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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROYAL NORDELL ALLRED, :  
Plaintiff and Appellant, :  
vs. : Case No. 15688  
MARK E. COOK, BRYANT MADSEN, :  
KENNETH R. STRATE and TOM MOWER, :  
Defendants and Respondents.

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BRIEF OF AMICUS CURIAE

UTAH SCHOOL BOARDS ASSOCIATION

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

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The public official defendants, Cook,  
Madsen and Strate, are absolutely immune  
from this type of prosecution

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MOWER, :  
Defendants. :

---

BRIEF OF AMICUS CURIAE,  
THE UTAH SCHOOL BOARDS ASSOCIATION

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NATURE OF THE CASE

This is an action for damages for alleged defamation of the plaintiff, the former superintendent of North Sanpete School District, by the defendants, three of whom were members of the North Sanpete School District Board of Education. The fourth defendant, Tom Mower, was not a member of the Board at the time of the alleged defamation.

DISPOSITION IN THE LOWER COURT

The complaint was dismissed for failure to state a claim upon which relief may be granted by the Honorable Don V. Tibbs, District Judge of the Sixth Judicial District.

RELIEF SOUGHT ON APPEAL

The amicus curiae, the Utah School Boards Association (hereinafter the USBA), is a representative of the boards of education of the state of Utah and of the members of

the said boards. The USBA, through its attorneys, has reviewed the briefs of the parties and believes that the views of the USBA with respect to the immunity of public officials from suit for damages would be of significance to the court in deciding this appeal.

#### STATEMENT OF FACTS

The USBA adopts the statement of facts given by respondents' brief.

#### THE PUBLIC OFFICIAL DEFENDANTS, COOK, MADSEN, AND STRATE, ARE ABSOLUTELY IMMUNE FROM THIS TYPE OF PROSECUTION

The amicus curiae, USBA, offers the following reasoning to establish that Cook, Madsen, and Strate, members of a board of education, are immune from this suit.

(1) Defendants are public officials. (2) Defendants were acting within the scope of their discretionary powers when they performed the acts of which the plaintiff complains. (3) A public official, acting within the scope of his duties, is immune from suit for defamation. This doctrine is necessary to prevent harrassment of public officers, conserve the time and resources of public officers for application to their duties, and maintain and foster communication to the public about the quality of government.

Black's Law Dictionary defines "public office" as "[t]he right, authority, and duty created and conferred by law, by which for a given period, either fixed by law

or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public. . . . [a]n agency for the state, the duties of which involve in their performance the exercise of some portion of the sovereign power, either great or small." Black's Law Dictionary 1235 (Rev. 4th Ed. 1968). This court remarked in passing in State ex rel. Hammond v. Maxfield, 132 P.2d 660 662 (Utah 1942):

Relators thereupon became members of the State Road Commission for the terms indicated, and as such were officers of the State of Utah.

From the Hammond case we may conclude that one who sits on a board or commission is an officer, notwithstanding that he may share his jurisdiction and duties with other members of the board. The prevailing rule from other jurisdictions is that members of boards of education are public officers. School Dist. No. 69 of Maricopa County v. Altherr, 10 Ariz. App. 333, 458 P.2d 537, 542; 78 C.J.S. Schools and School Districts, §106(a).

As a body, the Board of Education of North Sanpete School District is charged with supervising the operation of the District. A significant part of this function is the exchange of information between members of the board and the public about how the District should be run. There is no statutory mandate that the board



members should speak or otherwise participate at town meetings, but it would stretch the logic of the situation to the breaking point to suggest that participating in such meetings was not within the duties of the members of the board.

The Supreme Court of the United States commented on a similar issue in Barr v. Matteo, 360 U. S. 564 (1959). In response to a Congressional investigation of a certain department which had paid some of its employees in cash for the equivalent of their annual leave, the Acting Director of the Department had issued a press release, announcing that he was suspending two individuals who were involved in the payments. The press release explained why the suspension was ordered. The suspended employees sued the Acting Director for libel, and argued that the press release was not within the duties of the Acting Director because there was no statute or regulation requiring him to issue the release. The court held that the Acting Director's conduct was privileged, reasoning in part as follows:

It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not required by law or by direction of his superiors to speak out cannot be controlling in the case of

an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.

360 U. S. at 575 (emphasis in the original).

Furthermore, it is fundamental to the relationship between school board members and their constituents that a free flow of information be maintained. An election is a check on the powers of a representative, a means in the hands of his constituents by which they can influence his actions. It is vital to the constituents that their elected representatives be free to communicate with them. The Court in Barr v. Matteo, addressing this idea, reasoned further as follows:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. Barr v. Matteo, supra, at 575, citing Tenney v. Brandhove, 341 U. S. 367, 377 [emphasis added].

The policies mentioned by the Supreme Court apply with full force to this case: the defendant members of the

board of education should be held immune from suit because a different rule would subject them to harrassment, not only from those suitors in the unusual situation where there has been a legitimate wrong, but also in those all-too-frequent situations where a disagreement about policy motivates members of the public to seek any means available to influence the action of the public officer. The time and resources of the officer and of the public should not be spent on the defense of harassing litigation.

It is an established doctrine in Utah that public officers are immune from liability in a private suit for their acts in discharging official duties of a discretionary nature "unless guilty of corruption or willful violation of the law". Roe v. Lundstrom, 57 P.2d 1128 1131 (Utah 1936). This doctrine is common law and is based on a different policy than sovereign immunity, which is now embodied in the Utah Governmental Immunity Act in chapter 30, Title 63 of the Utah Code. See, Lister v. Board of Regents of University of Wisconsin System, 72 Wis. 2d 282, 240 N.W. 2d 610, cited in 67 C.J.S. Officers §206 n. 50. Indeed, Roe v. Lundstrom is older than the Utah Governmental Immunity Act. The independence of official immunity from sovereign immunity was further recognized by this court in Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367, 368 (1968), where the court stated:

However, it is equally plain that under no reasonable construction of the [Utah Governmental Immunity Act] could the Warden be deemed a governmental "entity". Thus he is not affected by the retention of immunity and it is necessary to look to the law independent of those statutes to determine the question of his liability.

The court concluded that in Sheffield the prison officers were immune.

More recently, in Cornwall v. Larsen, 571 P.2d 925, (Utah 1977), this court distinguished between public officials and employees in the grant of immunity. The court held the defendant policeman subject to suit under Utah Code Ann. §41-6-14, a statute specifically imposing a duty of care in the circumstances of the case, which involved a claim that the policeman had been negligent in driving an emergency vehicle. The court reasoned that the immunity granted by Sheffield v. Turner was limited to public officers, as opposed to employees. Cornwall v. Larsen, *supra*, 571 P.2d at 927 n. 9, *but see Connell v. Tooele City*, 572 P.2d 697, 699 (Utah 1977) ("Many of our decisions reflect that this Court has recognized the distinction between discretionary and ministerial duties, and immunity has been extended to an official or employee acting in his discretionary capacity . . . ." [emphasis added]) The conclusion therefore appears warranted that the doctrine of official immunity is still in force in Utah and thus should be applied in favor of the school

board defendants.

Perhaps the most important question in this case was addressed by Justice Black, concurring in Barr v. Matteo, supra, as follows, at 360 U. S. 577:

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

Mr. Barr was peculiarly well qualified to inform Congress and the public about the Rent Stabilization Agency. Subjecting him to libel suits for criticizing the way the Agency or its employees perform their duties would certainly act as a restraint upon him. As far as I am concerned, if federal employees are to be subjected to such restraints in reporting their views about how to run the government better, the restraint will have to be imposed expressly by Congress and not by the general libel laws. . . . How far the Congress itself could go . . . consistently with the First Amendment is a question we need not reach. . . . It is enough for me here that the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision.

It is respectfully suggested by amicus curiae that the foregoing arguments are sound reasons to find the

defendants Cook, Madsen, and Strate immune and sustain the judgment below.

Respectfully submitted,

KIRTON, McCONKIE, BOYER & BOYLE

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Bruce Findlay

Attorneys for the Amicus Curiae  
Utah School Boards Association

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Amicus Curiae Utah School Boards Association was hand delivered to Gerald E. Nielson, 1795 West 2300 South, Salt Lake City, Utah, 84119, Attorney for Appellant, and delivered by mail to: Don R. Strong, 197 South Main Street, Springville, Utah, 84663, Attorney for Respondent Tom Mower; Robert C. Fillerup, 120 East 300 North Street, Provo, Utah, 84601, Attorney for Respondent Kenneth Strate; Alan Larson, 700 Continental Bank Building, Salt Lake City, Utah, 84101, Attorney for Respondent Bryant Madsen; and Robert L. Moody, 55 East Center Street, Provo, Utah, 84601, Attorney for Respondent Mark E. Cook, this 7<sup>th</sup> day of December, 1978.

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