2006

Michael P. O'Connor, Plaintiff/Appellant, vs. Gary W. Burningham, Jeanna Burningham, Sandy Phillips, RUby Ray, Drew Downs, Curt Parke, Mike Powell, Barbara Powell, Steve Davis, Jan Dacis, Todd Kirkpatrick, Sue Chandler, Dallie Haderlie, Wendy Haderlie, Sheldon Worthington, John C. Rogers, Kenny Norris, Robyn Norris, Will Sunderland, Darlene Durrant, Blair Swenson, Paula Swenson, Robert T. Price, Kent Beckstead, Lisa Gray, John Jex, Jessica Johnson, Jeff Burningham and John Does 1-50 : Reply Brief

Joseph Rust; Matthew G. Bagley; Attorneys for Plaintiff/Appellant.

Michael W. Homer, Jesse C. Trentadue; Suitter Axland.

vtichael W. Homer tesse C. Trentadue SUITTERAXLAND I East Broadway, Suite 200 salt Lake City, Utah 84111 telephone: (801) 532-7300 ittorneys for Defendants/Appellees

Harold L. Petersen PETERSON & ASSOCIATES 230 South 500 East, Suite 400 Salt Lake City, Utah 84102 Telephone: (801) 328-5555 Attorney for Appellees Gary andJeanna Burningham

Joseph C. Rust Matthew G. Bagley KESLER & RUST 2000 Beneficial Life Tower Salt Lake City, UT 84111 Telephone: (801) 532-8000 Attorneys for Plaintiff/Appellant

IN THE UTAH SUPREME COURT

MICHAEL P. O'CONNOR, an individual, Plaintiff and Appellant, v. GARY W. BURNINGHAM, JEANNA BURNINGHAM, SANDY PHILLIPS, RUBY RAY, DREW DOWNS, CURT PARKE, JULIE PARKE, MIKE POWELL, BARBARA POWELL, STEVE DAVIS, JAN DAVIS, TODD KIRKPATRICK, SUE CHANDLER, DALLIE HADERLIE, WENDY HADERLIE, SHELDON WORTHINGTON, JOHN C. ROGERS, KENNY NORRIS, ROBYN NORRIS, WILL SUNDERLAND, DARLENE DURRANT, BLAIR SWENSON, PAULA SWENSON, ROBERT T. PRICE, KIM M. PRICE, KENT BECKSTEAD, SUZANNE BECKSTEAD, LISA GRAY, JOHN JEX, JESSICA JOHNSEN, JEFF BURNINGHAM, and JOHN DOES 1-50, Defendants and Appellees.	**APPELLANT REPLY BRIEF** Case No. 20060090 Subject to reassignment to the Court of Appeals

APPEAL FROM THE FOURTH DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH
JUDGE JAMES R. TAYLOR

Michael W. Homer
Jesse C. Trentadue
SUITTER AXLAND
3 East Broadway, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-7300
Attorneys for Defendants/Appellees

Harold L. Petersen
PETERSON & ASSOCIATES
230 South 500 East, Suite 400
Salt Lake City, Utah 84102
Telephone: (801) 328-5555
Attorney for Appellees Gary and Jeanna Burningham

Joseph C. Rust
Matthew G. Bagley
KESLER & RUST
2000 Beneficial Life Tower
Salt Lake City, UT 84111
Telephone: (801) 532-8000
Attorneys for Plaintiff/Appellant

IN THE UTAH SUPREME COURT

MICHAEL P. O'CONNOR, an individual, Plaintiff and Appellant, v. GARY W. BURNINGHAM, JEANNA BURNINGHAM, SANDY PHILLIPS, RUBY RAY, DREW DOWNS, CURT PARKE, JULIE PARKE, MIKE POWELL, BARBARA POWELL, STEVE DAVIS, JAN DAVIS, TODD KIRKPATRICK, SUE CHANDLER, DALLIE HADERLIE, WENDY HADERLIE, SHELDON WORTHINGTON, JOHN C. ROGERS, KENNY NORRIS, ROBYN NORRIS, WILL SUNDERLAND, DARLENE DURRANT, BLAIR SWENSON, PAULA SWENSON, ROBERT T. PRICE, KIM M. PRICE, KENT BECKSTEAD, SUZANNE BECKSTEAD, LISA GRAY, JOHN JEX, JESSICA JOHNSEN, JEFF BURNINGHAM, and JOHN DOES 1-50, Defendants and Appellees.	**APPELLANT REPLY BRIEF** Case No. 20060090 Subject to reassignment to the Court of Appeals

APPEAL FROM THE FOURTH DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH
JUDGE JAMES R. TAYLOR

Michael W. Homer
Jesse C. Trentadue
SUITTER AXLAND
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-7300
Attorneys for Defendants/Appellees

Harold L. Petersen
PETERSON & ASSOCIATES
230 South 500 East, Suite 400
Salt Lake City, Utah 84102
Telephone: (801) 328-5555
Attorney for Appellees Gary and Jeanna Burningham

Joseph C. Rust
Matthew G. Bagley
KESLER & RUST
2000 Beneficial Life Tower
Salt Lake City, UT 84111
Telephone: (801) 532-8000
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

RESPONSE TO APPELLEE'S STATEMENT OF ISSUES

Utah R. App. P. 24(b)(1) provides that an appellee brief may include a statement of issues, consistent with the requirements of Rule 24(a), where "the appellee is dissatisfied with the statement of the appellant[.]" In their Brief filed in this appeal, Appellees have listed eight issues, apparently in reliance on Rule 24(b)(1). Upon examination, however, most of Appellees' identified issues are duplicative, misstated, or are without basis.

Appellees' Issues 2, 3, 6 and 8 merely restate issues already identified in Appellants' statement of issues, and even include the same legal authorities for the respective standards of review. Issues 1, 4 and 5 were not a basis for the summary judgment from which the appeal is being taken and were not ruled upon by the district court. As such, it is questionable whether the issue of privilege is properly before this Court on appeal. The only new issue that Appellees raise legitimately is Issue 7 and even then, it is but a variation of O'Connor's Issue No. 4.

RESPONSE TO APPELLEES' STATEMENT OF FACTS

The Parents present their Statement of Facts in an argumentative narrative similar to what would be argued in front of a jury. Nowhere do they attempt to distinguish whether their claimed facts are undisputed and were before the trial court in proper form.[1] Even the

[1] A comparison of the fact section of the Memorandum in Support of Parent Defendants' Motion for Summary Judgment with the Statement of Facts in the Parents Brief filed with this Court shows no cogent relationship. Whereas pursuant to Utah Rules of Civil Procedure 7, the fact section of the Memorandum before the trial court was stated in numbered sentences, the Parents' Brief before this Court is unnumbered and in narrative form. Nor is there any effort to tie by reference the facts in the Brief to the facts in the Parents' Memorandum in Support of their Motion.

Parents' headings are phrased in argumentative form. Such a presentation of the Parents' version of the facts is inappropriate for an appeal of a case decided on summary judgment, where the facts and any reasonable inferences should be construed in Appellant O'Connor's favor. In any case, O'Connor's Memorandum submitted to the trial court refutes the bulk of the Parents' Statement of Facts. Therefore, except to sense the Parents' view of the case, this Court can ignore the Parents' Statement of Facts for purposes of determining whether summary judgment by the district court was appropriate.

Nevertheless, to show how the Parents' have generally skewed the facts, two examples are in order. First, one of the repeated accusations made by the Parents at issue in this litigation is that O'Connor was verbally abusive toward the girls on the basketball team. To attempt to establish that their claim is true, the Parents selectively quote testimony to give the impression that O'Connor regularly "screamed" at the girls on his team. (Appellees' Brief at pp. 5-7.) However, they have "cherry-picked" the statements and have omitted the proper contextual testimony. The following examples put the statements in context:

Q. Did you scream and rave at the girls?

A. I yelled as, like I said earlier last time, like any other coach.

Q. So what's your objection to that, that they exempt Michelle out?

A. Well, they – each girl was given constructive criticism, direction all the same, everyone. Our general practice as a staff was every time we corrected someone, there was praise with it. And that's what we – our whole staff did that.

* * *

Q. So you don't have a problem with the word scream then?

A. Well, in the context of scream and rave, I have a problem with that. Because to me, that seems to be overboard.

Q. What's your definition of scream?

A. Right in their face.

Q. You've never done that?

A. From the top of their lungs. No.

Q. What's your definition of rave?

A. I guess to me, out of control.

Q. And you've never been out of control with the team?

A. No.

Q. And you don't believe that anyone watching you could have got that opinion from your behavior; is that right?

A. I don't. I didn't have anyone approach me or come talk to me.

(R. at 816.)

Q. Oh, no parent has ever approached you after seeing you scream and yell at their kids during a game –

A. No.

Q. During practice?

A. Maybe what their daughter told them, yes.

Q. So, you're telling us that it's – we have to distinguish between what their daughter told them and what they personally observed on the court?

A. Correct.

Q. Okay. So you deny that any parent ever went to you after seeing you scream and yell at their daughters during a game and expressed concern that you would treat them that way?

A. That's correct.

(R. at 813-814.)

Q. Had you screamed at her?

A. Have I yelled at her? As a coach yells at players, yeah.

Q. And is it possible that someone might view that as abusive on your part?

MR. RUST: Objection, speculative and lack of foundation.

A. I don't think a coach yelling at a player is abusive.

Q. Can it be abusive?

A. If they cross the line. And I didn't cross the line.

(R. at 812.)

Likewise, the Parents have selected one letter which they claim is representative of all of the letters at issue in this case. That letter signed by Ruby Ray, a grandmother of one of the girls on the team, is probably the mildest of all the letters in terms of its tone and content of accusation. Even though O'Connor has identified many other letters alleging discrimination and favoritism, verbal, emotional and psychological abuse of minor girls, intimidating, threatening and humiliating behavior, team recruiting violations or improprieties, outrageous public behavior, unethical or illegal behavior, financial

improprieties, professional incompetence, inappropriate relationship with or unseemly domination by Michelle Harrison's family, or future reprisals against particular girls on the team due to the complaints registered by those girls' parents (see, e.g., R. at 1195-1198), the Parents do not even address those letters.

SUMMARY OF THE ARGUMENT

O'Connor takes exception to Parents' lengthy narration of facts. The narrative is not in proper form and in any case the alleged facts are disputed. Despite a few cases from other jurisdictions which take a contrary position, the better reasoned position, logically and for policy reasons, is that high school teachers, including coaches, should not be considered public officials for the purposes of defamation claims, with the possible exception where, in addition to their teaching and coaching responsibilities, they have significant administrative responsibilities. In any case, O'Connor did not become a public official for the purpose of defamation claims by reason of his coaching the girls high school basketball team. The Parents' comments, taken individually or more importantly in the context of being submitted collectively, are capable of sustaining a defamatory meaning. The standards and definitions of malice vary, depending on the status of the person who is the subject of the defamation. In any case, O'Connor has established colorable evidence of malice under any and all standards. The Parents do not enjoy either an absolute or a qualified privilege. The Memorandum of Costs issue is properly before this Court and the Parents failed to timely file

their Memorandum of Costs. The case should be remanded to the trial court for a trial on the merits.

ARGUMENT

This is not a case requiring marshaling of evidence. While reviewing the record in front of it, the district court did not engage in a factfinding exercise, but only attempted to determine whether the material submitted would sustain conclusions of law about: (1) the presence of "public official" status, and (2) the presence or absence of malice. For the purpose of an appeal of summary judgment, the evidence, facts and inferences must be reviewed in a light most favorable to O'Connor as the non-movant. Surety Underwriters v. E&C Trucking, Inc., 2000 UT 71, ¶ 15, 10 P.3d 338 (facts and inferences viewed in favor of non-moving party); Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991) (facts and inferences viewed in favor of losing party). In the context of a defamation case, the appellant court accepts as true the Plaintiff's contention that the defamatory statements were false, and looks to whether the statements were capable of a defamatory meaning and whether any privileges apply. West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994).

I. THE STATEMENTS AT ISSUE ARE CAPABLE OF SUSTAINING A DEFAMATORY MEANING AS A MATTER OF LAW.

The trial court did not make any finding or determination whether the statements at issue were capable of sustaining a defamatory meaning. It solely found that O'Connor was a "public official" and as such, that the statements were not made with the requisite degree of malice. However, a determination of whether a statement can sustain a defamatory

meaning is necessarily preliminary to issues of public official status and malice. By moving on to the public official and malice issues, and deciding the case on those bases, the district court tacitly acknowledged that the statements on their face were capable of sustaining a defamatory meaning.

In order to determine whether a given statement is capable of sustaining a defamatory meaning, the statement or publication containing the statement must be viewed in its particular context. A court "cannot determine whether a statement is capable of sustaining a defamatory meaning by viewing individual words in isolation; rather, it must carefully examine the context in which the statement was made, giving the words their most common and accepted meaning." West v. Thomson Newspapers, 872 P.2d 999, 1008-09 (Utah 1994) (in reversing the Court of Appeals, noting that Court of Appeals erred in using a "lexicographical approach" that "ignores context"). See also Mast v. Overson, 971 P.2d 928, 932 (Utah Ct. App. 1998) ("[i]n deciding whether a statement is capable of sustaining a defamatory meaning, the guiding principle is the statement's tendency to injure in the eyes of its audience when viewed in the context in which it was made") (citation and internal quotation marks omitted). "The relevant audience is neither an individual with peculiar views, nor a majority of society at large, but rather a 'substantial and respectable minority.'" Id., citing Restatement (Second) of Torts § 559 cmt. e (1972).

The relevant context in this case is the total and cumulative effect of the numerous letters and statements published by the Parents in conjunction with each other. A defamation

case typically involves a single or a few statements by one individual which become the subject matter of the subsequent defamation claim. Under those circumstances, it is easier to focus on the lexicographical import of the statement. In this case, most (if not all) of the letters and uttered statements in and of themselves contain defamatory material. In addition to the defamatory nature of each letter and statement, these were combined by the Parents for presentation to the public, thus lending further defamatory meaning by their sheer volume and cumulative effect. In short, the defamation consists not only of each of the individual defamatory statements at issue but also of the combining of the same as coordinated between the Parents. In the mind of Donna Barnes, a member of the Alpine District Board and the person who received the package of the Parents' letters, the multitude of charges made her believe the charges were true and O'Connor should not even be teaching school. (R. at 1150, 1237, 1233-1234.)

The district court had before it all of the letters written by the Parents as well as the minutes of meetings where oral statements were made. If the district court had determined that the letters and statements could not sustain a defamatory meaning, it could easily have disposed of this case on that basis, before ever reaching the issues of "public official" status or the presence or absence of requisite malice. As noted above, the trial court tacitly acknowledged that the oral statements and the letters could sustain a defamatory meaning. All of those materials are part of the record on review, and are before this Court.

As noted above, in his Statement of Additional Material Facts submitted to the trial court, O'Connor identified the different types of defamatory publications and specific letters representative of those different areas of defamatory content. (R. at 1194-1195, 1198.) In addition, in his deposition, O'Connor was asked concerning every letter and statements. (R. at 1196.) The Ruby Ray letter was placed in tandem with a multitude of coordinated defamatory statements and even repeated language from some of the other letters verbatim. In that sense, and in viewing the letters in context, the Ruby Ray letter is a further affirmation of all the other coordinated letters that were more or less simultaneously published for the purpose of removing O'Connor from his coaching position.

To attempt to break out specific phrases within each individual letter and to assign defamatory meaning to each parsed phrase in isolation, is to ignore context and the cumulative impact the letters and comments had as an whole. To do so would be to wrongly focus on a type of "lexicographical approach" that this Court has expressly rejected. West, 872 P.2d at 1009.

It is important to note that the law does not require a phrase-by-phrase parsing or dissecting approach to defamatory publications. Even the Parents' cited authority (Doggett v. Regents of Univ. of California, 2003 WL 21666102, an unreported California case) requires only that defamatory publications be identified with some specificity and not as undifferentiated generalities. The Doggett case was decided on the basis that the plaintiff in that case failed "to identify any defamatory statement attributable to any individual

defendant" or that the statements were even defamatory. Id at ¶ 2. In this case, the Court has before it the actual statements and their authors as well as a breakout by types of statements made. This is not a "dumping" of O'Connor's burden of argument and research onto the Court, as erroneously alleged by the Parents. The fact that the defamatory material is so voluminous is because the Parents purposefully produced it in significant volume.

In short, the materials submitted to the Court as part of the Record identified every statement by author. There is nothing vague or uncertain about what each Parent is being charged with publishing nor are such statements "shrouded in mystery": they are part of the Record. Moreover, as noted above, O'Connor was questioned for 135 pages of his deposition concerning each letter individually and he identified the untruths and defamatory comments contained in each.

It is also important to note that "opinion" is not at issue here. "Under Utah law, a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." West, 872 P.2d at 1008. By any definition, accusations of financial impropriety, abuse of young girls, discrimination, retaliation, recruiting and the like are statements tending to impeach an individual's honesty, integrity and reputation. Moreover, the accusations were not given as opinion but as fact. A few examples will suffice: "Over the past two years I have observed the abusive treatment meted out to the girls [on the] team." (R. at p. 771.) "I have never seen a coach attack kids like this." (Record at p. 771.) "This pattern of psychological abuse

is degrading..." (Record at p. 770.) As a further example, Appellee Sue Chandler, a social worker, stated that in her professional opinion O'Connor was abusive of the girls. (See, e.g., R. at 715, 763.) Furthermore, the fact that the Parents went to the trouble to publish such accusations in a public and coordinated fashion indicates that they intended such accusations to be understood as factual by their recipients, and not merely as an expression of opinion. The letters on their face state the accusations about O'Connor as facts and actions that had actually occurred. If one were to accept the Parents' proposed standard, any statement is merely an opinion, and thus no statement is defamatory.

It must also be remembered that whether the statements were expressions of "verifiable fact" is a matter for a factfinder, not for summary judgment by the court and all facts and inferences in this case must be construed in O'Connor's and not the Parents' favor. For the purposes of summary judgment, this Court has already stated the standard: where it is undisputed that the defendants published the statements at issue and that such statements were concerning the plaintiff, then the court must accept as true the plaintiff's "allegations that the statements are false and their publication resulted in damage." West, 872 P.2d at 1008. The court looks only to whether the statements, assuming for purposes of summary judgment that they are false, are capable of sustaining a defamatory meaning. Id.

II. O'CONNOR IS NOT A PUBLIC OFFICIAL.

Utah law requires a public official to be someone who invites public scrutiny. Russell v. Thompson Newspapers, Inc., 842 P.2d.896, 903 (Utah 1992). The Parents state without

citation to the Record that "the undisputed evidence shows that O'Connor occupied a position that invited public scrutiny[.]" (Appellees' Brief at p. 26.) Nowhere do the Parents identify the nature of such "undisputed evidence." To the contrary, the Record supports the conclusion that the scrutiny attaching to O'Connor's coaching position came not from the general public but rather from the Parents and perhaps other members of their families.

The United States Supreme Court, while generally defining the parameters of a "public official," has "expressly refrained from determining how comprehensive the term 'public official' should be. Van Dyke v. KUTV, 663 P.2d 52, 54 (Utah 1983). The U.S. Supreme Court has only been willing to enunciate general guidelines. Id. As such, the determination of how comprehensively the concept of "public official" should be defined has been left to the individual States. The fact that the several States have come to diametrically different outcomes on this issue while relying on the same U.S. Supreme Court jurisprudence and general guidelines is due to the fact that the different jurisdictions have given different weight to the competing interests of freedom of expression and integrity of one's reputation. See Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 97 Cal.App.3d 915, 924 (Cal. Ct. App. 1979).

In this case, varying policy arguments from different jurisdictions have been quoted in support of the opposing positions as to whether or not teachers and high school staff should be considered "public officials" for the purpose of defamation claims. As previously outlined in O'Connor's Brief at pp. 28-29, the better reasoned position is the one articulated

by a good number of bellwether jurisdictions which have declined to extend public official status to teachers and school staff. Most of those jurisdictions base their policy and rulings in significant part on the fact that teachers have little to no sway or influence on administration or policymaking. Ironically, the Parents would extend "public official" status to a high school teacher/coach whose decisionmaking ability over even the composition of his team was challenged by them. (See, e.g., R. at 739, 1251-1252.) The Parents are in effect arguing for a standard where any public employee is a public official, a drastic and far-reaching standard already rejected by this Court. See Cox v. Hatch, 761 P.2d 556, 560 (Utah 1988).[2]

The Parents tried to elevate the status of O'Connor by noting that he was the head coach of the girl's basketball team. In support they cite the Texas case of Johnson v. Southwestern Newspapers Corp., 855 S.W. 2d 182 (Tex Ct. App. 1993). In that case Plaintiff was the athletic director for the school as well as the head football coach. Aside from the fact that Johnson is not a Utah case, it is submitted that a person who has the responsibility for all athletics for the school has a far different and far more reaching responsibility than the coach of the high school girl's basketball team. Indeed, the Johnson case was quick to note that a school teacher is not a public official. Contrary to Appellee's

---

[2] The Parents' citation of In re K.B., 326 P.2d 395, 396 (Utah 1958) for the proposition that "the welfare, training and education of children are of such vital importance as to be a matter of public concern" (Appellees' Brief at p. 27) is taken out of context. At issue in that case was the State's power to deprive a biological parent of custody rights of a child on the basis of parental neglect. As such, the "public concern" comment related to society's interest in a parent's duty toward his or her own children rather than a public school teacher's duty.

Brief at pp. 29-31, it is further submitted that there is no evidence O'Connor had direct responsibility for the budget of the girl's basketball program or "authority over a substantial budget." Nor is there any evidence that the modest fund raising by the team amounted to "thousands of dollars." There is no citation whatsoever to the Record for such claims. In any case, the kinds of things which are being ascribed to O'Connor are the same things which would apply, for example, to a high school debate coach or a drama teacher. They have the right to determine who will be on the team or in the play They oversee team travel and the acquisition of costumes and scenery. They will often have assistants. The list goes on through the science club, the French club, the track team, and the softball team. It is submitted that the public at large takes far more interest in high school football games or in boy's basketball games than they do in the girl's basketball games. Indeed, a high school play will probably draw many more attendees from the community than a high school girl's basketball game. If the Parents' theory is correct, then anyone who is involved in extra-curricular activities at school in any supervisory capacity whatsoever is a public official.

It was the Parents' purpose to do what they could to curtail the limelight on Michelle Harrison. Some of their most repeated accusations are that O'Connor gave undue preference to Michelle Harrison and treated her too much like a star when he should have been treating all the girls equally. The Parents now turn that rallying cry on its head by claiming that because O'Connor had an exceptional player, he somehow gained public official status because of her stature. Aside from the fact that this is more of a "public person" than a

"public official" argument, it does not follow from any of the case law that having a star on a basketball team is equal to the life and death power vested in a policeman. Ironically, Gary Burningham and Sue Chandler had far more authority over the team than did O'Connor by reason of their getting an agreement from the principal that neither of their daughters would be cut from the team and would see substantial playing time. (R. at 739, 1251.) That may have come by reason of their influence in the community of Lehi or simply because of their influence over the principal, but obviously it was more substantial than O'Connor's influence.

III. THERE IS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF MALICE.

At pages 29-37 of his Appellant Brief, O'Connor has already addressed at great length the issue of malice and its different forms and standards. There is no need to repeat that analysis. However, as noted previously, the question of "actual malice" is a constitutional fact which this Court will review by way of an independent examination of the Record, giving no deference to the district court's findings or conclusions. Jensen v. Sawyers, 2005 UT 81, ¶¶ 91, 94, 103 P.3d 325. "Statements of actual malice are those made with knowledge that they were false or made with reckless disregard of whether they were false or not." Id. at ¶ 119. As also previously noted, the standard for "reckless disregard" is that the publisher "entertained serious doubts as to the truth of his publication" and evidence supporting a conclusion that the publisher "had a high degree or awareness of probable falsity." (Appellent's Brief, p. 30; Appellee's Brief, p. 34.)

The Parents argue that the "reckless disregard" standard is inapplicable to them because of their studied ignorance or refusal to "probe" into the truth of their allegations. The Parents then selectively cite portions of the Record to give the impression that the principal and school administration had not in fact come to any conclusions about the allegations regarding O'Connor. To the contrary, the Parents exhibited a high degree or awareness of the probable falsity of their claims by their continued repeating the same claims despite investigation into them by school administration and the administration conclusion that there were not grounds for the allegations of either financial improprieties or abuse of team members. (Appellant's Brief, pp. 33-37.) This scienter or "reckless disregard" is further confirmed by the fact that the July allegations, which were the same as raised in March and April, were not taken back to the high school administration, as the Parents had been instructed, but rather were taken to a new and fully public forum, namely the School Board open meeting, at a time when the basketball season was long over and the school year had concluded. In other words, the accusations were not based on any new conduct that had occurred since the administration's investigation, were entirely gratuitous, and were made in bad faith. Actual malice, either in the form of knowledge of falsity or reckless disregard of truth is readily apparent or inferable from such actions. The coordinated letter-writing campaign utilizing similar themes and language is also indicative of such scienter. As a side note, the Parents' argument further reveals the need, assuming that the actual malice standard is to be applied in this case, for a factual presentation to a fact finder.

The Parents cite the case of Sewell v. Brockbank, 581 P.2d 267 (Ariz. Ct. App. 1978), for the proposition that parents taking their complaints about a teacher to another administrative level despite that teacher's denials of the complaint is not sufficient evidence of "actual malice." It should be noted that Sewell does not set out a general rule governing parent-teacher interactions. At best, whether the evidence can sustain sufficient evidence of malice to take the question to a jury is a case-by-case inquiry. As such, the facts of Sewell, which is not binding authority in any event, are distinguishable from the facts of this case. In Sewell, parents of students of a particular chemistry teacher composed a list of grievances dealing with the teacher's teaching style and methodology and presented it to the principal. The teacher denied the charges in writing, and the principal expressed his confidence in the teacher. The parents then took their complaint to the school district superintendent. Upon receiving no response from him, the parents finally took their complaint to a school board meeting. In this case, O'Connor teaching was not at issue. Further, the Parents received a letter on April 15, 2004 explaining the principal's position. No effort was made to take the matter to the superintendent. Rather, some three months later letters were submitted to a member of the School Board in her private capacity. Thereafter, and without being on the Board's agenda and in a public as opposed to a confidential setting, the Parents made further claims.

IV. THERE IS NO ABSOLUTE DEFAMATION PRIVILEGE AVAILABLE TO THE PARENTS.

The Parents have no absolute defamation privilege. The cases cited by the Parents, most of which are from other jurisdiction are inapposite to this case. The Parents either individually or collectively, are not public officials. Their statements were not made in either a judicial or legislative proceeding. While the School Board meeting may arguably be characterized as an "official proceeding authorized by law," the Parents were not called on or scheduled as witnesses or to testify in any capacity. Nor did the School Board take any action as a result of their comments or letters. (R. at 1151.) As such, Appellants do not qualify for an absolute immunity, and could only argue at best that they come under a qualified immunity. However, as noted in O'Connor's initial brief at pp. 37-39, the offending statements do not even qualify for a qualified immunity.

As noted in O'Conor's initial brief, Mortensen v. Life Ins. Corp., 315 P.2d 283 (Utah 1957) is inapposite to the Parents' argument inasmuch as the Alpine School Board did not take any administrative action based on the Parents' defamatory comments. O'Connor was given no notice of the meeting, the Parents' accusations against him were not an agenda item, the Parents were not invited to the meeting as witnesses, nor were their comments invited or solicited beforehand. In addition, O'Connor was not a subject of any proceedings or actions taken by the Board that night. Rather, the Parents made a series of coordinated impromptu statements during the public comment portion of the meeting. While the Board listened to the Parents' comments, it declined to take any jurisdiction over or any action in regard to the

matter, and referred the matter to the superintendent, who in turn referred it back to the high school administration. The Board did not apply any law to facts, or otherwise exercise any discretion in relation to either O'Connor or the Parents' comments. Mortensen, 315 P.2d at 284. There was no quasi-judicial proceeding at issue.

Utah Code Ann. § 53A-3-421(1)(a) (which is being raised and cited for the first time on appeal) is clearly inapplicable. It relates to "civil actions" brought by or on behalf of a student. The statute requires the aggrieved students to bring a written complaint to the local board of education prior to bringing a civil action. Nowhere does it provide immunity for defamation. The Parents improperly try to shoehorn their letter-writing campaign as somehow being done in compliance with this statute and therefore bringing such communications within the ambit of an administrative proceeding. While creative in their approach, the Parents' assertion is clearly at odds with the facts and the Record, and is clearly an after-the-fact argument. The Parents nowhere suggest the possibility of a lawsuit or any disciplinary action nor do they ask the Board for a hearing. The letters are simply gratuitous and were never formally submitted to the School Board. Further, the Parents never filed a complaint within 60 days of filing their individual letters, as required by Utah Code Ann. § 53A-3-421(1)(a). The facts belie any argument that the Parents were acting in anticipation of any remedy provided by Utah Code Ann. § 53A-3-421(a).

V. THERE IS NO QUALIFIED PRIVILEGE AVAILABLE TO THE PARENTS.

O'Connor have previously surveyed Utah case law applying the "common interest" privilege and shown how it is inapplicable to the facts of this case (Appellant Brief, pp. 39-40). In response, the Parents do not address that case law, but rather look to other jurisdictions' purported application of the doctrine. Aside from their lack of precedential value, those cases are not applicable to the present situation. For example, Daubenmire v. Sommers, 805 N.E.2d 571 (Ohio Ct. App.2004) was examined and distinguished in O'Connor's initial brief and Sewell v. Brockbank is explained above. The case of Gatto v. St. Richard School, Inc. 774 N.E. 914 (Ind. App. 2002), was decided on the basis that there was no defamation. In dictum, the court also held that there was a common interest privilege in the private school notifying the parents that plaintiff had been terminated as a teacher. Id. at 926. Under those circumstances the parents probably had a bona fide interest in knowing that fact. In short, the cases cited by the Parents stand for the proposition that in certain formal school investigations and actions, there are privileges of communication. The instant case is not such a situation for the many reasons identified herein and in O'Connor's initial brief. Moreover, to the extent there was any possible privilege, the Parents have abused the same by their extensive publication of their defamatory material to the public at large.

VI. THE PARENTS' MEMORANDUM OF COSTS WAS UNTIMELY.

At the outset, the Parents have challenged this Court's jurisdiction over the issue of costs. Prior to the recent amendment of Rule 4 of the Utah Rules of Appellate Procedure,

this Court issued several opinions which dealt with the issue of post-judgment rulings on attorneys fees. In the recent case of ProMax Dev. Corp. v. Raile, 2000 UT 4, 998 P.2d 254, this Court clarified the fact that post-judgment rulings on attorneys fees were significant parts of the case and in many instances could make the difference to whether a party chose to appeal or not. On the other hand, rulings on costs are to be considered to be not a material matter and thus "such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered, and does not enlarge the time for appeal. . ." Id. at ¶ 11. In this case both the noticed appeal and the docketing statement had been filed before the trial court even ruled on the issue of costs. It is not in the interest of judicial economy or the proper flow of matters for an amended notice of appeal to be filed to simply add the issue of costs, particularly when, as noted, costs are considered an incidental matter to the case. Moreover, the docketing statement raised this matter specifically by the language: "Appellees also filed a Memorandum of Costs to which Appellant has made objection." (Docketing Statement ¶ 4.)

As to the merits of O'Connor's objection to the costs, the relevant sequence of filings was as follows. On November 30, 2005, the district court issued a Memorandum Decision granting summary judgment in favor of the Parents. On January 10, 2006, the Parents filed a Motion for Attorneys Fees. The Parents did not move for costs at the same time, unlike most prevailing parties that typically make both requests at the same time. The Order of Summary Judgment, prepared and submitted by O'Connor after the Parents failed to do so,

was entered on January 11, 2006. (R. at 1366.) The Order was a final order on all issues raised in litigation, and was not a partial adjudication as to less than all of the issues or the parties that would have required Rule 54(b) certification. O'Connor filed his appeal on January 17, 2006. The Parents submitted their Memorandum of Costs on January 19, 2006. That Memorandum of Costs was contested and the trial court's ruling came on February 14, 2006. (R. at 1560.)

All parties concede that the deadline for filing the Memorandum of Costs was January 19, 2006. It is also undisputed that the document was not actually filed with the district court until January 20, 2006. Appellees argue that for purposes of "filing," the date of mailing rather than the actual date of filing should be considered. Appellees have cited no persuasive legal authority for this proposition, but have urged this Court to adopt a good-faith based on a dissenting opinion. O'Connor submits that the law is clear enough on this issue without this Court having to construct a new mailing rule. First, the law is clear that the five-day limitation on filing a memorandum of costs is strictly construed, Highland Constr. Co. v. Union Pac. R.R., 683 P.2d 1042, 1052 (Utah 1982), and that memoranda failing to meet this timing requirement are excluded, Valcarce v. Fitzgerald, 961 P.2d 305, 318 (Utah 1998). Second, the Rule on its face is clear and unambiguous in its requirement that the applicant "file with the court" the memorandum of costs within five days of judgment. In constructing a rule or statute, an appellate court looks first to the plain language of the rule or statute, and only looks further in the case of an ambiguity. MacFarlane v. Utah State Tax Comm'n, 2006

UT 18, ¶ 12, 134 P.3d 1116. "[S]tatutory words are read literally, unless such a reading is unreasonably confused or inoperable." State v. Bluff, 2002 UT 66, ¶ 34, 52 P.3d 1210. "Unless so specified, the words of a statute are given their ordinary meanings and not their possible legal or technical meanings." State ex rel. A.B., 936 P.2d 1091, 1101 (Utah Ct. App. 1997).

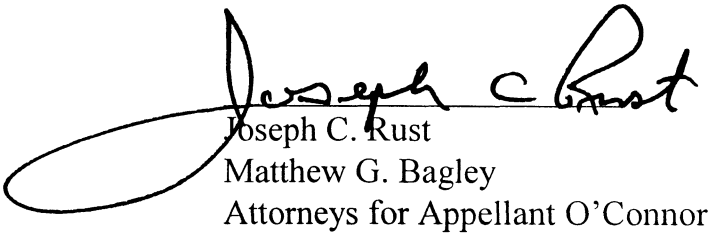
Here, "filing" clearly means filing with the Court, and not the date of mailing. There is nothing clear or ambiguous about the meaning of filing. The Court should reject the Parents' suggestion that "filing" be given an extra legal or technical meaning of "mailing" that is not obvious or ascertainable from the face of the Rule itself. This Court has stated that it "will not infer substantive provisions into a statute that are not expressly contained therein." Bradley v. Payson City Corp., 2003 UT 16, ¶ 35, 70 P.3d 47. Because the Parents' Memorandum of Costs was not filed with the district court until six days after the entry of judgment, it should have been excluded from judgment, and the district court erred in refusing to do so.

CONCLUSION

For all the foregoing reasons, together with those previously adduced in O'Connor's initial Brief, this Court should reverse and vacate the district court's summary judgment, and instruct the district court to proceed with the case to a trial of this matter.

DATED this 3rd day of July, 2006.

KESLER & RUST



Joseph C. Rust
Matthew G. Bagley
Attorneys for Appellant O'Connor

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **APPELLANT REPLY BRIEF**, in Case No. 20060090, postage prepaid, this 3rd day of July, 2006 to:

___ FEDERAL EXPRESS
_X_ U.S. MAIL
___ HAND DELIVERY
___ TELEFAX TRANSMISSION

Michael W. Homer
Jesse C. Trentadue
SUITTER AXLAND
Judge Building
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Attorneys for Parent Appellees

Harold L. Petersen
PETERSON & ASSOCIATES
230 South 500 East, Suite 400
Salt Lake City, Utah 84102
Telephone: (801) 328-5555
Attorney for Appellees Gary and Jeanna Burningham