

1978

# Royal Nordell Allred v. Mark E. Cook et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROYAL NORDELL ALLRED, )  
 )  
Plaintiff and )  
Appellant, )  
 )  
vs. )  
 )  
MARK E. COOK, BRYANT MADSEN, )  
KENNETH R. STRATE and TOM )  
MOWER, )  
 )  
Defendants and )  
Respondents. )  
 )

Case No. 15688

BRIEF OF RESPONDENTS COOK, MADSEN, AND STRATE

Appeal from a Judgment of the  
District Court of Sanpete County  
Honorable Don V. Tibbs, Judge

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FILED

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### NATURE OF THE CASE

This is an action brought by the former superintendent of the North Sanpete School District against three of the five members of the North Sanpete School Board. Plaintiff alleged in his Complaint that he had been slandered by defendants and sought general damages of nearly \$400,000 and punitive damages of \$1,000,000.

## DISPOSITION IN LOWER COURT

After the filing of Plaintiff's complaint all defendants filed motions to dismiss for failure to state a claim upon which relief could be granted. On February 24, 1978 the Honorable Don V. Tibbs, District Judge of the Sixth Judicial District, granted Defendants' Motions to Dismiss on the grounds that Defendant Mower had a constitutional right to participate in the



election process of assisting the other defendants to become members of the School Board, the publication alleged in Plaintiff's complaint did not constitute a slander, and in any event, Defendants' statements were privileged and Defendants were immune from the action.

#### RELIEF SOUGHT ON APPEAL

Defendants-Respondents seek affirmance of the Order of the District Court dismissing Plaintiff's complaint.

#### STATEMENT OF FACTS

Since this appeal is based upon the dismissal of Plaintiff's complaint this Court must accept the plaintiff's description of facts alleged in the complaint as true but is not required to accept extrinsic facts not plead nor legal conclusions in contradiction to the pleaded facts. Sampson v. Rumsey, 563 P.2d 506 (Kan. Ct. App. 1977).

With this principle of appellate review in mind Plaintiff's complaint states the following facts: Plaintiff had been the Superintendent of Schools of the North Sanpete School District and enjoyed an excellent reputation as an effective school administrator in his community. Defendants conspired to remove Plaintiff from this position and told many people of their desire to do so. Defendants attacked the qualifications of Plaintiff and "in further aid of said scheme and design, the Defendants Cook, Madsen and Strate, with the assistance of the Defen-

dant Mower, sought and obtained election to membership of the School Board of the North Sanpete School District." (R., p. 2).

The first encounter with Plaintiff occurred on May 23, 1977 when the Defendants Cook, Madsen and Strate spoke with Plaintiff in Defendant Strate's car advising him that they wished to have his resignation within 24 hours and that if his resignation was not forthcoming 27 charges against him would be brought out at a public board meeting on May 26, 1977.

Thereafter, each of the defendants told many persons of their claim that 27 charges would be brought out publicly in the next meeting and a public outcry resulted. Defendant Strate in a town meeting told 40-60 "interested" citizens that Defendants had 27 charges against Plaintiff and invited the people to come to the board meeting to see what they were.

Subsequently, Plaintiff and his attorney and numerous interested citizens sought to determine what these charges were but Defendants publicly stated they did not have 27 charges against Plaintiff nor any charges against him except "the charge of inadequate leadership, in that Plaintiff did not have support of the majority of said board." (R., p. 3).

In spite of the public disclaimer of these charges Defendants told many persons privately that they had such charges but would not bring them out because of possible legal consequences.

Plaintiff alleges in his complaint that Defendants mali-

ciously and intentionally made statements and encouraged rumors for the purpose of injuring Plaintiff in his employment and his professional reputation in the community and that these actions were done to diminish Plaintiff's influence and to increase Defendants' own influence over the affairs of the North Sanpete School Board.

Plaintiff stated the following in his complaint:

Even if said statements and rumors are widely disbelieved, some persons will either believe them or have doubts whereby Plaintiff is and will continue to be disadvantaged in his relationship with them. Even among those persons who do not believe said statements and rumors, particularly other professional educators, Plaintiff is and will continue to be disadvantaged and rendered less effective because he has been rendered by said statements and rumors "controversial". (R., p. 4).

Plaintiff further states in his complaint that he cannot allege the 27 charges "are false, because he does not know what they are".

Plaintiff alleges that Defendants acted jointly and severally in their individual capacity but waives any claim against the North Sanpete School District. Finally, Plaintiff alleges damages of \$397,000 plus punitive damages of \$1,000,000.

Plaintiff does not allege any special damages suffered as a result of the alleged slander. He does not allege in his complaint that Defendants Cook, Madsen, and Strate did not have the power as a school board to terminate his employment or to exercise control over his employment. He does not claim Defen-

dants were acting beyond their official capacity at the time of the alleged slander.

Based upon this complaint the trial court found as to Defendants Cook, Madsen, and Strate that an actionable slander had not been stated, that any statements made by the defendants were privileged, and that the school board members were immune. It is from this order that this appeal is taken.

### ARGUMENT

#### POINT I

#### PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM OF ACTIONABLE SLANDER.

#### Plaintiff's Complaint Fails to State a Claim of Slander Per Se or Slander Per Quod.

Defamatory words are either actionable per se or per quod. Those which are injurious upon their face and without extrinsic aid are defamatory per se; but if insinuations, innuendoes, colloquium or explanatory circumstances are necessary either to explain the person intended or the defamatory character, they are only actionable per quod and require pleadings and proof of special damages to the complaining party. Ramsey v. Zeigner, 444 P.2d 968 (N.M. 1968).

Since Plaintiff has made no allegation of special damages resulting from the alleged libelous statements the ruling of the trial court must be upheld unless it is assumed, as a matter of law, that the alleged statements made by Defendants con-

stituted slander per se. Western States Title Insurance Company v. Warnock, 415 P.2d 316 (Utah 1966).

For words to be libelous per se their injurious character must be a fact of such common notoriety as to be established by the common consent of men so that damage from the publication of such words may be presumed. Nichols v. Daily Reporter Co., 30 Utah 74, 83 P. 573 (1902).

It is generally recognized that per se defamation results from words imputing a matter incompatible with a person's business, trade or profession or a criminal offense. Restatement Of the Law, 2d, Torts, Section 570.

Section 573 of the Restatement of Torts states that one who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the conduct of his trade or profession is subject to liability without proof of special harm. This section is clear, however, that any alleged slanderous remarks must be specifically directed to the qualities necessary for the person's profession and not general defamatory remarks. The Comment to this section gives an example of this difference:

A statement that a physician consorts with harlots is not actionable per se, although a charge that he makes improper advances to his patients is actionable; the one statement does not affect his reputation as a physician whereas the other does so affect it. Id. at p. 194.

brought an action against various defendants who, among other things, called him a liar and a man needing psychiatric help. The court in that case held that such charges did not directly attack the plaintiff's professional ability but were general attacks upon the plaintiff himself and that therefore special damages had to be proven.

Section 571 of the Restatement of Torts provides defamation is per se if it charges a crime which is punishable by imprisonment or which is regarded by public opinion as involving moral turpitude.

Plaintiff argues in his brief that the "obvious" inference from the alleged statement of 27 charges is that Plaintiff was to be charged with 27 criminal offenses or at the least that Plaintiff had been deficient in the conduct of his office. (Plaintiff-Appellant's brief, pp. 6-7).

It is precisely this problem of "inference" which makes the alleged statements of Defendants, at best, to be defamation per quod. It is a well-settled rule of law that in evaluating a statement alleged to be libelous per se, the trial court must interpret the statement alone, without the aid of inducements, colloquialisms, innuendoes, or explanatory circumstances. The publication must contain defamatory words specifically directed at the person claiming injury, which words, on their face, and without the aid of intrinsic proof, be unmistakably recognized as injurious. Words which require an innuendo are not libelous

per se. Paris v. Division of State Compensation Fund, 517 P.2d 1353 (Colo. Ct. App. 1973); Ramsey v. Zeigner, 444 P.2d 968 (N.M. 1968).

It is impossible to know from this general language of "27 charges" whether any of the charges would involve an attack upon the professional competency of the plaintiff or would charge him with a crime involving imprisonment or moral turpitude. It is just as easy to assume that the attacks were upon Plaintiff's personal characteristics or criminal charges not involving felonies or a breach of morality. Thus, Plaintiff argues that when an unknown charge is made against a person it must be assumed that a per se defamation has occurred and that no showing of special damages is necessary. Defendants urge that this assertion is incorrect and that in a case such as this involving a general innuendo if any defamation is to be presumed it should be presumed to have been per quod requiring the showing of special damages. To hold otherwise gives the plaintiff the advantage of not having to prove special damages while at the same time having no clearly slanderous statements made against him.

Finally, it is doubtful that the allegations contained in paragraphs 7 and 8 of Plaintiff's complaint give rise to a claim for damages under either per se or per quod defamation. These paragraphs imply that Plaintiff's future employment may somehow be harmed because of the statements made by Defendants. It is clear, however, that words which are only possibly injurious

to some vague new future employment will not give rise to a cause of action under either per se or per quod defamation.

Gibson v. Kincaid, 221 N.E.2d 834 (Ind. App. Ct. 1967).

For these reasons the trial court was correct in holding that the statements alleged to have been made by the defendant school board members did not amount to a publication of an actionable slander or libel.

## POINT II

THE TRIAL COURT WAS CORRECT IN FINDING DEFENDANTS' ACTIONS TO BE PRIVILEGED.

### A. The Defendants have an Absolute Privilege to Make Statements Concerning Plaintiff's Employment.

Plaintiff's complaint alleges several occasions of slander. First, Plaintiff complains that he was told by the defendants that he should resign or charges would result against him within 24 hours. (R., p. 2). It was obvious, however, that the communication by Defendants with Plaintiff himself is not an actionable slander since there was no publication to third parties. Lenz v. Neuman, 290 P.2d 697 (Wash. 1955).

Second, Plaintiff complains that Defendants told interested citizens that the defendants had 27 charges against the superintendent and that these charges would be made at a board meeting.

Next, Plaintiff admits that these charges were never made at the board meeting and, in fact, that Defendants stated they did not have charges against him except that he did not have the support of the majority of the school board. Finally, Plaintiff



alleges that in spite of this public disclaimer of said charges Defendants told other persons privately that while there were actual charges against Plaintiff they would not be brought out because of legal consequences.

Assuming these allegations to be true, Plaintiff has not complained of anything other than instances where three members of the school board made statements concerning Plaintiff's conduct as an employee of the school district.

There can be no doubt that Title 53, Chapter 6 of the Utah Code Annotated empowers the school board to directly control the actions of the superintendent of schools including his appointment and removal. Section 53-6-7 specifically allows the board of education to remove an appointed or elected officer from office for cause by a vote of two-thirds of the board. Section 53-6-11 provides that a superintendent of schools shall be appointed for a two-year period until his successor shall be appointed and has qualified.

Since it is unknown from Plaintiff's complaint the identity of the "interested" persons to whom the defendants allegedly spoke, it can be assumed that these persons were other members of the school board, the school board staff, or parents having children in the school district.

Thus, any statements made concerning Plaintiff's employment or his conduct constituted an essential duty of the school board--in this instance consisting of a majority of the three

defendants.

Section 45-2-3 provides that a privileged publication or broadcast shall not be considered as libelous or slanderous per se if it is made in the proper discharge of an official duty. It is generally held that public officials who act in an official capacity are absolutely privileged to make any statement, whether slanderous or not, provided the statements are made or the actions are taken in the course of the official duties or powers and within the scope of the official's authority. Montgomery v. City of Philadelphia, 140 A.2d 100 (Penn. 1958).

Absolute privilege is in contrast to qualified or conditional privilege which merely rebuts the inference of malice that is imputed in the absence of privilege, and conditions recovery on a showing of falsity or actual malice. 50 Am.Jur.2d, Libel and Slander, Section 195.

The policy reasons behind the doctrine of absolute privilege were well stated by Justice Learned Hand who said:

[A]n official, who is in fact guilty of using his powers to vent his spleen upon others. . .should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.. .[But] it is impossible to know whether the claim is well-founded until the case has been tried, and. . .to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all

but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hardput to it to satisfy a jury of his good faith. . . . In this instance it has been thought in the end better to leave undressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949).

This Court on two occasions has held that an absolute privilege attaches to official proceedings. In Carter v. Jackson, 351 P.2d 957, 10 Utah 2d 284 (1960) an action for slander was undertaken against a city council member by a deputy city marshal who claimed defamation had occurred during a city council meeting. This Court stated:

The statement of the defendant was made in his official capacity in an official proceeding authorized by law and it had a reasonable relationship to the subject of the meeting. The statement, therefore, was absolutely privileged. Id. at 958.

See also Dodge v. Henriod, 444 P.2d 753 (Utah 1968) (Statement made in the course of a judicial proceeding and in discharge of an official duty absolutely privileged).

Plaintiff has not in his complaint alleged that the statements made by Defendants were not made in an official capacity nor in official proceedings. For example, the Spring City town meeting in which Defendant Strate allegedly made the defamatory statements could certainly be said to be an official function

of a member of a school board and that he was speaking on behalf of the school board at that time.

Cases in other jurisdictions clearly hold that members of a state school board or equivalent authority are absolutely privileged in the investigation and handling of employment matters.

In Lombardo v. Stoke, 276 N.Y.S. 97 (Ct. App. N.Y.) a suit was brought by two members of a college against the New York City Board of Higher Education which had released information to the press and to the public concerning the hiring practices of the university. The court in that case stated:

In the case before us, the Board of Higher Education, is undoubtedly an "important agency" of municipal government. . . . We have previously recognized that making the official statements of some government executives absolutely privileged is "essential in the conduct of official business". In our view, the members of the defendant Board of Higher Education are such executives and they should be free to report to the public on appropriate occasions "without fear or reprisal by civil suit for damages". Id. at 101.

Likewise, in Laurence University v. State, 344 N.Y.S.2d 183 N.Y. App. Div. (1973) the court held that the Commissioner of Education who under New York law possessed broad and comprehensive powers to enforce all laws relating to the educational system and to execute all policies determined by the Board of Regents had the right and duty to concern himself with the quality of any faculty under his supervision together with its

higher educational pursuits to the extent that those pursuits added to or detracted from the quality of performance. The court concluded that the commissioner had authority to make qualitative comments to other college presidents, superintendents and other institutions he deemed appropriate.

In Roberts v. Lenfestey, 264 So.2d 449 (Fla. App. 1972) the plaintiff was an applicant for a teaching position at a junior college. During the course of negotiations the defendant, the chief executive officer of the college in charge of hiring, made allegedly derogatory statements against the plaintiff. The court, in upholding the absolute privilege of the administrator, stated that under our democratic system the stewardship of public officials is daily observed by the public. "It is necessary that free and open explanations of their actions be made." Id. at 451.

In McLaughlin v. Tilendis, 253 N.E.2d 85 (Ill. 1969), the superintendent had told the board of education that the plaintiffs' teaching was poor, that they left their rooms unattended, and they in general lacked ability as teachers. In affirming the dismissal of the plaintiffs' complaint, the Illinois Supreme Court noted that the duties of the superintendent included making recommendations concerning teachers and concluded that any such statements were absolutely privileged.

In Smith v. Helbraun, 251 N.Y.S.2d 533 (N.Y. 1964), it was held that the members of the board of education had an absolute

privilege where, in a resolution adopted by the Board, it was stated in effect 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. The court pointed out that the members of the board of education had wide executive and administrative powers in the management and control of the educational affairs and other interests within the responsibility of the board and that in executing their duties the members of the board performed a state function of high importance to the people and to the district and that they were thus clothed with an absolute privilege and that since the resolution complained of concerned the continued service of the superintendent of schools, a subject clearly within the purview of the board of education, the statement of the board by resolution was absolutely privileged.

See also Williams v. School District, 447 S.W.2d 256 (Mo. 1969), where a superintendent's comments to the board about a school teacher were held absolutely privileged; and Brewbaker v. Board of Education, 502 F.2d 973 (Ca. 7). See also Martin v. Kearney, 51 Cal. App.3d 309, 124 Cal. Rptr. 281, where it was held that a parents' letter to principal charging a teacher with lack of judgment, rudeness, etc., was a publication within the meaning of a statute establishing absolute privilege with

regard to communications between interested persons.

Other cases concerning officials not directly involved with education are analogous. In Schlinkert v. Henderson, 49 N.W.2d 180 (Mich. 1951) a letter written by a member of the State Liquor Control Commission recommending rejection of an executive director because he was not fit by temperament, capacity or experience for such a position was absolutely privileged as an official act within the scope of the writer's duty and in the public interest. The appellate court affirmed the lower court's dismissal of the action.

In Montgomery v. City of Philadelphia, 140 A.2d 100 (Penn. 1958) the Supreme Court of Pennsylvania upheld the dismissal of plaintiff's complaint in which it was alleged that a government official had made defamatory statements to the press concerning a contractor's quality of work. The court held that the public official was justified in making statements to the public and the press concerning the quality of the plaintiff's work since it involved an important interest of public concern.

See also Saxon v. Knowles, 185 So.2d 194 (Fla. Ct. App. 1966) (appellate court upholding trial court's dismissal with prejudice of complaint alleging that city manager had maliciously and falsely slandered plaintiff's business reputation by public and newspaper statements); Ascherman v. Natanson, 100 Cal. Rep. 656 Cal. (Ct. App. 1972) (absolute privilege attached to hospital officials engaged in investigation and hearing of mat-



ter delegated to them).

In the present case, an absolute privilege attached to any statements of the defendants and that privilege may not be overcome except by a showing in Plaintiff's complaint that the statements were not made within the scope of the official duties. The fact that the defendants had a statutory right to make such statements is clear when one reads Utah Code Annotated, Section 53-6-20 which allows a member of the board of education to "do all things needful for the maintenance, prosperity and success of the schools and the promotion of education" and Section 53-6-11 which governs the appointment of superintendent of schools. In addition, Section 53-4-14 allows a school board to terminate a contract of employment for cause at any time.

Appellant attempts to distinguish the defendants' official duties by citing the Orderly School Termination Procedure Act and arguing that under such act Plaintiff was entitled to sixty days notice of termination of employment which had not been received. (Appellant's brief, pp. 10-11). He argues that Defendants, acting as a majority of the school board, had no right to terminate Plaintiff at the end of the June period and that any inquiry or charges for his resignation were not "official".

It must be noted that Plaintiff's statement concerning the two-month period and the failure to give notice is not contained in the pleadings and cannot be considered in a motion to dis-



miss. In addition to this fact, it is questionable whether the Orderly School Termination Procedure Act applies to superintendents because of the inconsistencies in the statute itself--for example, the heading of the act is "Teacher's Termination Procedures"--and because superintendents are the direct agent of the school board and have never enjoyed tenure privileges.

As stated by the Wyoming Supreme Court:

The legislature may wish at some future time to bring superintendents within the application of tenure provisions. But, on the other hand, there are reasons why it may not wish to do so. As representatives of the people, the Board of Education is the body charged with the primary responsibility in forming educational policy and supervising school administration. In order for the Board to discharge these responsibilities and be responsive to the wishes of the electorate, it would seem essential that they have the right to choose, in their discretion, the district's chief executive officer. Otherwise, the Board would have duties but would lack the necessary means of fulfilling them. Seyfang v. Board of Trustees, 563 P.2d 1376 (Wyo. 1977).

Plaintiff also argues that the charges and inquiries allegedly made by the defendant school board members could not have been germane to dismissal for cause since "They did not have the two-thirds majority of the board required to do so." (Appellant's brief, p. 11). This too is an unplead assumption which assumes that the other two school board members would never have voted for the plaintiff's dismissal regardless of

the charges made.

In any event, however, Plaintiff in his complaint does not allege that Defendants were acting beyond their official power and duties nor that they had no ability to dismiss Plaintiff as the superintendent. For these reasons, since it must be assumed as a matter of law that defendant school board members were acting in their official capacity they must be given absolute privilege in any statements they allegedly made.

B. Defendants' Statements Were Conditionally Privileged.

Assuming arguendo that the alleged statements made by Defendants were not absolutely privileged as discussed in the preceding section there can be no question they would be entitled to a conditional or qualified privilege.

A conditional privilege protects the speaker from defamation suits except as to those occasions when the speaker makes false defamatory statements which either (a) he in fact does not believe to be true or (b) has no reasonable grounds for believing to be true. Gardner v. Harrifield, 549 P.2d 266 (Ida. 1976).

In addition, the Supreme Court of the United States has held that people such as Plaintiff who are in public positions assume the role of a public figure and that such a person cannot recover for defamatory falsehoods relating to his official conduct unless he proves that the statement was made with actual malice--with knowledge that it was false or with reckless dis-

regard of whether it was false or not. Curtis Publishing Company v. Butts, 388 U.S. 130 (1967).

To defeat that privilege, it is incumbent upon a plaintiff to plead and prove, as to each statement, that the statement was false and that it was written or spoken "with knowledge that it was false or with reckless disregard of whether it was false or not". Beatty v. Ellings, 173 N.W.2d 12 (Minn. 1969).

The court in the Beatty case noted that Plaintiff's allegation that defamatory words were "maliciously" spoken was not a sufficient pleading of constitutional malice. The court noted that mere proof of personal ill will does not meet the constitutional standard of actual malice.

In Utah, Section 76-9-506 presumes that communications between interested persons is not malicious. That section states:

Communication made to a person interested in the communication by one who is also interested, or who stands in a relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.

See also Combes v. Montgomery Ward & Co., 228 P.2d 272 (1935).

The plaintiff in his complaint states, "Defendants and each of them made such statements and caused and encouraged said rumors intentionally, deliberately, maliciously, and recklessly for the purpose of injuring Plaintiff in his employment". (R.,

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p. 4). Aside from this bare assertion there is nothing in the complaint that shows any more than ill will between Defendants and Plaintiff.

The court in Williams v. The School District of Springfield, 447 S.W.2d 256 (Mo. 1969) in upholding the dismissal of the plaintiff's complaint stated:

The allegation that Respondent Graff's exercise of the ministerial duties was done in a "wanton, reckless and malicious" manner are mere conclusions not substantiated by any facts pleaded by appellant and therefore not admitted by the motion to dismiss. Id. at 266.

Similarly, in Dean v. Chapman, 556 P.2d 257 (Okla. 1976) the Supreme Court of Oklahoma, in affirming the lower court's dismissal of Plaintiff's complaint, held that the complaint charging Defendants' conduct was reckless, willful, wanton, malicious, unlawful and grossly negligent was not sufficient to allege malice when there were no evidentiary facts plead in the complaint to support the legal conclusion of maliciousness.

This Court in Anderson v. Granite School District, 413 P.2d 597 (Utah 1966) applied this principle in affirming the lower court's order of dismissal in which claims of malicious actions on the part of Defendants were made. This Court stated:

Except for the allegations in the plaintiff's complaint that the defendants acted maliciously and outside of their authority in interfering with their ditch, there is nothing whatsoever to indicate that such was the fact. Id. at 599.

See also Sampson v. Rumsey, 563 P.2d 506 (Kan. 1977) (A court is not required, on a motion to dismiss, to accept as true conclusory allegations as to the legal effect of facts set out, if these allegations do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself).

With this principle in mind Plaintiff's complaint fails to show any facts upon which malice can be based. Paragraph 2 of the complaint states that Defendants desired to remove Plaintiff from his position as superintendent of the school district because they did not think he possessed sufficient character and qualifications. Any citizen is entitled to attempt to remove any official not qualified for his job and such action cannot, alone, constitute malice. Defendants, however, were more than just citizens; they constituted a majority of the board of education and were thus entitled to remove the superintendent.

Paragraph 3 of the complaint alleges that the defendants stated to Plaintiff that he had interfered with them for the last time and that they wanted his resignation. If such resignation did not come Defendants allegedly said they would publicize 27 charges against him. Once again, however, Defendants were Plaintiff's immediate supervisors and could certainly ask for his resignation without having any vindictive or malicious motives.

Paragraph 4 of the complaint states that Defendants told interested citizens that 27 charges would be brought out publicly in the next board meeting. Again, such a statement to "interested" persons does not show a malicious motive on the part of the defendants but only a desire to allow public information and comment concerning the employment controversy.

Paragraph 5 alleges that the defendants denied having any charges against Plaintiff except his ability to receive the support of the board. Certainly there is no malice in such an allegation.

Paragraph 6 alleges that Defendants told other persons privately that there were charges but they would not be brought out because of the possible legal consequences. Assuming this fact to be true, Defendants' decision not to publicize the charges was not malicious nor can it be presumed that this decision to retract previous statements was made to harm Plaintiff--rather than vindicating him.

Even giving Plaintiff the benefit of all doubts and assuming all of his allegations are correct, there is nothing which shows that the statements concerning the 27 charges were made by the defendants with a motive other than their desire for Plaintiff to resign. Since Plaintiff himself does not know whether or not the charges were true as alleged in paragraph 9 of his complaint, Plaintiff cannot say that they were unfounded nor maliciously formulated.

The ill will obviously present between the parties in this case does not constitute the actual malice necessary to eliminate a conditional privilege. Defendants' decision, presuming that such charges existed, not to pursue the charges was inferentially done upon legal advice and in the discretion of the board. Defendants had no duty to publicize these charges so that Plaintiff could deny them. And while it may have been poor judgment on the part of the board to decline to discuss the charges any further with the "interested persons", the board's decision does not amount to the actual malice necessary in order to eliminate a conditional privilege.

For these reasons, therefore, even if it is assumed that the board did not have an absolute privilege, they are entitled to a conditional privilege since Plaintiff is unable to show sufficient facts to justify his allegation of malice.

### POINT III

THE TRIAL COURT WAS CORRECT IN FINDING  
DEFENDANTS ARE IMMUNE IN AN ACTION FOR  
SLANDER.

In addition to the absolute and conditional privilege available to public officials in defamation cases only, there exists the general immunity provisions applicable to all governmental employees. Section 63-30-2 of the Governmental Immunity Act provides that a school district is a political subdivision and a governmental entity within the meaning of the Act. Section 3 of the Act provides that except as otherwise provided, govern-

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mental entities are immune from suit for any injury which may result from the activities of the entity wherein the entity is engaged in the exercise and discharge of a governmental function. Section 63-30-10 provides that immunity from suit of governmental entities is waived for injury caused by a negligent act or omission of an employee except if the injury "arises out of. . .libel, slander".

After the passage of the Governmental Immunity Act, the legislature adopted the Public Employees Indemnification Act, Title 63, Chapter 48, Utah Code Annotated. That Act provides that suits against governmental employees arising out of acts occurring during the performance of their duties, within the scope of employment or under color of authority, must be defended by the governmental entity. The entity is required to pay any judgment that is rendered against the employee. There is an exception if the acts giving rise to the suit are due to the gross negligence, fraud or malice. The statute further eliminates the right of the entity to common law indemnification from the employee.

The legislature also has made it perfectly clear that a government employee is protected from personal liability while acting in his official duty unless he acted through gross negligence, fraud or malice. The 1978 Amendment to the Governmental Immunity Act evidences this intent. Section 63-30-4, U.C.A.

(Supp. 1978)



While the plaintiff's complaint purports to assert a claim against the defendants in their individual capacity only, such a statement in the complaint does not make it so; in fact, it is obvious that the actions of the defendants were undertaken solely because of their respective positions as members of the board of education. Since they were acting within the scope of their duties as provided by statute, that is, hiring, firing, or forcing the resignation of a superintendent, they are clearly entitled to tender the defense of this action to the school district and the school district will ultimately be required to defend and indemnify. Thus, the school district would be ultimately liable but for that provision of the Immunity Act which retains immunity for actions for libel and slander. Under these circumstances, the individual employees of the governmental entity share any immunity which the entity would otherwise have.

In Wilkinson v. State, 42 Utah 483, 134 P.626 (1913), the plaintiff's land was damaged by the overflowing of a state canal. Plaintiff claimed that even if the state and State Board of Land Commissioners were immune from suit, the individual commissioners could be held liable. In reversing a judgment for the plaintiff, the Supreme Court held:

It is idle to contend that an action is not against the state when it and no one else is held responsible, and its funds are directed to be appropriated in satis-

faction of the judgment without even a right to recoup its loss. To say that under such circumstances the action is merely against state officials or state agencies is to ignore the very essence of things. 42 Utah at 492, 134 P. at 630.

Similarly, in Anderson Investment Corp. v. State, 28 Utah 2d 379, 503 P.2d 144 (1972), suit was brought against the individual members of the State Road Commission. The trial court dismissed the complaint. In affirming, the court stated:

These members in the performance of their duties have the same immunity as does the commission which they constitute. 28 Utah 2d at 381, 503 P.2d at 146.

In Rosendaal Construction and Mining Corp. v. Holman, 28 Utah 2d 396, 503 P.2d 446 (1972), Plaintiff sued the state, the Tax Commission and one of its agents. In affirming the dismissal of the complaint it was specifically held:

As to the plaintiff's claim for damages it must proceed, if at all, pursuant to the provisions of Title 63, Chapter 30, U.C.A. (1953), known as the Governmental Immunity Act. A prerequisite in pursuing a claim against the state or its officers is a compliance with Section 63-30-12 [the notice provision]. . .

It appears that the plaintiff's complaint is fatally defective in that it does not allege compliance with that section. (Emphasis added). 28 Utah 2d at 398-399, 503 P.2d at 448.

The logic of these cases is clear. If a suit, although nominally against an individual, is in reality and substance a suit against a governmental entity, then the procedures, ex-

ceptions and limitations that apply to the governmental entity must apply to the suit against the individual.

The same position has been also adopted by the highest courts of other states, e.g., Schreder v. Veatch, 337 P.2d 814 (Ore. 1959); State Highway Comm. v. Green-Boots Const. Co., 187 P.2d 209 (Okla. 1947).

Thus, the defendants are immune not only because the entity of which they are officers is immune, but also because the plaintiff has failed to comply with or to allege compliance with the appropriate provisions of the Governmental Immunity Act.

There is no allegation in Plaintiff's complaint that the three defendants were not acting in official capacities as members of the North Sanpete School Board. There is also no allegation showing that their actions in confronting Plaintiff were not done in good faith on their honest belief that Plaintiff was not qualified to hold the office. Absent a pleading of facts showing actual, malicious, and evil motive of the conduct of Defendants the Governmental Immunity Act protects these individuals from a suit of this nature.

In Anderson v. Granite School District, 413 P.2d 597 (Utah 1966) the court stated the rule as follows:

It is a little difficult for us to regard in a serious light the plaintiffs' asserted claim for \$80,000 punitive damages against the defendant School Board members individually. In common with

other public officials, they have authority to do whatever is reasonably necessary in carrying out the duties imposed upon them. It would be quite impractical and unfair to require them to act at their own risk. This would not only be disruptive of the proper functioning of public institutions, but undoubtedly would dissuade competent and responsible persons from accepting the responsibilities of public office. Accordingly, it is the settled policy of the law that when a public official acts in good faith, believing what he does to be 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. Id. at 599.

Aside from Plaintiff's conclusionary statement in the complaint that the action of Defendants was done maliciously there is nothing in the factual context of the complaint which shows bad faith on the part of the defendants or their belief they were not acting on behalf of the school board.

Even this Court's recent decision of Cornwall v. Larsen, 571 P.2d 925 (1977) does not affect the immunity in this case since Defendants were exercising discretionary powers--not ministerial--at the time of the alleged slander and, furthermore, were not in violation of any specific statute as was the police officer in Cornwall.

Therefore, the trial court was correct in finding immunity on behalf of the defendants through the Governmental Immunity Act.

## CONCLUSION

Defendants' alleged statements concerning the "27 charges" do not amount to a slander per se. It would be impossible for a listener of such a statement to know what kind of charge was being made by the defendants and only by innuendoes could any derogatory fact concerning Plaintiff's profession be found. At most, the "27 charges" statements are libel per quod in that they are general allegations which may or may not have gone to the professional competence of the plaintiff. As such, therefore, it was necessary for the plaintiff to plead actual damages if he was to sustain his burden during the motion to dismiss.

Even assuming arguendo that a slander was made, the defendants are absolutely privileged from any statements they made when acting in their official capacity regardless of their motive or intentions. This rule has been developed especially to protect government officials from the "catch-all" tort of slander and libel and protects government officials and officers from a myriad of lawsuits which could result from public statements or public actions concerning individuals.

Even assuming, for the sake of argument, that an absolute privilege did not attach to Defendants with regard to slander there can be no dispute that a conditional privilege attached. This privilege could only be lost in the showing of actual malice

as defined by the United States Supreme Court, Plaintiff's com

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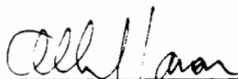
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plaint while making conclusionary statements of malice did not allege sufficient facts to justify such a conclusion.

Finally, regardless of the special area of slander immunity provided to officials in the form of absolute privilege and conditional privilege, Defendants are entitled to the protection of the Governmental Immunity Act applicable to all employees as they acted in their official duties and in good faith. There is no showing in Plaintiff's complaint that Defendants did not act in their capacity as members of the school board with the function of supervising and administering the employees of the district or that their actions and statements were not made in good faith for the benefit of the school system.

For these reasons, the judgment of the trial court dismissing Plaintiff's complaint should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of August, 1978.



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MAILING CERTIFICATE

I hereby certify that I mailed two copies of Respondents' Brief to Gerald E. Nielson, 1795 W. 2300 South, Salt Lake City, Utah 84119, postage prepaid.

DATED this 21 day of August, 1978.

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