

1978

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

Utah Supreme Court

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## Recommended Citation

Reply Brief, *Allred v. Cook*, No. 15688 (Utah Supreme Court, 1978).  
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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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REPLY BRIEF

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Plaintiff replies to the arguments propounded by Defendants in their briefs as follows:

POINT I

DEFENDANTS IN THEIR POINT I HAVE ATTEMPTED TO IMPOSE ON THE COURT AN OLD AND MINORITY DISTINCTION BETWEEN SLANDER PER SE AND SLANDER PER QUOD WHICH IS INCONSISTENT WITH THEIR INITIAL MEMORANDA TO THE TRIAL COURT.

In their Memoranda to the trial court, the Defendants Cook and Madsen each asserted the definitions of slander contained in the Restatement of Torts Sections 570-574 (R21 & 22 and R40). Strate asserted the definitions in 50 Am.Jur.2d (R48 & 49). Plaintiff agrees with those publications and relied on them as well (Plaintiff's Brief P.8).

In their Brief on appeal, however, Defendants have resorted to the case of Ramsey v. Zeigner, 444 P.2d 968 (N.M. 1968) and

Paris v. Division of State Compensation Fund, 517 P.2d 1353 (Colo. Ct. App. 1973) to make the point that if inference or innuendo is required to render the words in question mischievous they are not actionable Per Se but only actionable Per Quod.

Restatement of Torts, Second Edition, acknowledges that some courts have taken the position now asserted by Defendants; characterized it as a minority position; observed its lack of currency and pointed out the reason for the change as follows (comment to §569 at mid-page 183):

Some courts have taken the position that a libelous publication is actionable per se only if its defamatory meaning is apparent on its face and without reference to extrinsic facts; otherwise proof of harm is required. The principal justification urged for this minority position — that if the defendant did not himself know of the extrinsic facts he would be held liable without fault — has now been eliminated by the current constitutional rule that the plaintiff must show fault on the part of the defendant regarding the defamatory character of the communication.

The Ramsey v. Zeigler decision most relied on by Defendants in their Brief (quoted in two places in support of essentially the same argument), while it recites the rule advocated by Defendants, held the language in question to be libelous Per Se apparently against the contention made here that it was not libelous without resort to extrinsic facts. More important however, the New Mexico Court has since overruled that case and adopted the Restatement position in a carefully analyzed decision in Reed v. Melnick, 81 NM 608, 471 P.2d 178 (1970).

The court there observed at both second column P. 180:

Thus we adopt §569 of the Restatement of Torts, together with what we understand to be the intended meaning of the amendment adopted at the 1966 meeting of the American Law Institute.

and further first column P. 181:

Our previous holdings contrary to the above are modified accordingly — We limit the statement of the "per se—per quod" rule in Ramsey v. Zeigler and question its use by - - - etc.

It should be noted that both cases cited by Defendants in their Brief, Zeigler and Paris v. State Compensation Fund, the overruling Reid v. Melnick case and the Restatement of Torts §569, all involve defamation cases and definitions. That the same rule applies to slander is clear from the Restatement §570 and 573 as follows:

§570. Liability Without Proof of Special Harm - Slander

One who publishes matter defamatory to another in such a manner as to make the publication a slander is subject to liability to the other although no special harm results if the publication imputes to the other

- (a) a criminal offense, as stated in §571, or
- (b) a loathsome disease, as stated in §572, or
- (c) matter incompatible with his business, trade, profession, or office, as stated in §573, or
- (d) serious sexual misconduct, as stated in §574.

§573 Slanderous Imputations Affecting Business, Trade, Profession or Office

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, whether honorary or for profit, is subject to liability without proof of special harm.

Note 570's heading is Liability Without Proof of Special Harm -- the essential distinction between Per Se and Per Quod and 573 says "is subject to liability without proof of special harm" -- also the essential distinction between Per Se and Per Quod (see definitions Libelous Per Se and Libelous Per Quod P.1062 Black's Law Dictionary 4th ed.)

## POINT II

DEFENDANTS DID NOT HAVE AN ABSOLUTE PRIVILEGE.  
THEY DID NOT SATISFY THE CONDITIONS OF THEIR  
CONDITIONAL PRIVILEGE.

As to the law on this subject, generally Plaintiff cites the Annotation entitled "Actionability of Statements Imputing Inefficiency or Lack of Qualification To Public School Teacher 40 ALR 3d 490, "(the Annotation includes cases involving principals and superintendents as part of "Public School Teachers". The general rule is cited at P.493 as follows:

Generally, accusations or statements, written or oral, imputing to a school teacher want of professional capacity are actionable per se.

The general rule as to school officials is stated at P.502:

A qualified or conditional privilege for school officials or administrators to make statements imputing inefficiency or lack of qualification to a public school teacher has been recognized in the following cases.

That Annotation introduces the issue of absolute privilege

as follows at P. 506:

§ 5. Absolute Privilege

The few cases where the issue of absolute privilege was raised in regard to statements imputing inefficiency or lack of qualification to a public school teacher have involved statements made by school officials or administrators. Some courts have held that such statements were absolutely privileged.

Clearly the Annotators regard the absolute privilege doctrine as a minority or spurious view.

Defendants' cite the Utah case of Carter v. Jackson, 351 P2d 957, 10 Ut.2d 282 in support of their claim that in this case there was an absolute privilege, but that case relies on a Utah Statute saying that matter is not libelous Per Se when made in the proper discharge of an official duty or in any publication of any statement made in any legislative or judicial proceeding. Plaintiff urges that his Complaint alleges and he believes he can prove that Defendants made the statements in question:

- (a) in the parked car (Complaint paragraph 3, R-2).
- (b) to many persons (Complaint paragraph 4 R-3).
- (c) to an informal meeting of citizens of Spring City (Complaint paragraph 5 R-6).
- (d) and told many persons privately (Complaint paragraph 6 R-3).

Plaintiff concedes that if the statements were made in the proper discharge of Defendants' duties and were made in good faith without malice, they were privileged, but urges that the

statements herein complained of were not made in or as part of Defendants' official duties -- they were in fact made because Defendants could not accomplish what they wanted in the course of their official duties; they were not made in good faith and were made with malice. In short, they were not privileged.

Defendants' complain that Plaintiff did not allege that the statements made by Defendants were not made in an official capacity nor in official proceedings. Plaintiff contends that if Defendants believe those matters to be true, they are matters of defense and should be pleaded and proved by Defendants as part of their defense. Plaintiff's Complaint can not reasonably plead the absence or negative of all possible defenses, especially defenses that Plaintiff believes are not applicable.

Plaintiff concedes that Defendants had a conditional privilege to make statements they believed or had reason to believe were true in the course of their official duties. Had they set out to dismiss Plaintiff in accordance with the law they could have reported to the Board what they considered to be his deficiencies. But they can not tell numerous persons unrelated to their official duties what they knew to be untruths and be said to be either in the course of their duties or in good faith. Fifty Am.Jur.2d on "Libel and Slander - School Matters," §205 p.713 says:

Because of the great public interest involved, it is generally recognized that statements in regard to school matters are qualifiedly privileged if made by persons having a common duty or interest in the premises and acting in good faith.

-- It must be borne in mind that the privilege referred to is only qualified, and affords no protection against an improper or excessive publication, or a publication from malicious motives. Thus, assuming that the parent of a schoolchild is privileged to repeat to a member of the board of education a report that a teacher was afflicted with a contagious disease, it is clear that he can claim no privilege in respect of further repetitions to third persons.

Plaintiff's pleadings concerning Defendants' efforts and desire to remove him from his job in the context of their inability to accomplish that result in a lawful way and their efforts to accomplish that same thing by untruths indicate their malice and further removes them from a conditional privilege.

### POINT III

#### DEFENDANTS WERE NOT IMMUNE.

On this point, Defendants' Brief contends or assumes (especially P. 28)

- (a) Defendants acted without malice.
- (b) Defendants acted in good faith.
- (c) Defendants acted in the course of their official capacities.

Plaintiff concedes if all those matters were true Defendants are not liable. Plaintiff has contended in its original Brief that neither of those matters are true and will rest on that except to make the observation that each of those matters involves a question of fact that Plaintiff contends he is entitled to have a jury decide. Plaintiff further observes that



each of said matters is to some extent a matter of defense which Defendants are required to plead and prove.

#### POINT IV

PLAINTIFF DOES NOT PROPOSE TO INFRINGE TOM MOWER'S CIVIL RIGHTS. PLAINTIFF'S CLAIM AGAINST THE DEFENDANT MOWER IS MADE BY THE SEVERAL TIMES REPEATED PHRASE "DEFENDANTS AND EACH OF THEM" BY WHICH PLAINTIFF INTENDED TO INCLUDE THE DEFENDANT MOWER.

Paragraphs 2, 4, 6 and 7 each contain the phrase "Defendants and each of them." As to each of those paragraphs, Plaintiff claims against the Defendant Mower as well as the other Defendants.

Plaintiff does not contend that the Defendant Mower was or is or in any way should be inhibited from using his political clout for the purpose of removing Plaintiff from his job as superintendant. Plaintiff does claim that the Defendant Mower is not entitled to employ untruths to do so and that to the extent he has he is liable for slander.

#### SUMMARY AND CONCLUSION

As a matter of reply, Defendants' Memoranda do not change the position urged by Plaintiff in its original Brief. Accordingly, Plaintiff reasserts the Summary asserted therein.

RESPECTFULLY SUBMITTED this 8th day of December, 1978.

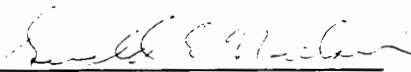


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MAILING CERTIFICATE

I hereby certify that I mailed copies of Plaintiff's Reply Brief to Allan L. Larson, SNOW, CHRISTENSEN & MARTINEAU 700 Continental Bank Building, Salt Lake City, Utah 84101, Robert C. Fillerup, HOWARD, LEWIS & PETERSEN, 120 East 300 North Street, Provo, Utah 84601, Robert L. Moody, CHRISTENSEN, TAYLOR & MOODY, 55 East Center Street Provo, Utah 84601, and Don R. Strong, 197 South Main Street, Springville, Utah 84663, postage prepaid, this 8th day of December, 1978.

  
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Gerald E. Nielson

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