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SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS REYKDAL, ET AL.

Plaintiffs-Respondents

vs.

MAIA ESPINOZA ET AL.

Defendants-Appellants,

and

KIM WYMAN, SECRETARY OF STATE,

Nominal Party.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION¹

Incumbent Superintendent of Public Instruction Reykdal would prefer voters not know the details of sex ed curricula he has promoted while he seeks re-election. His challenger, Maia Espinoza, focuses voters directly on that issue. The core debate in the fall campaign, particularly in light of Reykdal's efforts to make sex ed more mandatory, more centralized, and more the obligation of his office, is this: what does Reykdal think is age-appropriate sex ed?

Ms. Espinoza thinks she knows the answer: *He champions a policy that teaches sex positions to fourth graders.* Why? Because his office reviewed and labeled as "age-appropriate" a sex ed curriculum that includes a book, for distribution to fourth graders, with graphic drawings of people engaged in intercourse in different positions. Over the course of months of debate over the implications of including that

¹ This brief is in reply to Reykdal's brief. The Secretary of State also filed a brief, but addresses only the issue of whether RCW 29A.32.090 is constitutional. Espinoza argued below, and argues here, that RCW 29A.32.090 must be interpreted in a way that conforms to constitutional requirements protecting political speech. The Secretary agrees with Espinoza that in order to strike a statement from the Voter's Pamphlet, the trial judge must conclude that the petitioner has "a very substantial likelihood of prevailing in a defamation action." Br. Sec'y at 3, 12. The Secretary also agrees that such a finding must be based on the "extensive body of defamation case law." *Id.* at 12. Because the Secretary correctly rejects the claim made by Reykdal that his burden is somehow less than what would be required if Reykdal brought a defamation action against Espinoza, this brief is devoted to establishing (1) that Reykdal misinterprets the standard established in RCW 29A.32.090; and (2) Reykdal is incorrect in claiming that he has "a very substantial likelihood of prevailing in a defamation action."

curriculum and its book recommendation, Reykdal's OSPI has never once retreated from the position, still touted on his website, that it is "age-appropriate." Even in these briefs, Reykdal never once tells the Court he does not still believe the book is age-appropriate for fourth graders, much less point to any pre-existing evidence that would support that assertion. As a matter of fact, Reykdal does think *It's Perfectly Normal* is age-appropriate for fourth graders, graphics and all.

Rather than defend his position to the public, Reykdal would prefer to avoid the debate, and to do so, asks this Court to censor discussion of his conduct in office. His challenge fails because he evades the facts and mis-states the law. He asks this Court to construe RCW 29A.32.090 in a blatantly unconstitutional manner, and to do so after crediting in his favor every highly disputable claim he makes about the sex ed curriculum listings on the OSPI website.

The facts are plain: Ms. Espinoza's statement is a blunt and accurate statement of Reykdal's actions in office. And the law is clear: To strike it from the voter's pamphlet contradicts the text of the statute and offends the Constitution.

II. FACTS AND STANDARD OF REVIEW

Reykdal has not challenged any of the facts asserted in Espinoza's opening brief, and concedes that there is no deference to any factual finding by the trial judge.

III. ARGUMENT

A. **RCW 29A.32.090 Does Not Permit Removal of Statements Merely Because They Are “Misleading” or “Leave a False Impression.”**

1. **RCW 29A.32.090(2) is a distraction *in this case*.**

Reykdal devotes a considerable portion of his brief to the claim that RCW 29A.32.090 applies a different standard to a statement made in the voter’s pamphlet compared to a statement made in the course of political campaigning. To make this argument, Reykdal relies on the legislative history of RCW 29A.32.090, which added language about what constitutes “libel or defamation per se” for purposes of the action authorized by subsection (3). Reykdal suggests that Espinoza would have the court ignore RCW 29A.32.090(2). Br. Resp. at 18. Espinoza did not call for the court to ignore RCW 29A.32.090(2), but to recognize it for what it is in this case—a distraction. RCW 29A.32.090(2) only establishes the *damages* element of a defamation case. Here, the only questions raised both at the trial court and in this Court are whether Espinoza’s statements are “provably false,” and if so, whether they were made with actual malice. Whatever the legislature’s intent in 2009, it did not change the standard that it requires the trial court to apply in RCW 29A.32.090(3), which requires proof of defamation—the same as would be the case if the statement were made in any other context in the course of a political campaign. This court is therefore required to determine whether, if Reykdal initiated a civil action for defamation, he

would have a “very substantial likelihood” of prevailing. Because the issues in this case revolve around what makes a statement “provably false,” and what is sufficient to establish (with convincing clarity) actual malice, RCW 29A.32.090(2) is literally what Espinoza called it—a distraction.

Nor would it matter if the legislature’s subjective intent were to lower the standard for removing language from the voter’s pamphlet. “[A] court cannot indulge in speculation about the Legislature’s subjective intent or its group psychology. Unambiguous statutory language must be given its unambiguous meaning.” *Caritas Servs., Inc. v. Dep’t of Soc. & Health Servs.*, 123 Wash. 2d 391, 409, 869 P.2d 28 (1994). RCW 29A.32.090(3)(b) unambiguously prohibits the trial judge from entering an order to remove language from the voter’s pamphlet unless it concludes that Reykdal would have a very substantial likelihood of prevailing in a civil action for defamation. Reading the statute as a whole, including the provision in RCW 29A.32.090(2) for establishing what constitutes the element of damage in a defamation action, Reykdal cannot prevail unless he meets the same standard as would be applied in a civil action for defamation. He cannot.

2. “Leaving a False Impression” Does Not Establish Defamation.

This Court’s cases make it abundantly clear that to prevail in a defamation action, the plaintiff must prove that the allegedly defamatory

statement was “provably false.” *Duc Tan v. Le*, 177 Wash. 2d 649, 300 P.3d 356 (2013); *Mohr v. Grant*, 153 Wash. 2d 812, 108 P.3d 768 (2005); *accord*, *Herron v. KING Broadcasting Co.*, 112 Wash. 2d 762, 776 P.2d 98 (1989); *Mark v. Seattle Times*, 96 Wash. 2d 473, 635 P.2d 1081 (1981).

Reykdal seizes upon the use of the phrase “false impression” to suggest that a statement could be the basis of a defamation action if it left the reader with a “false impression.” Br. Resp. at 20. To be sure, that phrase is used in *Seaquist v. Caldier*, 8 Wash. App. 2d 556, 438 P.3d 606 (2019) and in *Mohr*, 153 Wash. 2d at 812. (Notably, both of those cases rejected any theory of defamation liability resulting from a claimed “false impression.”) To permit a public official to prevail in a defamation action merely by showing that the defendant’s statement “left a false impression” would stand the law of defamation on its head.

In *Mohr*, a *private* plaintiff sued a TV station that broadcast a news report about the arrest of a disabled man after he had come into the plaintiff’s store asking for candy, suggesting that Mohr had orchestrated the arrest because he was unsympathetic to disabled people. The trial court dismissed the action, but the appellate court reversed. This court then *reversed* the appellate court and reinstated the trial court’s dismissal. It considered whether “defamation by implication” could be the basis for a defamation case. It relied upon previous cases to find that, at least in theory, a claim of “defamation by implication” could be

sustained.² However, it is important to note that only one case³ has suggested that a public official could satisfy the falsity element of a defamation claim merely by showing that the challenged statement “left a false impression” with the reader.

In *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 515 P.2d 154 (1973) a port official sued a newspaper that reported on what appeared to be the receipt by the port official of reimbursement for a trip he did not take. The port official had contacted the newspaper with an exculpatory fact prior to the story being printed, but the newspaper chose not to include the exculpatory fact. After the case was dismissed on summary judgment, the appellate court affirmed, but this Court reversed the dismissal, ruling that the plaintiff had raised sufficient factual questions to require determination of liability by the trier of fact.

In reversing the grant of summary judgment, the *Chase* court held that the omission of a critical fact can render an otherwise true statement such a distortion of reality that it qualifies for the “false statement” component of a defamation claim. For example, suppose the following story was printed about a public official: “John Doe has never paid child

² For example, in *Herron*, 153 Wash. 2d 812, this court quoted a previous case that described a plaintiff’s burden in a defamation case as proof “that the statement was false, or would create a false impression in some material respect.”

³ In the other cases that have suggested that “defamation by implication” is actionable, the plaintiffs were private figures (*Mohr, Taskett, Mark*), or else the court ruled that, even if “defamation by implication” standard were applied, the plaintiffs failed to meet their burden (*Herron, Schmalenberg*).

support to his ex-wife. She lives in extreme poverty. Her children, now eight and twelve years old, have never been to a dentist, and rely on public school lunches for the only nutritious meal of the day.” If John Doe and his ex-wife never had children, and their divorce decree never included a child support obligation, “defamation by implication” might have occurred, even if each statement claimed to be defamatory was technically true.

This was the case in *Chase*. The plaintiff had indeed made a repayment to Attorney General’s Office, as reported in the story. But in fact—as was known to the newspaper before printing the story—he had never actually received public funds for which he had an obligation of repayment. He made the repayment because it was cheaper to do so than to employ lawyers to establish his defense in court. To omit the critical fact—that Chase had no obligation to make the repayment—rendered the supposedly “true facts” so misleading as to survive a summary judgment motion.

If a public official’s burden of establishing that the challenged statement is “provably false” were watered down to require only a showing that the defendant’s statement left a “false impression,” almost nothing would be left of the First Amendment protections of political speech. Every political candidate accuses his or her opponent(s) of publishing misleading statements that omit critical facts, leaving a false impression with the reader. Neither *Chase* nor any other case using the

language of “defamation by implication” or “false impression” should be read to change the requirement that a defamation plaintiff establish that what the defendant has said or written is “provably false.”

While Reykdal asks in this case for a special rule to be applied to statements in a Voter’s Pamphlet, there is no limiting principle that could separate this case from the long line of cases establishing the plaintiff’s burden in a defamation case—especially in a case of a public official claiming defamation. Because RCW 29A.32.090 only permits the exclusion of a statement from the voter’s pamphlet if the judge concludes that the petitioner has “a very substantial likelihood of prevailing in a defamation case,” this Court’s ruling on whether Reykdal has met that standard will apply to any future case in which a public official sues for defamation.

Seaquist, 8 Wash. App. 2d 556, applied the proper standard, rejecting the kind of defamation by implication proposed by Reykdal here. In that case, a suit between candidates for the Legislature about campaign materials, the defendant had published statements and images that were not merely bland, sterile, “just the facts, ma’am” recitations of an incident between the candidates. The court dismissed the plaintiff’s defamation action, just as it would reject any attempt by Reykdal to bring a defamation claim against Espinoza if her statement were made in a campaign mailer or on the stump—a point he concedes

by repeatedly drawing the legally erroneous distinction between those fora and the Voter's Pamphlet.

B. Nothing in Espinoza's Statement Is Provably False.

Reykdal's entire argument is premised on the false assumption that he need only prove that the statement made in the Voter's Pamphlet was "misleading" or "left a false impression." Br. Resp. 20. When examined under the true test of whether any part of the statement was "provably false," Reykdal is unable to meet his burden.

1. Reykdal "Championed" The Policy.

Reykdal complains that the word "champion" has a meaning that is "not benign." Br. Resp. at 25. But the record is clear that Reykdal was an ardent supporter of ESSB 5395, centralizing and strengthening the force of his office's curriculum review, and giving ever greater importance to his description of a sex ed curriculum as "age-appropriate." He does not deny that fact. The word "champion" is appropriate and accurate.

2. Reykdal Championed A Policy.

Reykdal complains that he himself would never support teaching sexual positions to fourth graders, and to do so would be inappropriate and contrary to the requirement that sex education be age appropriate. Br. Resp. at 24. But the point is that the *policy* he supported would have that effect. Reykdal does not contest the statement in Espinoza's opening brief that ESSB 5395, which Reykdal strongly advocated, narrowed the

choices available to school districts for providing sex education. Even before ESSB 5395, RCW 28A.300.475(4) required the Superintendent of Public Instruction to “develop a list of sexual health education curricula that are consistent with the 2005 guidelines for sexual health information and disease prevention.” As a result of ESSB 5395, school districts must either choose from a curriculum “from the list developed under subsection (4),” or “must conduct a review of the selected or developed curriculum to ensure compliance with the requirements of this section.” ESSB 5395, Sec. 1 (6).

Reykdal’s championing of ESSB 5395 made it much more likely that school districts would choose from the list that OSPI developed of approved curricula. It is irrelevant, even if true, whether Reykdal himself never thought teaching sexual positions to fourth graders was a good idea. The point is that he championed a *policy* that not only included in its list of curriculum materials a curriculum that taught sexual positions to fourth graders, but his policy made it much more likely that more school districts would wind up adopting that curriculum.

3. The Policy Teaches Sexual Positions.

Reykdal concedes that one of the meanings of “teach” is “to cause to know how.” Br. Resp. at 25. Reykdal vociferously objects that OSPI “does not ‘approve’ or recommend curricula or other instructional materials.” Br. Resp. at 6. But as the previous section demonstrates, the effect of ESSB 5395 is to encourage school districts to adopt one of the

curricula identified on its website as satisfying the state requirements. While this may not fit some dictionary definitions of “approval,” Reykdal makes a distinction without a difference.

Adopting the 3Rs curriculum would mean distributing to each fourth grader the handout that was identified in Maia Espinoza’s declaration, which recommends that parents share *with their children*, as “age appropriate,” the book *It’s Perfectly Normal*. By viewing the cartoon illustrations in that book, a child would “know how” to engage in sexual intercourse in different positions. It makes no difference to the truth of the statement whether or not every OSPI-approved curriculum includes *It’s Perfectly Normal*. Nor does it matter whether every school district following OSPI’s approval and adopting 3Rs would decide to use the handout. And perhaps not every parent, after reviewing the book, would decide that it was in fact age-appropriate to share the book with his or her child. It is part of a curriculum that he calls age-appropriate, lists on the OSPI website, and which, after passage of the law he drafted and promoted, is ever more likely to be adopted by Washington school districts.

The burden is on Reykdal to establish that the statement that the policy teaches sexual positions to fourth graders is “provably false,” but it is not. Even if his exaggerated version of the possible impression left by the statement ought to be credited as the only possible impression the statement could leave, simply creating a misleading impression is not

enough to satisfy a public official's burden in a defamation case. Even under the "false impression" or "defamation by implication" standard, the omitted fact must render the challenged statement provably false. Adding the fact (if it is a fact) that Reykdal does not personally favor teaching sexual positions to fourth graders does not change the truth of the fact that his office has stated that 3Rs meets state standards. His office has called it age-appropriate. The 3Rs curriculum includes a recommended supplement that does teach sexual positions to fourth graders. Most campaign statements omit facts that, if included, would have put the opposing candidate in a more favorable light. Nothing that Reykdal offers as exculpatory evidence renders the challenged statement provably false.

4. The Policy Applied To Fourth Graders.

The last part of the statement is also indisputably true. In listing the 3Rs curriculum as one that satisfied the state standards, OSPI encouraged school districts to follow the curriculum. Reykdal attempts to distance himself from *It's Perfectly Normal* by referring to it as "a separate book, referenced in a separate handout that comes with the 3Rs curriculum. . . . But the book itself fails to support her attack. The separate book is intended to be used as a potential tool for parents that might be useful for answering questions children raise at home about puberty." Br. Resp. at 29.

Reykdal's statement to this Court is misleading, practically to the point of being provably false. The one-page handout was to be given to each child to take home. It stated that the book *It's Perfectly Normal* was age-appropriate. The book was not intended for background instruction by parents (as though they were looking at a medical textbook or item that only they should look at). It was recommended as age-appropriate for distribution to fourth graders. A parent might look at the book and decide that it was not appropriate for his or her child, but a parent might also trust the judgment of Reykdal's OSPI about what is age-appropriate and hand it to the fourth grader.

5. Taken as a Whole, The Statement Is True.

Reykdal urges that the statement must be evaluated by considering it as a whole. Br. Resp. at 24. Reykdal cannot point to any part of the statement that is "provably false." But he complains that after reading the statement as a whole, a reader would be "led to believe that Reykdal is a militant advocate of instructing fourth graders on how to engage in certain sexual positions." The true fact, he would concede, is that he (1) promoted a policy that (2) listed curriculum materials as satisfying state standards, (3) that recommended as supplemental reading a book that included depictions of people engaging in sex in different positions, and (4) the supplement was part of a curriculum for fourth graders. Reykdal claims a possible "false impression" that results from first exaggerating the tone of the statement to make it more

accusatory and then asking the Court to instead credit each and every one of his denials and disclaimers—none of which a voter, much less this Court needs to agree with. He certainly does not demonstrate that Espinoza’s statement was provably false.

6. The Damage To Reputation Must Result From the Provably False Statement.

Defamation law requires not only that the plaintiff prove that the defendant made a statement that is provably false, but also that it is the falseness in the statement that caused the injury, not the “gist” or “sting” of what is true. Thus, in *Mark*, 96 Wash. 2d 473 the defendant published stories about the plaintiff that exaggerated his criminal conduct. Because there was no material difference between the statement “bilking the state out of at least \$300,000” and the actual fact—that he was charged with larceny for \$200,000 in fraud billing—the court found the element of falsity had not been satisfied. *Id.* at 496.

Even if the shortened version of the statement Espinoza submitted made Reykdal to appear worse than he is, the plain fact is that the wound inflicted on Reykdal is largely self-inflicted--not caused by any falsity in Espinoza’s statement. Reykdal oversaw an office that listed *and still lists* a curriculum as satisfying the state standards for fourth graders that included recommendations for giving fourth graders a book that in turn included cartoons of couples engaging in different sexual positions. Unless Reykdal can show that some false aspect of Espinoza’s statement

inflicted damage other than the damage resulting from the true statement that he is forced to concede, he has not met the standard for defamation.

C. Reykdal Never Established The Elements Of A Defamation Claim With Convincing Clarity.

RCW 29A.32.090(3)(b) forbids the entry of an order striking language from a Voter's Pamphlet unless the petitioner has satisfied the trial court that he or she has a "very substantial likelihood of prevailing in a defamation action." Where the defamation plaintiff is a public official, such as Reykdal, the elements of a defamation claim must be established with "convincing clarity." *Duc Tan*, 177 Wash. 2d at 649. The words "convincing clarity" appear nowhere in Reykdal's brief. In *Mohr*, 153 Wash. 2d 812, one of the cases Reykdal relies upon, the plaintiff was a private figure who only had to establish the elements of his case by a preponderance of the evidence. *Id.* at 822. Even at that, the plaintiff's claim was properly dismissed on summary judgment.

Here, by contrast, the trial judge was required to find all of the elements of a defamation claim, proven with convincing clarity, such that he could conclude that the plaintiff had "a very substantial likelihood of prevailing in a defamation action." RCW 29A.32.090(3)(b).

No evidence of actual malice was established in this case—and certainly not with "convincing clarity." Reykdal attempts to avoid his burden of proof by claiming that RCW 29A.32.090(3)(b) was somehow

superseded by the addition of RCW 29A.32.090(2). Br. Resp. at 21-2. A previous section of this brief addressed that argument.

As a second line of attack, Reykdal argues that he did prove actual malice—but again, without mentioning the important qualifier *with convincing clarity*. A public official or public figure cannot recover in a defamation case unless a false statement was made with actual malice. *Duc Tan*, 177 Wash. 2d 649. In the defamation context, actual malice may be inferred from circumstantial evidence, but the existence of the defendant’s hostility or spite is “generally insufficient to establish actual malice.” *Id.* at 669. Instead, the publisher must be on notice that the statement is so “inherently improbable” that additional research should be done before publishing the statement. In *Chase*, discussed above, the newspaper received the clarifying comment that would have changed the entire meaning of the article printed about the port official. The newspaper deliberately chose not to include it in their report. That evidence was enough to survive summary judgment.

Here, Reykdal suggests that actual malice can be inferred on two grounds. First, Espinoza is said to have ignored the OSPI statement on its website that “OSPI does not ‘approve,’ ‘endorse,’ or ‘recommend’ any given curriculum.” Br. Resp. at 35. But as previous sections of this brief demonstrated, there is no meaningful difference between the statutory obligation to list curricula that comply with state requirements—which OSPI concedes it did—and “approving” them.

Not only would a reasonable person assume that the list containing the 3Rs curriculum was “acceptable” to OSPI, but that it and the other listed curricula were recommended. Far from leading a reasonable person to “entertain serious doubts as to the truth” of the statement she had formulated, Espinoza and any voter would be entitled to draw that conclusion as a fact.

Reykdal’s second argument is that her statement was “inherently improbable.” Br. Resp. at 35. Again, by drawing fine distinctions between “approving” curricula and listing curricula that meet state requirements, Reykdal attempts to avoid the logical conclusion that any person would draw from examining OSPI’s website: the materials listed are those that OSPI (and Reykdal) think would be appropriate for the relevant age groups. After all, that is exactly what OSPI says about them!

Perhaps some as-yet uninformed voters will find it inherently improbable that Reykdal’s OSPI would include as age-appropriate a book showing graphic pictures of sexual activity as a recommended resource in a curriculum for fourth graders. But that most important part of the story turns out to be exactly, literally, and as admitted by Reykdal, true. Those same voters might think it inherently improbable that the incumbent Superintendent of Public Instruction, who oversees the Office that lists curricula as meeting state standards, would do nothing to correct this situation—but that also turns out to be true.

None of the components of Espinoza’s statement were “provably false.” And taken together, the worst that Reykdal can try to demonstrate about the full statement is that it is “misleading” or “leaves a false impression.” What is misleading about Espinoza’s statement, apparently, is that while Reykdal’s office has recommended the use of this book, and he himself has done nothing to remove the book from the list of recommended resources, Reykdal may personally believe the book is inappropriate for fourth-graders. Of course, he does not say that himself, nor does he point to any evidence that would lead one to believe he disapproves of the book as part of the 3Rs curriculum. He certainly hopes this Court thinks he disapproves. But he cannot turn that unstated, unproven, undemonstrable, and perhaps non-existent disapproval into a defamation claim.

There is nothing in Espinoza’s statement that is provably false; there is no evidence upon which it could be inferred that Espinoza acted with actual malice; and neither of these propositions could be established with “convincing clarity.”

IV. CONCLUSION

Reviewing the facts of this case *de novo*, this Court should conclude that Reykdal failed to establish a “very substantial likelihood” that he could prevail in a defamation action. The trial court’s judgment should therefore be reversed and Reykdal’s petition denied.

Submitted this July 31, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I electronically filed this document with the Supreme Court of Washington's electronic filing system which will send notification of my filing to all counsel of record.

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