt High School had every opportunity to review and prevent the publication of the libelous material. There is no student's First Amendment issue involved in requiring that review.

4. ***Fourth Alternative Basis for Trial Court Ruling.*** In this portion of the trial court's summary judgment ruling, the trial court ruled that "the student's report that Hugh and Drake Sisley were 'infamous landlords' who had been 'accused of racist renting policies' is a non-actionable opinion that is not defamatory as a matter of law." The trial court was incorrect in concluding that because a statement is expressed as an opinion, it is "non-actionable as a matter of law." This conclusion by the trial court is contrary to the decision of the United States Supreme Court and the *Restatement of Torts.*

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

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

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

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

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

> (1) the entire article and not merely a particular phrase or sentence; (2) the degree to which the truth or falsity of a statement can be objectively determined without resort to speculation; and (3) whether ordinary persons hearing or reading the matter perceive the statement as an expression of opinion rather than a statement of fact.

The more important statement in *The Roosevelt News* article that implied undisclosed defamatory facts is the statement in the 2009 article referring to "crack shacks owned by the Sisley brothers." (CP 166.) Petitioners consider this an extreme form of libel. It may be one thing to call someone a slum lord and refer to dwellings as "slums" or "run-down houses." Such statements do not contain any implication of an undisclosed defamatory fact.

It is considerably different to make a statement that someone is an owner of a "crack shack." This implies an association with cocaine, either as a dealer, user or one who knows that the home is being used as a cocaine

and/or drug facility. The same can be stated about the statement "accused of racist renting policies."

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

5. ***Fifth Alternative Basis for Trial Court Ruling.*** The trial court, in granting summary judgment at CP 234, ll. 6-7, ruled "plaintiffs are unable to prove defendant Seattle School District was at fault for the student's speech and knew, or should have known the student's speech was false."

What the trial court did here by this finding is predict that the plaintiffs would be unable to establish fault. The trial court's prediction that a plaintiff may not prevail at trial is insufficient to sustain summary judgment. *Meadows v. Grants Auto Brokers*, 71 Wn.2d 874, 431 P.2d 216 (1967).

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 Sisley brothers (with) their monopoly on the run-down homes that surround Roosevelt, worth an estimated $14 million dollars which marks them among the top 3 slumlords in the City; (3) the houses that surround the school have once again began to crumble back into a shamefully shanty existence.

When this first false publication occurred (CP 200) Drake Sisley went to the principal, pointed out the correct status of ownership of the slum properties, that the principal took notes and assured Drake Sisley that it would "not happen again." (CP 194, ll. 9-13 and CP 34, l. 2). The trial court found that the plaintiffs will have no difficulty proving that the libelous statements in 2009 were false. (CP 234, l. 2.) Petitioners assert that the evidence of the meeting with the principal in 2003, the discussions, the taking of notes, and the assurance that it would not happen again, all raise a material and substantial issue of neglect, negligence and fault on the part of the School District, an issue that should be submitted to the jury for determination.

Drake Sisley's meeting with the principal after the 2003 publication and being assured that it would not happen again clearly establishes knowledge, absence of mistake and supports plaintiffs' claim that the District was negligent and at fault in 2009 with the libelous publication that was similar to the 2003 publication.

6. ***Sixth Alternative Basis for Trial Court Ruling.*** The trial court ruled that "Plaintiffs are unable to prove that Antoinette Sisley was a target of the alleged defamation." (CP 234.)

This is immaterial. Petitioners' cause of action was an action brought on behalf of the Sisley marital community and both Drake Sisley and his wife, Antoinette Sisley, were named as plaintiffs. Of course, Antoinette was upset by the defamation of her husband, and this is true whether or not she personally was a "target" of the defamation.

II. CONCLUSION

The Supreme Court Review sought by this Petition should not require a review of the six "alternate bases" for the trial court's summary judgment ruling. If any of the six had substance, counsel for the School District would have presented argument, cases and analysis. Instead the District merely lists the issues with a statement that they are "alternative bases for the trial court's ruling that would justify affirming summary judgment."

The Court of Appeals decision saw no reason to discuss or resolve any of the six issues, stating in this opinion at p. 4: ". . . the element primarily at issue in this case is falsity" and stating in footnote on p. 2 of the opinion "we need not address the other reasons given for dismissal in order to resolve this case and, therefore, do not do so."

The Court of Appeals thereby tacitly chose to ignore the finding of the trial court (CP 234) that the statements in *The Roosevelt News* article were false and that the plaintiffs would be able to prove the falsity. The Court of

Appeals opinion then attempted to justify overlooking such proof of falsity by coming up with a new "gist" or "sting" of the article (a fact issue) deciding as a matter of law that plaintiffs could not prove that this new "gist" or "sting" was false.

Petitioners seek review because (1) the Court of Appeals opinion incorrectly decides an issue of fact as a matter of law (the real gist/sting of the publication); (2) the opinion ignores affidavits and deposition testimony, relying instead on newspaper articles; and (3) the opinion represents an unfortunate trend, particularly in defamation cases such as *U.S. Mission Corp. v. KIRO-TV*, 172 Wn.App. 767, 292 P.3d 137 (2013), toward taking clearly disputed issues of fact from a jury and deciding them as a matter of law.

Respectfully submitted this 30th day of April, 2014.

Ray Siderius WSBA 2944
SIDERIUS LONERGAN & MARTIN LLP
Attorneys for Appellants

500 Union Street, Ste 847
Seattle, WAS 98101
206/624-2800

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 emailed or sent by legal messenger a true copy of this document to:

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

Dated this 30th day of April, 2014.

Mary Berghammer