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Utah Supreme Court

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Don R. Stringham; Robert L. Nosay; Robert C. Fillerup; Alan Larson; Attorneys for Respondents; Gerald E. Nielson; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROYAL NORDELL ALLEN, JR.

Plaintiff

MARK E. COOK, SR.

KENNETH R. STRATTON

Defendants

Appeal from the

Honorable

Alan Larson

700 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorney for Respondent
Bryant Madsen

Robert L. Moody

55 East Center Street
Provo, Utah 84601

Attorney for Respondent
Mark E. Cook

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROYAL NORDELL ALLRED,)	
Plaintiff,)	
vs.)	CASE NO. 15688
MARK E. COOK, BRYANT MADSEN,)	
KENNETH R. STRATE and TOM)	
MOWER,)	
Defendants.)	

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action for damages for slander.

DISPOSITION IN LOWER COURT

Each of the defendants made motions to dismiss plaintiffs Complaint which the court granted by written order on the 24th day of February, 1978. Arguments of all parties were submitted in writing. The court concluded that the statements alleged to have been made by defendants did not amount to actionable libel or slander and that defendants were immune because of their capacity as school board members. There was neither testimony, other evidence or oral argument submitted to the court.

RELIEF SOUGHT ON APPEAL

Plaintiff and appellant seeks reversal of the Order of the

district court and remand to the district court for trial.

STATEMENT OF FACTS

The facts are contained in plaintiff's Complaint. For the purpose of considering whether plaintiff's Complaint should have been dismissed, the allegations of the Complaint must be taken as true. As part of his statement of facts, plaintiff herewith incorporates said Complaint (R 1-5) as though set forth herein in full. Briefly summarized the facts are as follows.

Prior to the incidents in question, plaintiff enjoyed an outstanding reputation in his profession (Educator) and in his community (Mt. Pleasant City and Sanpete County, Utah), and beyond. The defendants Cook, Madsen and Strate were members of the North Sanpete Board of Education. On or about May 23, 1977, they asked plaintiff to join them in their auto in a parking lot. When he did, they told him:

"You have interfered with us for the last time,
we want your resignation".

The defendant Madsen added:

"And we want it within twenty-four (24) hours".
When plaintiff asked the reason, the defendant Cook said:
"We have twenty-seven (27) charges against you
and if you do not resign, we will bring those
charges out in public at the next Board meet-
ing".

(The next Board meeting would occur on May 26, 1977, three days later.)

The defendant Strate said:

"I feel I have to go along with these men in this problem".

Thereafter, the defendants and each of them, told many persons of their claim that they had twenty-seven (27) charges against plaintiff that would be brought out publicly in the next public meeting of the Board, which resulted in a public outcry. The defendant Strate in a Spring City town meeting, called by interested citizens, told the meeting which consisted of forty (40) to sixty (60) people, that:

"That they (defendants) had twenty-seven (27) charges against the Superintendant (plaintiff)", and further invited the people to:

"Come to the Board meeting and see what they are".

(Referring to the Board meeting of May 26, 1977).

Thereafter said defendants publicly denied they had said charges but privately started, fed and encouraged rumors that they had such charges but could not bring them out because of possible legal consequences.

Plaintiff's Complaint further alleged that said statements were made intentionally, deliberately, maliciously and recklessly to injure plaintiff and his reputation as an educator and in the community.

Plaintiff's Complaint alleged there was a large public outcry and he was in fact damaged in his reputation by persons who believed the statements in question directly, and by persons who did not believe, because to them he was rendered "controversial".

While plaintiff contends the following facts relate to matters of privilege and/or immunity which are matters of defense, they are herewith offered for clarification. Plaintiff does not herewith undertake any factual burdens which are not his by law or the rules of court.

At the time of the utterances complained of, plaintiff's contract had less than sixty (60) days to run. (The utterances were on May 23, 1977 and later, and plaintiff's contract expired at the end of June, 1977.) The school board had been sharply divided on many issues -- the three defendant members opposed to the remaining two members. One of the matters about which they were divided was their respective support and non-support for the plaintiff Superintendant. Accordingly, the three defendant members could not remove plaintiff for cause because they require a two-thirds (2/3) vote, which they did not have (UCA 53-6-7). They were too late to fail to renew his contract because the Utah Orderly School Termination Procedures Act UCA 53-51-5-(2) and (5) required both a notice of intent not to renew sixty (60) days prior to the expiration of the contract and another notice thirty (30) days prior to that.

It follows that at the time of the utterances complained of the defendant school board members were attempting to accomplish by malicious coercion and slander what they could not accomplish by motion and vote in their role as school board members.

Said matters were pointed out to the court by defendants and by plaintiff (R 59). They were well known in the community and may constitute part of the context in which the court considered this matter.

ARGUMENT

I

DEFENDANTS' STATEMENTS CONSTITUTE ACTIONABLE SLANDER PER SE.

Defendants claim that they published no slander because they did not communicate any specific wrongdoing on the part of the plaintiff. But where the words complained of convey a defamatory inference, they are actionable although there is no specific allegation.

"For to render a defamatory statement actionable, it is not necessary that the charge be made in a direct, positive, and open manner. If the words used, when taken in their ordinary acceptation convey a defamatory imputation, no matter how indirectly, they are actionable, and it matters not how artfully their meaning is concealed or disguised. A mere inference, implication, or insinuation is as actionable as a positive assertion if the meaning is plain. The test is whether the words, taken in the sense in which they are reasonably understood under the circumstances by persons familiar with the language used, are capable of a defamatory construction."

50 Am.Jur.2d§13p528-9

When the defendant school board members told the plaintiff: "You have interfered with us for the last time", and then stated, "We have twenty-seven charges against you and if you do not resign, we will bring those charges out in public at the next Board meeting", the thrust of their threat was that the plaintiff would be forced to resign if he did not do so immediately. Either the charges would reveal acts or an act sufficient to allow them to remove him from his position as Superintendant for cause, or

the revelation of the charges would induce him to resign because of his public shame. The defendants' characterization of their actions in their Memoranda in lower court makes it clear that this is the interpretation they intended. Defendant Madsen reports the allegations as being that "[they had] 'charges' against the plaintiff, presumably sufficient to justify his removal from office as Superintendant". After speaking to the plaintiff, defendants repeated to numerous people that they had twenty-seven charges against the plaintiff, and invited them to the next Board meeting (three days later) to hear what they were. An obvious inference that many persons in the community believed and that defendants intended them to believe was that the school board had twenty-seven criminal charges against the plaintiff. But the defendants have consistently refused to specify any charges. On several occasions they have said that in school board meetings they did not have twenty-seven charges against the plaintiff; at other times they have said they did. (Defendant Cook has specifically denied the existence of any charges in a deposition given in another case relating to the same nucleus of facts from which this case arose). Defendants at no time had grounds to remove the Superintendent from his position for cause, nor did they have any charges which if publicly proven would have induced him to resign his office. Thus the statement that twenty-seven charges existed is both false on its face and false in what must necessarily be inferred from it. The plaintiff respectfully contends that the question of whether defendants' words, as they

reasonably understood under the circumstances, were defamatory, is one of fact, and that a jury should be allowed to decide it.

Because of the great public interest in education, statements imputing inefficiency or lack of qualification to a school teacher or school official tend to injure the teacher in his occupation or profession. For this reason such statements are actionable. An ALR annotation entitled Libel and Slander: Actionability of Statements Imputing Inefficiency or Lack of Qualification. 40 ALR 3d490 (The annotation included cases involving Principals and Superintendents as part of Public School Teachers) is in point on this question and gives examples of statements about school personnel that have been held to be actionable slander per se. An examination of them shows that specific allegations of wrongdoing are not necessary and that statements weaker than those involved here have been held to be actionable per se.

- a. "incompetent" (p.493)
- b. "weak spot in system" (p.493)
- c. "insufficient and inadequate with students" (p.493)
- d. "Principal paid little attention to school and less to teachers" (p.493)
- e. "not competent and had little control over school" (p.494)

The defendants by their conduct intentionally and deliberately created in the minds of many the false impression that the plaintiff in the conduct of his office had been, at best, greatly deficient, and at worst, criminal. Having maliciously caused the kind of harm

to a professional reputation that slander laws are designed to protect against, the defendants should not be allowed to escape liability because they refused to specify any wrongdoing. In reality, defendants would have caused the plaintiff less harm if they had specified the charges, because he would have been able to respond to them and clear his name. It strongly appears that they did not specify charges because they had none.

The alleged slanders are per se, rather than per quod, because they pertain directly to plaintiff's fitness for his office and profession. The two definitions (suggested by defendants in their Memoranda in lower court) of slander that is actionable per se are as follows:

"(3) conduct, characteristics, or a condition incompatible with the exercise of a lawful business, trade, profession or office," 59 Am. Jur. 2d 524, §10 of "Libel & Slander".

"One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office ... is subject to liability without proof of special harm," Restatement of Facts §573.

The notes to §573 make it clear that the slander must relate to the plaintiff's professional reputation and not merely to his character as an individual. The defendant school board members, in implying that plaintiff Superintendant would not be able to remain in office if he did not comply with their demands, obviously intended to slander his fitness for the proper conduct of his office.

Plaintiff contends that his Complaint states a claim for

damages per se, but does not concede that he has not made a claim for damages per quod.

ARGUMENT

II

DEFENDANTS WERE NEITHER IMMUNE NOR WERE THEIR STATEMENTS PRIVILEGED, BECAUSE THEY WERE NOT ACTING IN THE COURSE OF THEIR OFFICIAL DUTIES, THEY WERE NOT ACTING IN GOOD FAITH, AND THEY WERE NOT WITHOUT MALICE.

Defendants claim separate defenses of statutory immunity under the Governmental Immunity Act (UCA 63-39-10), which excepts from waiver of immunity actions for libel and slander. Both defenses are founded upon the need to permit public officials to freely exercise the lawful functions of their office without fear of liability from an honest error in judgment, or from an act that their duties required. Plaintiff concedes that if the Board members were carrying out official duties at the time of the alleged slanders, in good faith and without malice, they are immune from plaintiff's action.

But the privilege or immunity extends only to the exercise of official functions of their office. If they were not carrying out their functions, or if they were, but were not doing so in good faith, without malice, then no law or public policy protects them. Their acts become those of individuals and not of the state.

The public interest is then best served by holding them liable for their actions.

The lawful powers and duties of the school board regarding termination and hiring of school superintendents are defined in the Orderly School Termination Procedures Act (UCA 53, Chapter 51). An examination of them reveals that defendant school board members were not acting within the statutory requirements.

"(1) This act shall be known as the "Utah Orderly School Termination Procedures Act."

(2) The purpose of this act is to require school districts to adopt orderly termination procedures and to specify standards of due process and causes for termination.

(3) (1) "Contract term" or "term of employment" means the period of time an educator is engaged by the school district pursuant to a contract of employment whether oral or written.

(3) (2) "Dismissal" or "termination" means:

(a) Any termination of the status of employment of an educator.

(b) Failure to renew the employment contract of an educator who pursuant to the employment practices of the school district has a reasonable expectation of continued employment in successive years.

(c) Reduction in salary of an educator not generally applied to all educators of the same category in the employ of the school district during such educator's contract term.

(d) Change of assignment of an educator with an accompanying reduction in pay, unless such assignment change and salary reduction is agreed to in writing.

(3) "Educator" or "teacher" means all teaching and professional personnel of a school district who hold a regular contract for positions requiring certification and valid certificates issued to them by the state board of education.

(4) "Contract classified school employees" mean all educational supportive employees, working under contract with a school district.

(4) The board of education of each school district by contract with its educators or their associations or by resolution of the board shall establish procedures for termination of educators in an orderly manner without discrimination.

At the time of the alleged slanders, plaintiff's contract had less than two months to run. Defendants therefore were precluded from giving the required two months notice, and also could not give the notice required in Section 4 to be given one month before the two months notice. They could not terminate plaintiff's contract for cause because they did not have the two-third majority of the Board required to do so (UCA 53-6-7). Instead, they attempted to force the plaintiff to resign by falsely claiming that they had twenty-seven charges against him which they would reveal at a public Board meeting if he did not resign. They were attempting to accomplish by unfair coercion what they could not accomplish by motion and vote.

Furthermore, they were entitled to deliberate only as a Board. They had no right, duty, or authority to execute policies lawfully adopted by the Board. They were even less entitled to execute policies unilaterally conceived by them. The Utah case of Roe v. Lundstrom 57 P.2d 1128, 89 Utah 720, in which the court considered the liability of individual members of the Logan City Commission who at their own discretion caused Logan City police officers to close a business claimed to be operating without a license, delineates the difference between lawful actions by a Board and improper actions by individual board members.

"Now let us assume that the defendant commissioners are charged with the duty of seeing that the ordinances are faithfully executed. In the exercise of this power, they would necessarily have to act as a

board and not informally and independently as individuals. If we are to give effect to the provision that when power is conferred upon the board of commissioners to perform any act, they may provide by ordinance the manner and details necessary to the full exercise of such powers, then an informal personal interference with the operation of the police department or any directions to its officers would appear to be wholly unjustified and entirely beyond the powers conferred upon the board, or upon the individual commissioners, as such ..."

The court concluded that the Commissioners were not immune from liability because they were acting outside the scope of their authority. In the instant case, the defendants did not merely exceed the scope of the school board's authority to terminate or remove the Superintendent, they deliberately attempted to subvert the statutory requirements of notice and due process and accomplish by coercion what they knew they could not get the Board to officially do.

The unofficial character of the alleged activities of the defendants is further attested to by their informal and even furtive nature. The defendants spoke to the plaintiff in a parked car, in violation of the Utah Open and Public Meetings Act. They employed threats and malicious rumors. There was no official meeting, formal resolution, or other color of official action.

The Public Employees Indemnification Act (UCA Ch. 63-48) is not applicable to the defendants in this action, against because they were not engaged in the performance of their duties. The Act provides for suits to be defended by the government entity, and for judgments to be paid by the government entity, but only where

the acts complained of were within the scope of employment. Consequently the claim of the defendants that although this suit is against them as individuals, it is in substance against the school board as a government entity because the school district would be required to defend and indemnify the school board members has no validity. To remove all doubt, plaintiff waived any claim against the school board or district in his Complaint (R-5).

A claim of absolute privilege, in the minority of courts that have recognized it, also requires that the official have been engaged in the performance of his duties. In McLaughlin v. Tilendis, 263 NE 2d 85 (Ill. 1969), the court held that it was within the Superintendent's official duties to make recommendations concerning teachers, and that any such statements were absolutely privileged. In Smith v. Helbraun, 251 NYS 2d 533 (NY 1964), the Board of Education officially passed a resolution stating that greater progress could be made in solving educational problems of the district under new leadership and that the presence of the plaintiff Superintendent of Schools of the District was detrimental to the best interests of the school district and to the education of the children. No such official action characterizes the defendants' conduct in the instant case.

Most jurisdictions impose a good faith requirement on claims of immunity by public officials, making the privilege enjoyed by them conditional and not absolute. Appellant contends that Utah is among them. Most of the cases cited by defendants in support of their claims of privilege and immunity contain the good faith requirement. See

Anderson v. Granite School District, 413 P.2d 597, 17 Utah 2d 405 (1966), Roe v. Lundstrom, 57 P.2d 1128, 89 Utah 720, Rosendnal Mining and Const. Co. v. Holman, 503 P.2d 446, 28 Utah 2d 396 (1972), and Sheffield v. Turner, 445 P.2d 367, 21 Utah 2d 314. The Anderson case, which dealt with the liability of school board members, stated the rule as follows:

"it is the federal policy of the law that when a public official acts in good faith, believing what he does within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment." 413 P.2d at 599.

The two cases cited by defendants which do not contain a good faith requirement, Anderson Investment Corp. v. State, 28 Utah 379, 503 P.2d 144 (1972) and Wilkinson v. State, 42 Utah 43, 134 P 626, (1913) do not signify that there is no good faith requirement. The Anderson case cites Sheffield v. Turner, supra, which squarely announces a good faith qualification. The Wilkinson case is an old one (1913), it is prior to the Utah Governmental Immunity Act, and does not deal with the good faith problem at all.

A recent case in a close neighboring jurisdiction that deals directly with the question of good faith and conditional privilege in a school situation is Gardner v. Hollifield, 549 P.2d 266, 97 Idaho 607 (1976). In that case the Idaho Court reversed a summary judgment in favor of the school board. The claimed utterance was that plaintiff

"was uncompetent as a school teacher and not doing a competent job."

The court in finding defendants' conditional privilege lost,

pointed out its holding in an earlier Barton case as follows:

"Can the motives and purposes of a school board, when performing an official act clearly within their powers under the law be put in issue in an action for damages under the charge of civil libel? The answer must inevitably be in the negative. They have no right to employ libelous language in the performance of their official duties and cannot shield themselves behind their official character where they have overstepped their authority or exercised official powers in an unlawful manner, but so long as their acts are clearly within the purview of the statute and are such as they have an unquestioned right to perform, they should not be subject to an action for libel on the charge of conspiracy or malice in doing the act." 21 Ida. at 617-618, 123 P. at 480 (emphasis in original omitted.)

"In our earlier opinion in Gardner v. Hollifield supra, we pointed out that Barton would not allow the use of defamatory language violative of the conditional privilege. A conditional privilege may be lost when a speaker on an otherwise privileged occasion publishes false and defamatory matter concerning another which either (a) he in fact does not believe to be true or (b) has no reasonable grounds for believing it to be true. See Gardner v. Hollifield, 96 Ida. at 612, 533 P.2d 730; Barlow v. International Harvester Co., 95 Ida. 881, 892, 522 P.2d 1102, 1113 (1974); Ranous v. Hughes, 30 Wis. 2d 452, 141 N.W.2d 251 (1966); Prosser, Torts (4th ed. 1971) Sec. 115; Annot., 26 A.L.R.3d 492 (1969); Annot., 40A.L.R.3d 490 (1971); Restatement (Second) of Torts. Sec. 600 (Tent. Draft No. 20, 1974).

The defendants would have acted in good faith only had they brought charges pursuant to an effort to remove plaintiff for cause, (which they knew they could not accomplish) and only if they had given him notice and allowed him a hearing in which to respond to them, as the statute, supra, required. Even if the statute had not so required, Board of Regents v. Roth, 92 S.Ct. 2701 (1972) clearly imposes notice and due process requirements wherever there is a possibility of a stigma that will affect future employment. If they were not attempting to remove the plaintiff for cause, they had no right to do more than request his resignation. But

they did more than that, they slandered plaintiff when they claimed to have twenty-seven charges against him that they would make public at an upcoming meeting if he did not immediately resign. That they thereafter denied they had such charges in public and said they did have them in private was obviously done in an attempt to inflict personal pain or to unfairly coerce plaintiff to act contrary to his own will, or both. The question of good faith is usually one of fact, and plaintiff respectfully contends that it should not be decided by the court on Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim. 59 Am.Jur. §197.

SUMMARY

The utterances complained of were defamatory, and since they were obviously intended to call into question plaintiff's fitness for his profession, they are actionable per se.

Defendants cannot claim a conditional privilege or statutory immunity because they were not acting within the scope of their authority. If they had a privilege, they lost it by their bad faith and malice.

All of the issues argued herein are at the very least questions of fact, and should not be summarily disposed without trial.

Respectfully submitted

Gerald E. Nielson,
Attorney for Plaintiff, Appellant.