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2006

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, Robert T. Price, Kim M. Price, Kent Beckstead, Suzanne Beckstead, Lisa Gray, John Jex, Jessica Jensen, Jeff Burningham and John Does 1-50, Defendants and Appellees:

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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 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

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JIAH APPELLATE COURTS
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Jeanna Burningham

Sandy Phillips

Ruby Ray

Drew Downs

Curt Parke

Julie Parke

Mike Powell

Barbara Powell

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Todd Kirkpatrick

Sue Chandler

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). This appeal is subject to reassignment to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4).

STATEMENT OF THE ISSUES

1. Issue: Did the district court err in determining that a high school girl's basketball coach is a public official required to show constitutional "actual malice" on the part of the Defendant Parents for the purposes of a defamation claim?

Standard of Appellate Review: Correctness. Determination of a defamation plaintiff's status as a "public official" on summary judgment is a question of law reviewed for correctness and the legal conclusion reached by the district court is accorded no particular deference. Madsen v. Ltd. Television, Inc., 797 P.2d 1083, 1083 (Utah 1990). See also Wayment v. Clear Channel Broad., Inc., 2005 UT 25, ¶ 17, 116 P.3d 271 ("[t]he determination of a defamation plaintiff's public figure status is a question of law, reviewed for correctness"); Riddle v. Perry, 2002 UT 10, ¶ 6, 40 P.3d 1128 ("the existence of a [defamation] privilege is a question of law").

Preservation of Issue Below: This issue was preserved in the district court below. (R. at 1359-66.)

2. Issue: Did the district court err in holding there was insufficient evidence to support a finding of malice?

Standard of Appellate Review: Correctness. Whether the evidence in a particular case is sufficient to support a finding of malice is a question of law. Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 903 n.20, 904 (Utah 1992).

Preservation of Issue Below: This issue was preserved in the district court below. (R. at 1359-66.)

3. Issue: Were there material issues of fact before the district court that should have precluded summary judgment on the issue of whether Appellees or any of them actually made the statements at issue with the requisite degree of malice?

Standard of Appellate Review: Correctness. An appellate court reviews a district court's summary judgment determination for correctness, granting no deference to the district court's legal conclusions. The appellate court determines only whether the district court erred in applying the governing law and whether the district court correctly held that there were no disputed issues of material fact. Wayment, 2005 UT 25, ¶ 15. Whether a person has actually acted with defamatory malice is a question of fact, and summary judgment on the issue of malice is inappropriate where a jury could find as a matter of fact that a party acted with malice. ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 260 (Utah Ct. App. 1997); West v. Thomson Newspapers, 835 P.2d 179, 187-88 (Utah. Ct. App.1992). See Brehany v. Nordstrom, Inc., 812 P.2d 49, 59 (Utah 1991) ("[t]he issue of malice is ordinarily a factual issue"); Alford v. Utah League of Cities & Towns, 791 P.2d 201.

205 (Utah Ct. App. 1990) ("[o]rdinarily, the question of whether the statements were maliciously published would be one for a trier of fact"). See also Murphree v. US Bank of Utah, N.A., 282 F.Supp.2d 1294, 1298-99 (D. Utah 2003) (to defeat summary judgment, plaintiff need not prove malice, but only proffer evidence sufficient to support a jury finding of malice). Compare Hill v. Allred, 2001 UT 16, ¶ 18, 28 P.3d 1271 (fact-dependent legal questions "preclude summary judgment in all but the clearest of cases"); Trujillo v. Utah Dep't of Transp., 1999 UT App 227, ¶ 28, 986 P.2d 752 (fact-intensive inquiries by their nature are "not particularly amenable to summary judgment"). On review of a summary judgment, facts and inferences must be viewed in favor of both the non-moving and the losing party. Sur. 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).

Preservation of Issue Below: This issue was preserved in the district court below. (R. at 1359-66.)

4. Issue: Did the district court err when it held that Appellee's Memorandum of Costs was submitted within five business days of the date of entry of the final judgment?

Standard of Appellate Review: Correctness. The application of a legal time limit is a question of law, reviewed for correctness. Selvage v. J.J. Johnson & Assocs., 910 P.2d 1252, 1257 (Utah Ct. App. 1996).

Preservation of Issue Below: This issue was preserved in the district court below. (R. at 1499-1508, 1563-64.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Utah R. Civ. P. 6(a)

[Time] Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Utah R. Civ. P. 54(d)(2)

[Judgments; costs] Costs; How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court . . .

Utah R. Civ. P. 56(c)

[Summary Judgment] Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Nature of the Case

This is a claim for defamation brought by Appellant Michael O'Connor ("O'Connor"), the former coach of the girl's high school basketball team at Lehi High School in Utah County. During the 2003-2004 school year, Appellant O'Connor was repeatedly defamed, both orally and in writing, by Appellees ("the Parents")¹, who are principally the parents of certain girls on the team who thought that their girls did not get enough playing time and attention. The situation came to a head in July 2004 when the Parents each wrote letters accusing O'Connor of abuse and other improprieties, which letters were then collected by Appellee Gary Burningham and delivered as a package to the Alpine School District. In addition, most if not all of the Parents then attended a School Board meeting on July 20, 2004 where four representatives of the Parents, with the approval of the remaining Parents, repeated many of the same accusations against O'Connor during the public portion of the meeting. The letters and the statements accused O'Connor of abusing girls on the team, being dishonest with funds entrusted to him in his position as a coach, recruiting, discrimination and favoritism, and other conduct unbecoming a high school coach. Then in

¹ For the ease of identification in this Brief, all of the Appellees will be referred to as the Parents, although a number of them are either grandparents or friends of girls on the basketball team.

September of 2004, after the new school year had started, O'Connor was accused of retaliation against several girls whose parents were the ring leaders of the Parents' effort to defame O'Connor. As a result of all of the defamatory communications, O'Connor was terminated in September 2004 as the basketball coach, although he was permitted to continue to teach at the high school as well as to coach the girl's track team. O'Connor brought the litigation against those who had written the letters and made the public comments.

Course of Proceedings and Disposition at Trial Court

After discovery had been completed, the Parents moved the district court for summary judgment. (R. at 1202.) The trial court granted the Parents' summary judgment based on the Court's determination that O'Connor was a public official. The Court also determined that O'Connor had not provided evidence of actual malice as required by the First Amendment, namely that the Parents knew or should have known their statements were false or were made with reckless disregard for their truth. Therefore, the case was dismissed with prejudice. (R. at 1353-66.) Appeal was taken from the final judgment. (R. at 1495-96.) Thereafter, the trial court awarded the Parents certain costs over O'Connor's objection that their Memorandum of Costs had been filed too late. (R. at 1552-60, 1562-64.) The district court's cost determination was made after O'Connor had already filed his Docketing Statement in this appeal.

STATEMENT OF FACTS

1. Appellant O'Connor is a high school girls basketball coach who, while successfully coaching in California, was recruited to coach at Lehi High School. (R. at 659, 850-51, 853.)
2. After successfully turning the Lehi High girl's basketball program around, O'Connor incurred the wrath of certain of the Parents who had girls on the team because they felt that he overused one girl on the team, despite her being considered by many to be one of the top high school girls basketball players in the United States.² (R. at 659, 718-78.)
3. In November of 2003, after learning some of the Parents were questioning his use of donated team funds, O'Connor called a meeting of all Parents of girls on the team, explained fully his past and anticipated use of the funds in question, and understood he had answered all concerns. When the meeting was over, no Parent indicated they had any remaining questions about the use of funds. (R. at 775-76, 837-43.)
4. At no time subsequent to the November 2003 meeting did any of the Parents ever request or receive any additional information from the high school administration which would suggest any impropriety with school funds. (R. at 1248, 1263.)

² Subsequent to the filing of this appeal, the girl in question, Michelle Harrison, was named the top high school girls basketball player in Utah by *The Deseret News* and was named to the McDonalds All Americans, an honor given to the top 24 high school senior girl basketball players in the U.S.

5. Nevertheless, at a meeting in March 2004 scheduled by and for the Parents, they continued to accuse O'Connor, among other things, of financial improprieties, which claim was communicated to the high school administration. (R. at 857-59, 1263, 1268-69.)
6. The Parents all had private meetings with the high school administration during the Spring of 2004, and specifically with Principal Worthington. As a result, the high school administration reviewed O'Connor's use of school and donated funds, reviewed criticisms of his dealings with the girls on the team, and determined that he was worthy of the administration's full support, which was communicated orally and then confirmed in a letter dated April 15, 2004 sent to the Parents of all the girls on the team. (R. at 1171-72, 1248, 1268-69.)
7. The Principal instructed the Parents to come to him with any further questions or concerns about O'Connor or his management of the basketball team. (R. at 1171-72.)
8. When the Parents, who in March 2004 had organized as a group, did not seem to get satisfaction from complaining to the high school administration, they each wrote one or more letters accusing O'Connor of physical and psychological abuse towards the girls on the basketball team, financial dishonesty with school funds, illegal recruiting of girls to the team, unethical behavior, favoritism, and discrimination. (R. at 718-78.)

9. The letters written by the Parents were collected by one or more of the Parents and delivered by Appellee Gary Burningham to the home of Donna Barnes, a member of the Alpine School Board. (R. at 1244.)
10. Although the Parents in their letters claimed O'Connor abused team members at basketball practices, with the exception of perhaps one or two Parents, none of the Parents ever attended any of the basketball practices for the girls basketball team, and those who did so attend never stayed for a whole practice. (R. at 660.)
11. Although she has never filed any criminal charges and even though she is a professional social worker, Appellee Sue Chandler gave it as her opinion that the abuse by O'Connor was criminal in nature. (R. at 672-73, 759-62.)
12. Acting in her private capacity and not as an official act of the School Board, Donna Barnes read all the letters and concluded that the allegations must be true because of the sheer number of the letters repeating the same allegations. She then passed them on to the School District Superintendent. (R. at 1233-37, 1243.)
13. On July 20, 2004, the Parents attended a regularly scheduled meeting of the School Board where, during the open forum portion of the meeting and without being an agenda item, four of the Parents, the maximum allowed to speak by the Board, spoke out against O'Connor, referred to their letters, and voiced the same accusations against O'Connor at the public meeting as they had expressed in their letters. (R. at 711-16.)

14. Nowhere in their letters nor in their comments made to the Board did the Parents ask for an investigation. Rather they asked for O'Connor to be terminated based on unverified accusations alone. (R. at 711-16, 718-78.)
15. As a direct result of the Parents' defamatory publications, O'Connor was terminated as the girls basketball coach. (R. at 1224-25.)
16. The reason given by the high school administration for O'Connor's termination as girls basketball coach was his claimed refusal to guarantee that the daughters of some of the Parents would be guaranteed a position on the basketball team and significant playing time. Nevertheless, and despite the Parents' claims, O'Connor was never disciplined or terminated for any claimed abuse of the girls, for discrimination, illegal recruiting, dishonesty, or for any other conduct unbecoming a high school coach. (R. at 1250, 1263.)
17. Although Mrs. Barnes gave it as her opinion as a member of the Alpine School Board that a person accused of the kind of abuse as was alleged in the Parents' letters should not even be teaching, much less working as a coach with girls, the high school administration continued to have O'Connor not only teach, but also coach other girls' sports after he was terminated as the girls basketball coach. (R. at 1233-37, 1250.)
18. About one year before the said School Board meeting, Gary Burningham, one of the principal instigators among the Parents, openly stated he was going to get O'Connor fired from his coaching position, and was otherwise very aggressive in seeking

playing time and exposure for his daughter Kayla, even though at best she was an average player. (R. at 664-66.)

19. Once O'Connor was terminated from his basketball coaching position, Kayla Burningham was elevated to a star position on the team. (R. at 1261.)

20. After O'Connor was terminated as the basketball coach, none of the Parents ever complained about him again, even though he continued to teach and coach girls in the same high school. (R. at 1250.)

SUMMARY OF THE ARGUMENT

The publications at issue in this case, which accused O'Connor of physically and psychologically abusing his juvenile charges and misusing school funds, if given their most common and accepted meaning are capable as a matter of law of sustaining a defamatory meaning. Aside from the fact that the district court erred in failing to make that legal determination, it further erred by holding that O'Connor was a public official for purposes of this case. However, a high school girl's basketball coach does not meet the general "public official" criteria established in either Utah or United States Supreme Court case law, nor does O'Connor meet the case law criteria of a "public figure." However, even assuming for the sake of argument that a "malice" standard of scienter applies in this case, there was sufficient evidence in the record to support a finding of malice. Thus the district court further erred in finding, based solely on the record, that there was no malice when in fact a jury could find as a matter of fact that the Parents acted with malice in this instance. Under

the circumstances of this case, the Parents do not qualify for any constitutional, statutory or common law defamation privileges or immunities. The trial court erred further in ruling that the Parent's Memorandum of Costs was timely filed.

ARGUMENT

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). However, summary judgment should only be granted under Rule 56(c) "when it is clear from the undisputed facts that the opposing party cannot prevail." Washington Nat. Ins. Co. v. Sherwood Assocs., 795 P.2d 665, 666 (Utah Ct. App. 1990). Summary judgment is not a vehicle to weigh the parties' evidence or credibility. Rather, the presence of one disputed material fact or one sworn statement disputing any of the movant's stated material facts is enough to defeat a motion for summary judgment. Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1292 (Utah Ct. App. 1996). All issues of fact and reasonable inferences should be viewed in the light most favorable to the non-moving party. Surety Underwriters, 2000 UT 71, ¶¶ 15, 36. As such, fact-intensive inquiries by their nature do not lend themselves to summary judgment.³

³ Hill, 2001 UT 16, ¶ 18 (fact-dependent legal questions "preclude summary judgment in all but the clearest of cases") (fraudulent concealment under the discovery rule); Trujillo, 1999 UT App 227, ¶ 28 (fact-intensive inquiries by their nature are "not particularly amenable to summary judgment") (affirmative defense of governmental immunity).

I. THE COMMUNICATIONS AT ISSUE WERE CAPABLE OF SUSTAINING A DEFAMATORY MEANING.

Utah appellate courts have held that 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." Mast v. Overson, 971 P.2d 928, 932 (Utah Ct. App. 1998); Berry v. Moench, 331 P.2d 814, 820 (Utah 1958). See also Utah Code Ann. §§ 45-2-2 and 76-9-501 for similar definitions. "The defamatory words are actionable if they impute a want of capacity or fitness for engaging in the plaintiff's profession or if they render him unfit to fulfill his duties." Allred v. Cook, 590 P.2d 318, 320 (Utah 1979). "At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation." West v. Thompson Newspapers, 872 P.2d 999, 1008 (Utah 1994) (citations omitted). "Thus, in determining whether a particular statement fits within the rather broad definition of what may be considered defamatory, the guiding principle is the statement's tendency to injure a reputation in the eyes of its audience." Id.

Moreover, if the statements "charge criminal conduct, loathsome disease, conduct that is incompatible with the exercise of a lawful business, trade, profession, or office, or the unchastity of a woman," they are defamatory per se. Larson v. SYSCO Corp., 767 P.2d 557, 560 (Utah 1989); Baum v. Gillman, 667 P.2d 41, 43 (Utah 1983). Statements imputing a lack of professional capacity to a teacher can also be defamatory per se. 50 Am.Jur.2d § 129, at 630 (1970). When a statement is defamatory per se, damages are presumed to flow from

the defamation and special damages do not need to be pled nor proven, Baum, 667 P.2d at 43; Allred, 590 P.2d at 320-21, and malice is implied, Allred, 590 P.2d at 321. It is O'Connor's position that the statements made by the Parents, both orally and in writing, were not only defamatory in the sense of being untrue, but they were defamatory per se.

The Parents alleged that O'Connor physically and psychologically abused the girls on the Lehi High School basketball team, and that he was further guilty of discrimination, financial dishonesty, and retaliation. All such communications qualify as allegations of O'Connor's unfitness for or incompatibility with the requirements of his high school coaching job, and as such expose him to public contempt and disapprobation. Therefore, as a matter of law, O'Connor has stated a prima facie claim of defamation. Such defamatory communications are amply cited in the Material Facts submitted to the trial court and supported as required by Utah R. Civ. P. 56. (R. at 1194-1218.)

The West case provides that in any defamation case the district court must make a threshold determination of whether the statements at issue were capable of sustaining a defamatory meaning. 872 P.2d at 1008. "Whether a statement is capable of sustaining a defamatory meaning is a question of law[.]" Id. at 1008. A court determines whether a particular statement can sustain a defamatory meaning by "carefully examin[ing] the context in which the statement was made, giving the words their most common and accepted meaning." Id. at 1009. Only after the court has determined that a statement is capable of

defamatory meaning as a matter of law does the factfinder "then determine whether the statement was in fact so understood by its audience." Id. at 1008.

Here, the district court failed to make a determination of whether that threshold issue had been met, namely, whether the Parents' numerous letters and other communications were capable of sustaining a defamatory meaning. Although the district court failed to make this determination, this Court can do so as a matter of law based on the Record before it. A reading of but a few of the letters and recorded comments in question (R. at 711-16, 718-78, 857-59) make it clear that such communications are clearly capable of sustaining a defamatory meaning. Giving the words and allegations contained therein their most common and accepted meaning, they clearly can sustain a meaning that O'Connor was abusive to his juvenile charges, failed to be professional in his work, and was dishonest in his dealings as a school employee, and therefore unfit for his line of work. As such, this is clearly a threshold issue which can be affirmatively determined by this Court, after which the matter needs to be remanded and submitted to a jury for a factual determination of whether the defamatory intent was understood as such by its intended audience.

II. A HIGH SCHOOL COACH IS NOT A "PUBLIC OFFICIAL" FOR PURPOSES OF DEFAMATION.

The trial court's ruling granting summary judgment in favor of the Parents was based on its view that O'Connor was a public official for purposes of defamation.⁴ The trial court's

⁴ In this case, the district court did not address the other legal theories put forward by the Parents as bases for their summary judgment motion, namely absolute

novel application of the "public official" status to a high school coach finds no support in prior Utah defamation case law. As such, the district court essentially took the initiative of ruling on an issue of first impression. The majority of reported defamation Utah cases which require proof of malice do so in the context of a "public figure." Only a handful of reported cases do so in the context of a "public official." Of those cases, even fewer discuss whether a particular person by virtue of his employment or circumstances is a "public official."⁵

This Court has looked to United States Supreme Court jurisprudence in determining the bases and extent of the "public official" qualified privilege to defamation:

The United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) first recognized a qualified privilege under the First Amendment for a false, defamatory communication made by a defendant concerning a public official. The privilege effectuates an accommodation between free speech interests and reputational interests by requiring a plaintiff who is a public official to prove that a defendant acted with "actual malice" in making a false, defamatory statement about the plaintiff. Thus, a public official may recover damages for a defamatory falsehood relating to his official conduct, but only if he proves that the defendant made the statement with knowledge that it was false or with reckless disregard of whether it was false or not.

privilege, qualified privilege, and O'Connor's purported "public figure" status. However, the Parents have made it clear in their Docketing Statement that they continue to rely on those theories in addition to the actual theory relied on by the district court. Those particular legal theories will be addressed later in this Brief.

⁵ West, 872 P.2d at 1119 (defamation plaintiff who was an elected mayor at the time of the allegedly defamatory comments identified in opinion as "public official"; plaintiff's status as "public official" not at issue.); Seegmiller v. KSL, Inc., 626 P.2d 968, 972 (Utah 1981) (private property owner that was subject of local news story on purported animal cruelty was neither a "public figure" nor a "public official"; plaintiff's status as "public official" not at issue).

Cox v. Hatch, 761 P.2d 556, 559 (Utah 1988) (citations and internal quotation marks omitted). The terms and concepts delineating a "public figure" as opposed to a "public official" are distinct and are not interchangeable. This Court has previously noted the differences between the two concepts.

A public figure is one who has either (1) attained special prominence in the affairs of society and thus assumes a public figure role voluntarily, or (2) thrust himself or herself to the forefront of public controversies in order to affect the outcome of those controversies. A public *official*, on the other hand, is one who holds a position in government which has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds that position.

Russell, 842 P.2d at 903 n.20 (emphasis in original; citations and internal quotation marks omitted). In order to qualify as a public official, "the public official's position must be one which would invite public scrutiny and discussion of the person holding it, *entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.*" Id. (emphasis in original, citations and internal quotation marks omitted). See also Van Dyke v. KUTV, 663 P.2d 52, 55 (Utah 1983) ("[t]he libeled individual must occupy a position which invites public scrutiny absent any defamatory charges, before the label of 'public official' may attach to him"). Compare Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs")

This Court has noted that the United States Supreme Court has "expressly refrained from determining how comprehensive the term 'public official' should be[,]" but has only articulated the general guidelines identified above. Van Dyke, 663 P.2d at 54. As such, this Court has necessarily addressed issues of whether a particular plaintiff qualifies as a "public official" for defamation purposes on a case-by-case basis. A review of the extant Utah reported cases applying this general standard to particular fact controversies will be helpful to the consideration and resolution of the issue on appeal in this case.

At issue in the Van Dyke case, 663 P.2d 52, was whether plaintiff college director of financial aid was a public official for purposes of a defamation lawsuit. The Supreme Court held that he was. In particular, the Court found that where plaintiff received and had discretion on how to disburse nearly two million dollars in federal funds among 4,000 students for scholarship awards, plaintiff "was thus accountable to the general public and held a position which invited public scrutiny." Id. at 55. Furthermore, the allegedly defamatory comments regarding plaintiff's putative sexual harassment of financial aid recipients "bore directly upon [plaintiff]'s fitness and qualification to hold that position." Id.

At issue in the Cox case, 761 P.2d 556, was whether plaintiff postal workers whose photographs appeared in campaign political fliers without their consent or approval were "public officials" for purposes of a defamation action. This Court held that they were not. It expressly noted that not all public employees are public officials. See also Hutchinson v.

Proxmire, 443 U.S. 111, 119 n.8 (1979) (not every public employee is a public official). Rather, the test for determining public official status was whether the public employee's position is one "which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." Id. at 560, quoting Rosenblatt, 383 U.S. at 86 n.13.⁶ This Court noted that any implication from the campaign flier that the pictured postal workers may be endorsing a particular political candidate was irrelevant to plaintiffs' qualifications or actual performance as postal workers. 761 P.2d at 560-61.

At issue in the Madsen case, 797 P.2d 1083, was whether plaintiff police officer who had shot and killed a suspect was a public official or a private citizen for purposes of his defamation case in relation to media broadcasts that were critical not only of his decision to fire on the suspect, but also of his past performance as a police officer. This Court declined to hold that a police officer is automatically a public official by virtue of his position, but went on to hold that plaintiff in this case did qualify as a public official "by virtue of the facts and circumstances which gave rise to the killing of [the suspect]." Id. at 1085. In particular, it noted that the decision to use deadly force "propelled him into a category far-removed from

⁶ The Rosenblatt opinion also teaches that for purposes of determining whether a particular public employee is a "public official" for purposes of defamation, the position in question must have "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." 383 U.S. at 86.

that of an ordinary patrolman" let alone a private individual, and that "a police officer who takes a life in the process of apprehending a suspect certainly cannot be expected to escape public scrutiny." Id. The case went on to note that the media scrutiny and alleged defamation related solely to plaintiff's official police conduct and history as a law enforcement officer. Id. In affirming the district court's conclusion that plaintiff was a "public official," this Court concluded: "The public clearly has a significant interest and concern in the use of deadly force by a peace officer and also in the work performance record of those entrusted to uphold the law. News accounts of the shooting incident that left a suspect dead at the hands of a police officer specifically relate to plaintiff's official conduct." Id.

Here, the position of high school girl's basketball coach does not meet the general "public official" criteria or concerns laid out by this Court in past case law. First, it is not a position of such "apparent importance that the public has an independent interest in the qualifications and performance of the person who holds that position" . . . "beyond the general public interest in the qualifications and performance of all government employees." Rosenblatt, 383 U.S. 86; Russell, 842 P.2d at 903 n.20. The coaching selection process is not put to public vote nor determined by public input but rather is handled internally at the administrative level. Indeed, there is no evidence that the general public is invited to comment on the selection process at all. Those who examine the coach's qualifications and performance do so as school administration and not as members of the general public. The

public's interest, where there is any, is limited to learning about the selection after the fact. Nor does the public have some right in the termination of a high school coach. Moreover, high school team activities are not part of the core curriculum to which a student is entitled. As was made clear in Starkey v. Bd. of Ed. of Davis County Sch. Dist., 381 P.2d 718, 721 (Utah 1963), extracurricular activities at a public school are a privilege, not a right. In other words, for purposes of a student's educational rights, the hiring, firing or retention of a high school English teacher is more important than that of a high school team coach. If a high school coach is a public official, then certainly the chemistry, math and biology teachers are more so.

In short, if a high school girl's basketball coach is a position of such "apparent importance" that the public at large has an "independent interest" in that person's qualifications and performance, then in truth there is no public employment that would not qualify for "public official" status. Arguably the janitorial staff and food service personnel in any public school have more impact and contact with the general student body than does any particular coach. Under the Parents' proposed standard, a "public employee" would effectively be synonymous with "public official," an outcome that this Court has expressly rejected. Cox, 761 P.2d at 560. The exception would swallow up the rule.

Second, the position of high school girls basketball coach is not one that, outside of the controversy occasioning the defamation lawsuit, invites public scrutiny and discussion

of the person holding it. While it may invite scrutiny within the studentbody and school community, it is not one that naturally invites the scrutiny of the general public outside of the limited school setting. In this regard, many jurisdictions outside Utah have declined to find that a high school coach is a public figure or a public official for defamation purposes. Although there is a split among the jurisdictions on this issue, the better-reasoned approach finds that high school teachers and coaches are not public officials. These cases are discussed in greater detail in subsection C below.

In addition to the foregoing, there are also significant policy reasons why it would be improper to classify a high school girls basketball coach as a "public official" for the purposes of defamation law.

A. The law should not encourage the defamation of teachers.

This Court has already established a heightened scienter standard for defamation claims brought by those heavily embroiled in public issues. As discussed in Wayment, such persons can be classified as limited purpose public persons, and then must establish proof of malice. 2005 UT 25, ¶¶ 22, 31-39. However, that should not become a basis for added leeway to defame putatively "public figure" high school coaches simply because someone disagrees with their coaching. It is easy for parents or relatives to feel frustration or anger that their favorite student is not getting the attention or playing time which supposedly they deserve and thereby vent their frustrations by defaming the coach. There is probably no parent, or for that matter grandparent, who does not think that their child or grandchild

should have more playing time, should be given greater opportunities, or should receive more attention. When it is perceived by that individual that that student is being short-changed, and regardless of how patiently the coach has tried to explain the situation or how fair the coach has tried to be, it will be easy for that adult to make defamatory statements about the coach.

If the coach is deemed to be a public official, then the opportunity for redress, considering the heightened "actual malice" standard to which a public official is subject, is daunting. The California Court of Appeals has aptly articulated this concern. While noting the qualified privilege to criticize public officials derives from "the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government[,]" it went on to hold that these considerations did not extend and were ill-suited to public teachers:

The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical: Far too much so, in our view, to justify exposing each public classroom teacher to a qualifiedly privileged assault upon his or her reputation. * * * We are unwilling to hold that a school teacher must be deemed to have assumed the risk of nonmalicious defamation. We perceive in such a rule a real and intolerable danger to the freedom of intellect and of expression which the teacher must have to teach effectively.

Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 97 Cal.App.3d 915, 924 (Cal. Ct. App. 1979). The Maine Supreme Court also noted that teachers do not have the recourse to rebuttal or defense that other public officials do:

The Supreme Court noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." We do not find that a public school teacher usually has this greater access. Like other private individuals, the teacher is vulnerable to injury from defamation, and the state interest in protecting the teacher is greater than the interest in protecting those with readier access to channels of communication. Moreover, we do not find any "assumption of the risk": by accepting a public teaching position without more a private individual cannot be said to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood."

True v. Ladner, 513 A.2d 257, 264 (Me. 1986) (citations and parentheticals omitted). See also Nodar v. Galbreath, 462 So.2d 803, 808 (Fla. 1985) ("we cannot conclude that one who accepts a position as a teacher in a public high school thereby effects the same kind of surrender of the right to vindicate defamation as does one who seeks or accepts an elected or policymaking position with a public body or government institution").

In summary, if a high school coach, or for that matter any school teacher, has to assume the burden of nonmalicious defamation that was originally intended for officials having some real impact on governmental policymaking or administration, then such a person's career and professional pursuits are in jeopardy at the whim of any disgruntled parent. In the instant case, as a direct result of the Parents' published defamatory comments, O'Connor was terminated as the basketball coach and now lives under the cloud of claimed professional misconduct. Such unbridled defamation should not be encouraged or protected in the name of free speech.

B. Extracurricular high school sports are a privilege, not a right.

In the seminal Starkey case, this Court determined that extracurricular activities were a privilege and not a right. 381 P.2d at 229-30, 231. This is a significant distinction. That means that all students have a right to an education, but do not have a right to be in the school play or be a member of the school team. That means that all students have the right to be taught core classes, but do not have a right, if they are on a team, to dictate how much exposure or time they will have while playing or be guaranteed they will not be cut from the team.

In this particular case, even after the Parents had made their false, accusatory claims, the girls who were the daughters of the Parents' ringleaders continued to play on the team. However, when O'Connor refused to commit that he would never cut them and refused to guarantee them significant playing time, he was terminated. Somehow what was a privilege under Utah law suddenly became a right at Lehi High School. Ironically, even though O'Connor was being told by the high school administration he had no meaningful control or professional discretion over how the girls basketball program was to be run, the trial court declared him to be a "public official." The incongruity of these outcomes speaks for itself.

C. The better-reasoned approach among the several bellwether jurisdictions is that a teacher is not a public official.

Although the issue of whether a high school coach or a teacher is a "public official" for purposes of defamation is apparently an issue of first impression in Utah, other

jurisdictions have addressed this issue. While there is a split of authority on the issue, the better-reasoned position, and that held by the bellwether jurisdictions, is to hold that teachers are not public officials.

Jurisdictions holding that teachers are not public officials include California,⁷ Florida,⁸ Illinois,⁹ Maine,¹⁰ New Jersey,¹¹

⁷ Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 97 Cal.App.3d 915 (Cal. Ct. App. 1979) (public high school teacher was not public official for purposes of defamation claim arising out of magazine editorial critical of her choice of curriculum materials). The Franklin court expressly disagrees with the contrary results reached by the courts in Oklahoma and with the earlier position of Illinois, which has since been reversed.

⁸ Nodar v. Galbreath, 462 So.2d 803 (Fla. 1985) (public high school English teacher was not public official for purposes of defamation claim against student's parent who made comments about teacher at school board meeting).

⁹ Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc., 696 N.E.2d 761 (Ill. App. Ct. 1998) (teacher was not public figure for purposes of defamation claim against principal and television station for reports alleging teacher's serious misconduct); Kumaran v. Brotman, 617 N.E.2d 191 (Ill. App. Ct. 1993) (substitute school teacher was not public figure for purposes of defamation claim against newspaper, reporters and attorneys for newspaper article). The Kumaran case repudiated the previous line of Illinois cases holding that public schoolteachers were public officials, in particular the case of Basarich v. Rodeghero, 321 N.E.2d 739 (Ill. App. Ct. 1974), which has been criticized elsewhere as wrongly confusing or conflating the "public official" and "public figure" categories when it held that the teachers in that case were "public officials" or "public figures." True v. Ladner, 513 A.2d 257. 264 n.8 (Me. 1986).

¹⁰ True v. Ladner, 513 A.2d 257 (Me. 1986) (public high school teacher was not public official for purposes of defamation claim brought against school union superintendent and school committee for statements made to inquiry from prospective employer).

¹¹ Rocci v. MacDonald-Cartier, 731 A.2d 1205 (N.J. Super. Ct. App. Div. 1999) (teacher was private individual for purposes of defamation claim against chaperone on school trip who had sent letter to school principal).

and New York.¹² Jurisdictions holding that teachers or coaches are public officials include Connecticut,¹³ Minnesota,¹⁴ Tennessee,¹⁵ Texas,¹⁶ and Washington.¹⁷ At least two jurisdictions, namely Arizona¹⁸ and Oklahoma,¹⁹ which in the 1970s found teachers to be

¹² Dec v. Auburn Enlarged Sch. Dist., 672 N.Y.S.2d 591 (N.Y. App. Div. 1998) (high school teacher was not public official for purposes of defamation claim against school district, board of education, board of education and board members for article published in local newspaper).

¹³ Kelley v. Bonney, 606 A.2d 693 (Conn. 1992) (teacher was public official for purposes of defamation claim against local board of education, board members, student, parent and local resident

¹⁴ Elstrom v. Indep. Sch. Dist. No. 270, 533 N.W.2d 51 (Minn. Ct. App. 1995) (public school teacher was public official for purposes of defamation claim against school district superintendent and human services coordinator for statements made in school district disciplinary proceedings).

¹⁵ Robinson v. Times Printing Co., 955 S.W.2d 609 (Tenn. Ct. App. 1997) (public school teacher was public official for purposes of defamation claim against publisher for newspaper article implicating teacher's criminal record).

¹⁶ Johnson v. Southwestern Newspapers Corp., 855 S.W.2d 182 (Tex. App. 1993) (High school athletic director, football coach and teacher was public official for purposes of defamation claim against local newspaper and sportswriter for newspaper article on basis of his multiple positions and not on basis of being a teacher; in particular, plaintiff exercised significant governmental authority on behalf of the school district by virtue of his athletic director position). But compare Poe v. San Antonio Express-News Corp., 590 S.W.2d 537 (Tex Civ. App. 1979) (noting that Texas had not yet ruled on whether a teacher was a "public official," and ruling that plaintiff had failed to demonstrate the same on summary judgment motion).

¹⁷ Corbally v. Kennewick Sch. Dist., 973 P.2d 1074 (Wash. Ct. App. 1999) (middle school teacher was public official for purposes of defamation claim against school district for statements made to newspaper).

¹⁸ Sewell v. Brookbank, 581 P.2d 267 (Ariz. Ct. App. 1978) (high school teacher was public official for purposes of defamation claim against parents of students presenting

public officials, did so relying on an Illinois case holding a public school teacher to be a public figure, and which the Illinois courts have subsequently repudiated as "sweep[ing] too broadly." Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc., 696 N.E.2d 761 (Ill. App. Ct. 1998); Kumaran v. Brotman, 617 N.E.2d 191 (Ill. App. Ct. 1993).

It is worth noting that all the foregoing jurisdictions base their holdings upon the same body of United States Supreme Court case law, but interpret it in such a way as to reach directly contrary outcomes on the same general issue of whether a public school teacher is a "public official" for purposes of defamation jurisprudence. The Franklin court expressly acknowledges that the outcome to the question depends on a balancing of the competing interests of freedom of expression versus interest in integrity of reputation. 97 Cal.App.3d at 924. Therefore, the disparate results reached among the different jurisdictions are a result of the different weights applied or favored by individual jurisdictions.

The courts finding that teachers are public officials tend to ignore or minimize the United States Supreme Court's teaching in Hutchinson that not all public employees are public officials. 443 U.S. at 119 n.8. They also tend to overstate the teacher's relative effect on government or administration. Moreover, as noted above, some courts have relied on

list of grievances to school board).

¹⁹ Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (grade school wrestling coach was "public official"). Luper v. Black Dispatch Publ'g Co., 675 P.2d 1028 (Okla. Ct. App. 1983) (plaintiff was both public official by virtue of her public school teacher position and public figure by virtue of her role as civil rights activist).

early Illinois decisions now rejected by subsequent Illinois decisions, casting further doubt on those cases finding that teachers are public officials for purposes of defamation.

In all respects, the better-reasoned position is the one holding that teachers are not public officials. This position recognizes the relative inability of a teacher to counter defamatory charges, the particular vulnerability of teachers to unchecked defamation, and the very limited role that teachers actually play in governmental administration or policymaking. See True, 513 A.2d at 264 (governmental authority exercised by teacher is "very limited" . . . "limited to school children within the school building during ordinary school hours"). In short, all reasoned policy reasons support the position that teachers are not public officials for the purposes of defamation.

III. UNDER ANY STANDARD, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF MALICE AS A MATTER OF LAW, AND A JURY COULD FIND THAT THE PARENTS ACTED WITH MALICE AS A MATTER OF FACT.

Utah case law recognizes three general standards of scienter in defamation cases. First, where the plaintiff is a public figure or public official, a constitutional "actual malice" standard applies. "Actual malice" is not a bar to recovery but only a heightened standard of scienter that a plaintiff must demonstrate before he or she can recover any damages sounding in defamation. Wayment at ¶ 19, quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). See also Cox, 761 P.2d at 560; Van Dyke, 663 P.2d at 54; Seegmiller, 626 P.2d at 973. Second, where the plaintiff was acting under a conditional privilege, then a

"common law" malice standard applies. Russell, 842 P.2d at 903 n.20, 904-05. Third, where the plaintiff is a private figure, then a negligence standard applies. Id.

A. Actual malice.

Where the First Amendment is implicated in a defamation claim, a finding of "actual malice" is required before defamation can be found. Jensen v. Sawyers, 2005 UT 81, ¶ 91, 130 P.3d 325. The heightened protection provided by the constitutional "actual malice" standard applies to those plaintiffs who the courts label as public figures or public officials. Russell, 842 P.2d at 903 n.20, 904 (Utah 1992); Cox, 761 P.2d at 559. "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." Jensen at ¶ 119 (citation and internal quotation marks and brackets omitted). See also Van Dyke, 663 P.2d at 54 (constitutional actual malice standard requires "showing of an intentional falsehood or reckless disregard for truth"). A reckless disregard for the truth of a statement is shown where there is evidence that the publisher "entertained serious doubts as to the truth of his publication." Seegmiller, 626 P.2d at 972. This is a subjective inquiry that can be satisfied where there is "sufficient evidence to permit the conclusion that the defendant actually had a high degree or awareness of probable falsity." Revell v. Hoffman, 309 F.3d 1228, 1233 (10th Cir. 2002), quoting and citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (internal quotation marks and ellipsis omitted).

Inasmuch as a trial court's finding of "actual malice" implicates the First Amendment, and thus is regarded as a "constitutional fact," any review of such a finding requires an appellate court "to conduct an 'independent examination of the whole record' to test its worthiness." Jensen, 2005 UT 81, ¶¶ 91, 94 (citations omitted).²⁰ This examination shows no deference to the examination conducted by the trial court. Jensen at ¶ 118.

B. Common law malice.

"Common law malice" requires a showing "that the publisher made the statements with ill will, that the statements were excessively published, or that the publisher did not reasonably believe his or her statements." Wayment, 2005 UT 25, ¶ 53. See also Russell, 842 P.2d at 904 (defining common law standard of malice as requiring a showing of "an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive"). This standard has elsewhere been summarized as requiring a showing of "ill will or spite." I.M.L. v. State, 2002 UT 110, ¶ 18, 61 P.3d 1038. See also Cox, 761 P.2d at 59 n.1 (common law malice entails disseminating defamatory statements on the basis of "personal hostility or ill will"). In contrast to the "actual malice" standard, "common law" malice can be established on a

²⁰ An "independent examination of the record" is not a de novo review of the whole judgment, but is "limited to the portions of the record relevant to the issue subject to independent review." Jensen at ¶ 94 n.11.

showing of improper motive.²¹

A party who otherwise qualifies for a conditional privilege for defamation purposes will forfeit that privilege where his publications are shown to have involved common law malice. Wayment, 2005 UT 25, ¶ 53 n.19. See also Russell, 842 P.2d at 904 (to overcome a conditional privilege under the common law standard of malice, a plaintiff must show "an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive"). A court looks not to whether the statements were malicious on their face, but whether they were maliciously published. Alford, 791 P.2d at 205.

C. Relationship between the two standards.

The constitutional "actual malice" standard and the "common law" malice standard are two distinct standards and are not interchangeable. Wayment, 2005 UT 25, ¶ 53 n.19; I.M.L., 2002 UT 110, ¶ 18; Cox, 761 P.2d at 559 n.1. However, "proof of knowledge of or reckless disregard for a statement's falsity would satisfy either" the actual malice or common law standard. Wayment at ¶ 53 n.19. "While in the public figure context, such proof demonstrates the required level of fault, the same proof serves in the privilege context to demonstrate the publisher's 'hostility or ill will[.]' Id.

²¹ This standard is not applicable to public officials. "[C]ommon law malice, i.e., ill will or spite, has no place in a 'public official' or 'public figure' case[.]" since motivations of ill will or spite can come under First Amendment protections. Cox, 761 P.2d at 559 n.3.

D. Application.

For the reasons argued both above and below, O'Connor is neither a public official nor a general-purpose or limited-purpose public figure, nor do the Parents qualify for any conditional or constitutional privilege or immunity for defamation purposes. As such, this case should be governed by a negligence standard of scienter. However, even assuming for sake of argument that either standard of malice were to be applied to this case, the Record contains sufficient evidence to support a finding of both constitutional and common law malice as a matter of law and the district court erred in failing to find as much. In that regard, the Court is directed to the Facts identified at the outset of this Brief as well as the accompanying citations to the Record. Included in the materials submitted to the trial court were not only the defamatory letters, the minutes of the Parents' meeting in March 2004, and a transcript of the Alpine School Board July 20, 2004 meeting at which some of the Parents spoke, but also relevant deposition testimony. Construing all that material in the light most favorable to O'Connor, which this Court is bound to do on review, Sur. Underwriters, 2000 UT 71, ¶ 15, Winegar, 813 P.2d at 107, the elements of malice have been established.

There is sufficient evidence in the Record to sustain a determination of constitutional malice. The Parents repeated their allegations of financial improprieties after having explanations and clarifications given them by both O'Connor and the high school administration. As such, the accusations of dishonesty were at worst intentionally false, and at best showed a reckless disregard for the truth. Likewise, the Parents repeated their

allegations of abuse, recruiting violations and favoritism after due investigation by the Principal and his communication to the Parents that no such problems existed. Moreover, the statements were made not to instigate a further investigation by the high school or by the School Board, but rather to force a change in the coaching position. Proceeding in this fashion lends itself to the reasonable conclusion that the Parents had a high degree or awareness of the falsity of these charges which had been determined to be baseless but which they nonetheless proceeded to repeat.

There is also sufficient evidence in the Record to sustain a finding of common law malice. There is sufficient evidence in the Record to conclude that the Parents made and repeated their defamatory statements with ill will. They repeated them despite receiving explanations of no financial improprieties and receiving the principal's assurance that there were no coaching problems of the type alleged. Certain Parents manifested an intent prior to or contemporaneous with the defamatory statements that they would have O'Connor fired from his position so that a new coach more favorable to their daughters would be put in his place. They ultimately took their complaints to a public forum despite having a reasonable suspicion if not knowledge that such allegations were untrue. The allegations were excessively published in that they were made to private citizens during the public comment portion of an open hearing, were not an agenda item, and the Board took no action on them. There is also evidence that they were published and/or disseminated within the general community. There is evidence, or the reasonable inference to be made therefrom, that the

Parents did not reasonably believe such statements at such time as they repeated them inasmuch as they had been assured that there was no foundation to such complaints. There is substantial evidence that the statements were driven by an improper motive, ill will, personal hostility, or desire to harm or spite, namely, the drive to terminate O'Connor from his coaching position as retaliation for the perceived lack of attention to the Parents' individual daughters and jealousy of the then star player.

E. Factual Issues.

Assuming that malice were an issue in this case, proof of malice is readily apparent or inferrable from the face of the statements made by the Parents and contained in the Record. Moreover, issues of whether a factfinder could find that the Parents had actually acted with malice are necessarily fact dependent, and do not lend themselves to resolution on summary judgment.

Those Parents who were the principal instigators of the most strongly-worded defamatory comments against O'Connor all had daughters the same age as Michelle. It quickly became obvious to them that their daughters could not be the stars as long as Michelle was around. O'Connor's sin consisted of utilizing (or attempting to utilize) Michelle's skills for the good of the team. Jealousies arose when the girls refused to follow the game plan, which involved Michelle. Those resentments and hurt feelings were channeled into accusations of abuse, discrimination, and other improper conduct by O'Connor. In order to gain their own ends of a team where their individual daughters would

have more playing time and recognition, the Parents saw a need to have O'Connor terminated from his coaching position. As is apparent from the Record, Defendant Gary Burningham had been trying to get Coach O'Connor fired from his position as early as the Summer of 2003. (R. at 667.) He tried to accomplish that task through the claim in November of 2003 that O'Connor was misusing school funds.

Malice can also be inferred from the fact that, in order to make their concerns known about what they considered to be special treatment of one girl over their own daughters, the Parents went beyond legitimate fact-based concerns to alleging dishonesty, discrimination, abuse, recruiting violations and retaliation. Moreover, they had already expressed their concerns to Mr. Worthington and had had a formal response from him by April of 2004, which was after the end of the basketball season for the school year. No further formal activities were to occur until the following school year. The letters to the School Board came after the Parents did not get what they wanted from the High School Principal, not because of any further conduct on the part of O'Connor.

After O'Connor's termination, Kayla Burningham and Breezy Chandler were treated as stars on the team, now coached by Lynn Allan, the athletic director at the school. Moreover, the coach who succeeded Lynn Allan was Mr. Allan's son-in-law. The Parents have obtained what they wanted, namely a chance for their daughters to shine without having to compete with Michelle Harrison. It certainly was not about winning or losing games, as

evidenced by the win-loss records.²² The Parents knew they could get O'Connor terminated only by accusing him of serious misconduct and by raising serious and sustained unwarranted attacks on him personally and professionally. That is what they did, all of which was done with malice, which malice is readily apparent from the Record, and which a jury considering the matter could determine as actionable instances of malice.

IV. NO OTHER STATUTORY, COMMON LAW OR CONSTITUTIONAL PRIVILEGE WAS AVAILABLE TO THE PARENTS UNDER THE CIRCUMSTANCES.

A. Statutory Privileges.

The Utah Code provides certain specific statutory exemptions from defamatory conduct. However, none are applicable in this case. As was noted by Justice Stewart in the Brehany case, Utah Code Ann. § 45-2-3(3) applies only to broadcasting and newspapers. 812 P.2d at 58. Other statutory privileges apply to communications made in the course of judicial and legislative proceedings. See Utah Code Ann. § 45-2-3(4). Such are not applicable here.

B. Common Law Privileges.

The cases the Parents cited to the district court with regard to privileges in relation to the proceedings of administrative officers and bodies do not apply to citizenry and public comments before those bodies. Thus, the case cited by Parents of Mortensen v. Life Ins. Corp., 315 P 2d. 283 (Utah 1957) is inapposite to the facts of this case inasmuch as the

²² The evidence is unrebutted that for several years before O'Connor's arrival in Lehi and the year after O'Connor's termination, the girls team had a negative win-loss record whereas under O'Connor, the team enjoyed three very successful seasons. (R. at 659.)

School Board in this case did not take any administrative action based on Parents' defamatory comments. Other cases cited by Parents involve immunity for governmental officers charged with administrative discretion or policy implementation, not for members of the public voicing public outcry. Parents' heavy reliance on Gallegos v. Escalon, 993 S.W.2d 422 (Tex. App. 1999) is also misplaced. The immunity granted in that case (which is not binding precedent for this Court in any event) was to the superintendent relative to comments made in a formal disciplinary hearing. No specific protection from defamatory statements was provided to the public at large.

No disciplinary procedure or other administrative proceeding was brought against O'Connor by the School Board. He was not even notified of the School Board meeting at issue. The Board listened to Parents in the public comment portion of their meeting, declined to take any jurisdiction of the matter and referred the matter to the Superintendent, who referred the matter back to the High School administration. Thus, there was no quasi-judicial proceeding at issue.

Moreover, the Parents' defamatory publications were not limited to the School Board meeting on July 20, 2004, nor did they begin and end there. Defamatory materials about O'Connor were being published as early as November, 2003, and continued through the Spring and Summer of 2004, reaching their peak in July 2004. The defamatory letters generated by the Parents were created not at the request of any public authority but at the request of Gary Burningham and Sue Chandler, and were delivered by Gary Burningham not

to a governmental body but to his friend and neighbor Donna Barnes, who in her individual capacity had no authority to deal with them, but who read all of them prior to presenting them to the Superintendent. (R. at 1235, 1243-44.) Then, further defamatory material was uttered at the School Board meeting and thereafter until O'Connor was terminated. Further, all these defamatory comments were being circulated into the community at large, as made clear by the comments being directed to Donna Barnes. (R. at 1240-42.)

The Parents' "common interest privilege" argument is likewise misplaced and unavailing. While "common interest" has not been expressly defined by Utah courts, the context in which this privilege will apply can be determined from an examination of some of the Utah cases in which it has been applied. For example, in Brehany, the Court held that "a publication is conditionally privileged if made to protect a legitimate interest of the publisher." 812 P.2d at 58. In that case a company president's statement to the company's management and buyers about certain employees was conditionally privileged on the basis that the parties to the communication had a common interest in enforcing the company's strict drug policy. Even then such communications are also subject to the claim of common law malice. The court further noted that the "first amendment standard of malice serves a different purpose in defamation law than the common law standard of malice," meaning that evidence of common law malice does not include the elements of deliberate misrepresentation or a reckless disregard for the truth or falsity of a statement. Id. at 59.

In Alford, 791 P.2d 201, a quasi-governmental body holding a special appeal hearing on an employee termination had a qualified privilege to consider written employee statements critical of the terminated employee inasmuch as it had a common interest with the employer in determining the factual circumstances surrounding the employee's termination, and such information was in fact demanded by the employee for inclusion in the hearing. In Lind v. Lynch, 665 P.2d 1276 (Utah 1983) a corporate stockholder mailed a proxy solicitation to other stockholders alleging corporate fraud on the part of the company's president and attorney. Such a publication was privileged inasmuch as the stock holders had a common business interest.

Here, there is nothing from the Record that would warrant the Parents' inference of a common-purpose qualified privilege with those to whom the statements at issue were published. Rather, the reasonable inference to be drawn is that Parents deliberately selected public opportunities in which to air their frustrations and to act on their effort to remove O'Connor as a basketball coach. In other words, such defamatory statements were not intended to be for any type of a confidential or privileged situation, the dissemination of the statements was much broader than to those who had a legitimate common interest with Parents. No effort was made by Parents to limit the distribution of their defamatory comments.

In their materials submitted to the trial court, the Parents cited the case of Daubenmire v. Sommers, 805 N.E.2d 571 (Ohio Ct. App.2004). Aside from the fact that this is an Ohio

case that is at odds with the controlling Utah case of Starkey and Utah case law on the common interest privilege issue, the case is inapposite in many respects. In the instant case, many of those designated as Parents have no children on the team, but rather are friends or relatives. Thus the interests of those designated as Parents are different, one from the other. Likewise, the third party recipients of the defamatory materials, such as the School Board members and the public at large in attendance at the School Board meeting in July 2004 had no common interest with the Parents. Indeed, the School Board declined to take any action on the letters submitted to the Board and the statements made at the meeting.

It is also important to note the case of Krouse v. Bower, 2001 UT 28, 20 P.3d 895, which holds that statements otherwise privileged under the judicial proceeding privilege may lose that privilege if they are "excessively published" to persons outside the scope of the privilege. Here, Parents published their statements to the public at large invited to the Board meeting.

C. Constitutional Privileges.

The First Amendment does not provide an unqualified privilege of petition, nor does it swallow up the law of defamation by allowing otherwise defamatory statements to be cloaked under the guise of privileged petitions. The courts have always been sensitive to the balance between free speech and the right of individuals to be free from defamatory material. Therefore, it is only on a limited basis that certain privileges are afforded to those who make defamatory comments, such as legislative or judicial immunities.

The constitutional law cases cited by Parents to the district court relative to petitions for redress²³ are not only factually inapposite to the instant case, but also Parents have no constitutionally protected rights at stake. The Starkey decision makes that point clear. The redress they claimed to be seeking was with regard to the conduct of a basketball coach relative to coaching a girls high school basketball team. No core educational or constitutional issues were involved.

V. O'CONNOR IS NEITHER A GENERAL-PURPOSE NOR A LIMITED-PURPOSE PUBLIC FIGURE.

The Parents argue, in the alternative, that O'Connor is either a general-purpose or limited-purpose public figure. The Wayment case, 2005 UT 25, addresses the standards for determining either type of public figure. That case's reasoning and holding compels the conclusion that O'Connor is neither a general-purpose nor a limited-purpose public figure.

²³ All of the cases cited by Parents for the proposition that their statements are protected by an absolute constitutional privilege to petition government are inapposite to the facts of this case, and are neither binding nor persuasive authority. For example, Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) involves violation of anti-trust law, and Parents' tellingly omitted the key phrase ". . . from antitrust liability" from their quotation "Those who petition the government for redress are generally immune . . ." In other words, the holding is not so broad as to extend the holding limited to antitrust issues to protect parents protesting the management of high school extracurricular activities. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 404 U.S. 508 (1972) was a monopoly case dealing with the Sherman Act. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) was a Clayton Act case dealing with the right to petition administrative agencies under the Clayton Act. Hufsmith v. Weaver, 817 F.2d 445 (8th Cir. 1987) involved a case extending the Noerr-Pennington doctrine to tortious interference cases. None supports the proposition that perceived grievances over the management of a high school extracurricular activity rises to the level of a constitutional right.

In that case, Wayment was a news reporter for a Salt Lake City television station who had appeared on-screen over a thousand times. She was terminated over a dispute about her involvement in a charitable organization and the alleged conflicts of interest such involvement posed with her employment. Ms. Wayment claimed defamatory publications were made by her employers in the process of her termination from employment, and her former employers asserted that Wayment was a public person as an affirmative defense. Based on Wayment, it is clear that O'Connor is neither a general purpose nor a limited purpose public person.

A. O'Connor is not a general-purpose public figure.

Under Wayment, a general-purpose public figure status will occur where "an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" and where such figures "occupy positions of such persuasive power and influence that they may hold sway on any issue with which they choose to become involved." 2005 UT 25, ¶ 22 (citations and internal quotation marks omitted). Such persons are those on the order of "well-known celebrities" whose names had become "household words." Id. at ¶ 24 (citations omitted). Thus, this Court rejected the argument that Ms. Wayment was a general-purpose public figure (citing for example to a case where "there was insufficient evidence to qualify a star high school athlete as an all-purpose public figure"). Id. at ¶¶ 25-30.

By no stretch of the imagination is a girls high school coach in a mid-size and rapidly growing Utah town a person of such pervasive fame or persuasive power or influence as anticipated by the case law. O'Connor clearly did not have any extraordinary degree of sway over any issue—not even issues as limited in scope as local school administration—as is contemplated by the case law.

The Parents cited two federal cases to the district court on this score, neither of which decided or applied the general-purpose public person issue, and are therefore inapposite to this case. In Levinsky's, Inc. v. Wal-Mart Stores, 127 F.3d 122 (1st Cir. 1997) the court was not determining whether a public figure was at issue but whether a statement had been made to the press about a matter of "public concern." In that case, a Wal-Mart representative made negative comments to a local reporter about a competitor in the Portland, Maine market. In Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287 (D.C. Cir. 1980), a national trade publication made negative comments about the CEO of a nationwide consumer cooperative owning supermarkets, retail outlets and gas stations. Whether he was a general-purpose public figure was never at issue, and the court's analysis and holding was limited solely to whether he qualified as a limited-purpose public figure. Id. at 1298. In fact, the court concluded that "we believe that a person can be a general public figure only if he is a 'celebrity[,] his name a 'household word' whose ideas and actions the public in fact follows with great interest." Id. at 1292; see also Id. at 1294.

The Parents failed to adduce any instance of a person on the order of a high school coach being adjudged a general-purpose public figure because there are no such cases. Indeed, "very few people . . . attain the general notoriety that would make them public figures for all purposes." Waldbaum, 627 F.2d at 1296. See also Wayment at ¶ 24 ("[t]he requirements for attaining this status are strict, and few qualify").

B. O'Connor is not a limited-purpose public figure.

The Wayment court also discussed the requirements for determining whether a particular person was a limited-purposed public figure. Initially, there must be evidence of a public dispute. In that vein, the court stated:

We agree with the vast majority of courts that have understood a "public controversy," in the context of limited-purpose public figure determinations, to be "not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." ("A public 'controversy' is any topic upon which sizeable segments of society have different, strongly held views."). In other words, "persons actually [must have been] discussing some specific question. A general concern or interest will not suffice." "If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy."

Id. at ¶ 35 (citations omitted).

That reasoning both pertains to and has important implications for this case. Whether a girls basketball coach should be terminated is not a public controversy, particularly when the only persons who seemed to be involved in this controversy were the Parents, their daughters and perhaps a few of their friends. There were not substantial ramifications for

nonparticipants or for the community at large. Moreover, once O'Connor was removed from being the basketball coach, neither the Parents nor anyone else has been heard to complain about O'Connor continuing to teach at the school or to coach other girls' sports.²⁴

The Wayment court then noted that for a plaintiff to be a limited-purpose public person, the plaintiff had to be voluntarily active in promoting or getting involved in the public controversy at issue so much so that, at least for the issue in question, he or she had become a public person. This Court concluded that although the issues surrounding Ms. Wayment and her ultimate termination had become public, there was no indication that Ms. Wayment had put herself into any public dispute except to bring the litigation.

Even if [the issues concerning Ms. Wayment amounted to public debate], however, we could not conclude that Wayment voluntarily thrust herself to the forefront of a controversy over her own or others' unethical activities. Such a conclusion would be equivalent to holding that any individual who engages in activities that attract public attention thereby injects himself into a public controversy over the conduct.

Id. at ¶ 39.

Here, there was no public dispute, and in any case O'Connor did not inject himself into the dispute. At most, after the dispute was at its peak he was interviewed for one or two newspaper articles along with other parties to this litigation. The evidence is that he did not in any way solicit the articles or engage in any public discussions or debate. Indeed one of the Parents' early complaints is that O'Connor would not agree to meet with a large group

²⁴ In fact, during the 2004-2005 school year, O'Connor was named coach of the month by the students in their school newspaper.

of them but rather would agree only to meet with them one-on-one. (R. at 844-45.) The Parents participated in numerous gatherings and meetings, including the public meeting before the School Board, all without O'Connor being involved or even having an opportunity to speak. The bulk of the defamatory conduct occurred prior to any newspaper articles.

Whether someone is a public person for the purposes of a defamation suit is an issue of law. Wayment, 2005 UT 25, ¶ 17. As a matter of law, there is nothing which makes O'Connor a public person. The facts as adduced in this case in no fashion support a finding or conclusion that O'Connor is either a general-purpose or limited-purpose public figure. The Court can rule as a matter of law that O'Connor is neither.

VI. THE DISTRICT COURT ERRED IN RULING THE THAT PARENTS' MEMORANDUM OF COSTS WAS FILED WITH THE COURT WITHIN FIVE DAYS OF THE JUDGMENT.

Utah R. Civ. P. 54(d)(2) provides that a party claiming costs in an action must both serve a memorandum of costs upon the opposing party and file the same with the district court within five days after the entry of judgment. This requirement is in the conjunctive and not the disjunctive: a memorandum must be served on the opposing party and filed with the court. Failure to file a memorandum of costs within the mandatory five-day period requires the exclusion of any such costs from a final judgment. Valcarce v. Fitzgerald, 961 P.2d 305, 318 (Utah 1998). Failure to timely file will result in a memorandum of costs being stricken and an applicant having to bear his or her own costs. This limitation is strictly construed. Highland Constr. Co. v. Union Pac. R.R., 683 P.2d 1042, 1052 (Utah 1984).

In this case, the Order granting Summary Judgment was filed on Wednesday, January 11, 2006. (R. at 1359-66.) As such, the fifth business day after the entry of judgment, and therefore the deadline for serving and filing any memorandum of costs in this case, was Thursday, January 19, 2006. See Utah R. Civ. P. 6(a). Specifically: (i) Day One was Thursday, January 12, 2006 (Utah R. Civ. P. 6(a) (time begins to run on day after act from which time is to be measured)); (ii) Day Two was Friday, January 13, 2006; (iii) Saturday, January 14, 2006, Saturday, January 15, 2006 and Monday, January 16, 2006, the Martin Luther King, Jr. holiday, would not have been included in any time calculation (Utah R. Civ. P. 6(a) (intermediate Saturdays, Sunday, and legal holidays not included in time computation)); (iv) Day Three was Tuesday, January 17, 2006; (v) Day Four was Wednesday, January 18, 2006; and (vi) Day Five was Thursday, January 19, 2006 (Utah R. Civ. P. 6(a) (last day of time period included for computation purposes)). Therefore, at the end of the business day on Thursday, January 19, 2006, the Parents' statutory five-day period in which to submit a Memorandum of Costs expired.

On Day Six, January 20, 2006, the Parents filed their Memorandum of Costs with the district court. By any calculation, this filing was more than five days from the entry of judgment. The Parents failed to provide any explanation for their failure to file a Memorandum with the district court within five days, nor did they ask for an extension during that time.

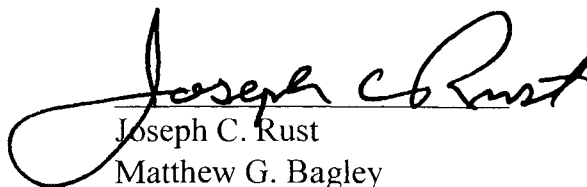
Therefore, by operation of law the Parents' requested costs should not have been considered by the district court and should have been denied and excluded from any final judgment. O'Connor objected to the untimely Memorandum on just this basis (R. at 1499-1508.) However, the district court awarded the Parents taxable costs on the basis that "[t]he Court is satisfied that the Defendants' requests for costs and fees was timely filed." (R. at 1558.) The district court failed to address the merits of O'Connor's objections or demonstrate why they were not well taken. More important, the district court failed to show how the Memorandum of Costs was timely filed for purposes of Rule 6(a) or give sufficient legal reason why Rule 6(a) should not have been followed in this instance. The district court's ruling on this point was a conclusory and self-validating pronouncement without legal support and contrary to the clear and unambiguous provisions of Rule 6(a). As such, the district court's ruling on this point should be reversed and vacated, and the Parents' Memorandum of Costs should be stricken in its entirety.

CONCLUSION

For all the foregoing reasons, this Court should reverse and vacate the district court's summary judgment, and instruct the district court to submit the case to a jury for further fact finding at trial of this matter.

DATED this 29th day of April, 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 a true and correct copy of the foregoing **APPELLANT BRIEF**, in Case No. 20060090, postage prepaid, this 28 day of April, 2006, to:

- FEDERAL EXPRESS
- U.S. MAIL
- HAND DELIVERY
- TELEFAX TRANSMISSION

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ADDENDUM

FILED
Fourth Judicial District Court
of Utah County, State of Utah
11 30 05 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

Michael P. O'Connor,	:	
Plaintiff	:	Memorandum Decision
vs.	:	Date: November 30, 2005
Gary W. Burningham, et. al.,	:	Case Number: 040402938
Defendants	:	Division VII: Judge James R. Taylor

This matter comes before the Court on the Defendants' motion for summary judgment. After briefing and oral argument the motion was taken under advisement. The Court now makes this memorandum decision.

Both the United States Supreme Court and the Utah Supreme Court have expressed a preference for pretrial resolution of defamation actions "when it appears that a reasonable jury could not find for the plaintiffs," West v. Thomson Newspapers, 872 P.2d 999 at 1015 (Utah, 1994). As matters of law several key questions must be answered by the Court before a case may be submitted to the jury. These include "whether the statements or declarations are capable of sustaining a defamatory meaning and whether any qualified or absolute privileges preclude the claim," West, supra at 1008.

After the complaint was filed and served in this case the Defendants moved to dismiss on the ground that the Plaintiff had failed to state a valid claim for relief. The motion was denied because this Court concluded that the Plaintiff was either a private figure in which case the

allegations were not privileged or was a public figure and that the Plaintiff had properly alleged malice in paragraph 20 by claiming that “[a]t the time of their meeting with the School Board Defendants knew or should have known that their statements were untrue.”

During oral arguments the parties informed the court that discovery was complete and that all of the evidence which would describe or present the statements which the Plaintiff felt had subjected him to defamation were included in the materials submitted with the motions for summary judgment. This Court now concludes that the Plaintiff is a public figure, for First Amendment purposes and that the declarations of the various defendants fall within the privilege described in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct 710 (1964). Under that case a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not, Van Dyke v. KUTV, 663 P.2d 52 at 54 (Utah, 1983). In general, citizens must be free “to applaud or to criticize the way public employees do their jobs, from the least to the most important,” Van Dyke v. KUTV, *Id.* In order for the privilege to exist “the employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy,” Van Dyke v. KUTV, at p.55.

In this case the Plaintiff was hired to coach the women’s basketball team at Lehi High School. He was a successful women’s coach in California and was hired to come to Lehi in spite

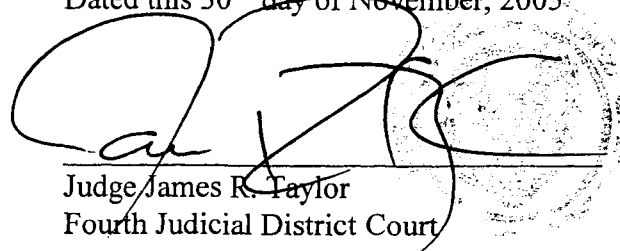
of the need to obtain waivers of endorsements to allow him to take the job here. High school sports are played not only for the general training and education of the athletes but are sources of entertainment and interest for the community. The Plaintiff has insisted that, as coach, he should have been able to run the program which the Court takes to mean, in addition to determining which players to keep on the team and which to “cut,” to decide how the team should function and to manage other administrative matters including supervision of up to four assistant coaches and the various fund raising activities connected with the team. The Plaintiff is and was a public employee who was charged with specific decision making authority about a program which was intended to provide educational opportunities for children in a public forum which invited public attention and scrutiny. The undisputed evidence presented in connection with this motion is that problems such as this were routinely discussed in public forum sessions of school board meetings, which is what occurred in this case.

As noted above, in order to sustain a defamation action against a public official a plaintiff must demonstrate that the declarations were made when the defendants knew or should have known that they were false or that they were made with reckless disregard for the truth. Such proof has been characterized as “actual malice” under New York Times, supra. There is no evidence in this case of actual malice. The Court has carefully reviewed all of the letters, the minutes of the parent’s meeting and the minutes of the school board meeting. Nowhere is there any indication that any of the persons who were criticizing the Plaintiff knew or should have

known that they were speaking a falsehood or that they were reckless or uncaring as to whether what they were saying was true or not. All of the declarations appear to be forthright descriptions of what they had observed coupled with their opinion as to the effect of the situation upon their children.

Inasmuch as there is no evidence of actual malice, the matter cannot be submitted to a jury to determine if the statements are otherwise defamatory or have occasioned damages for which compensation should be paid. Accordingly, the Court grants summary judgment to the Defendants. Counsel is directed to prepare an appropriate order in accordance with the Rules of Civil Procedure.

Dated this 30th day of November, 2005.



Judge James R. Taylor
Fourth Judicial District Court

A certificate of mailing is on the following page.

O'Connor v. Burningham 040402938 Memorandum Decision 11/30/05

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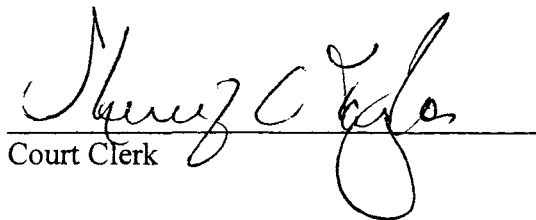
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Mailed this 30 day of 7/05, 2005, postage pre-paid as noted above.


Court Clerk

FILED
Fourth Judicial District Court
of Utah County, State of Utah
2-14-06 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

Michael P. O'Connor,	:	
Plaintiff	:	Ruling
vs.	:	Date: February 14, 2006
Gary W. Burningham, et. al.,	:	Case Number:
Defendants	:	Division VII: Judge James R. Taylor

This matter comes before the Court following the receipt of a request to rule from both sides on the pending request for attorney fees and costs. Although both have requested oral argument the Court is satisfied that the issues are fully and fairly presented in the briefs and that further argument would not substantially advance the Court's understanding of the question. The requests for oral argument are, therefore, denied.

This case commenced with the filing of a complaint on September 15, 2004. The first responsive pleading was a motion to dismiss filed October 14, 2004. After briefing and argument on December 1, 2004 the motion was denied. Some Defendants were dismissed by stipulation and a petition for interlocutory appeal was denied. By early spring of 2005 the operative answers had been filed and substantial discovery was undertaken. No counter-claims or cross claims were asserted by any Defendants. At the conclusion of discovery the Court was presented with the Defendant's motion for summary judgment. The motion was argued on November 17, 2005. The Court issued a written ruling on November 30, 2005 granting the

Defendant's motion for summary judgment. Counsel were directed to prepare an order in accordance with the rules of Civil Procedure. The Court intended the parties to follow Rule 7(f) which requires a prevailing party to serve a proposed order within 15 days of the Court's ruling upon the opposing side. Apparently the Defendant declined to prepare the order because, on December 27, 2005 the Court received a proposed order prepared by the Plaintiff. The mailing certificate on the proposed order indicates that it was mailed to counsel for the Defendants on December 16, 2005. The Court waited until January 10, 2006 to give ample opportunity for objection to the order. Receiving none, the Court signed the order on January 10 although it was formally entered by the clerk on the following day, January 11, 2006. The Defendants' combined motion for attorney's fees was signed, mailed to Plaintiff's counsel and filed with the Court on January 10, 2006. This Court did not have that motion before it when the Order was signed on that same day. Nevertheless, the motion does not object to the form of the order and would not have cause a delay in execution of the proposed Order. The affidavit of attorney fees to be considered in connection with the motion was received later, on January 12, 2006. The Verified Memorandum of Costs was filed on January 20, 2006 and the Notice of Appeal and Cost Bond were filed on January 23, 2006. For convenience, these days might be considered in table format:

Complaint filed	9/15/04
Motion to Dismiss	10/14/04
Oral argument, motion denied	12/1/04
Answers filed, no counter-claims	Spring 2005
Oral Argument, summary judgment	11/17/05
Memorandum Decision	11/30/05

Proposed Order mailed	Friday, 12/16/05
Proposed Order filed	Tuesday, 12/27/05
Proposed Order signed	Tuesday, 1/10/06
Motion for attorney fees filed	Tuesday, 1/10/06
Judgment entered	Wednesday, 1/11/06
Affidavit of attorney fees	Thursday, 1/12/06
Memorandum of Costs	Friday, 1/20/06
Notice of Appeal	Monday, 1/23/06

Costs

Rule 54(d), URCP, provides that “[t]he party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of his costs and necessary disbursements in the action, and file a like memorandum thereof duly verified . . .” Rule 6, URCP, also provides that “[w]hen the period of time prescribed or allowed . . . is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.” The judgment in this case was entered on Wednesday, January 11. The verified memorandum of costs and disbursements was filed on Friday, January 20. Martin Luther King day, a legal holiday, occurred on January 16. Five business days, excluding the weekend and the holiday made the pleading due on that day, January 20, 2006. The memorandum was, therefore, timely filed.

Counsel for the Plaintiff is, however, correct that some of the items assessed as costs are not properly recoverable costs under Rule 54(d). Travel mileage, postage, copy expenses and legal research are certainly normal costs of litigation and appropriately included in a general charge for fees. They are not, however, properly taxed as court costs under the rule. The

depositions were necessarily incurred when this Court denied the preliminary motion to dismiss and, whether actually cited and presented or not, fairly led to the conclusion that all available and relevant evidence had been explored and presented in connection with the motion. The interlocutory appeal filing fee was reasonably and appropriately incurred as a taxable cost. In summary, the Court determines that the following identified costs are properly charged:

1/05/05 transcript from Beverly Lowe for 12/01/04 hearing	\$187.00
1/18/05 filing fee for interlocutory appeal	205.00
4/15/05 witness fees (total)	122.09
4/20/05 service fees (total)	176.00
4/26/05 service fees (total)	<u>252.00</u>
Total	\$942.09

Attorney Fees

The Defendants seek substantial fees upon two alternate theories. First they assert that this action was without merit or frivolous and brought in bad faith which would entitle them to recover fees under Utah Code Annotated section 78-27-56. Secondly, they claim relief under Utah Code Annotated section 78-58-105, the Citizen Participation in Government Act. Each will be discussed.

In order to prevail in a claim for fees under section 78-27-56 the Defendants have to establish both proofs. That is, they must show that the claim is without merit and they must also show that the action was not brought in good faith. This Court has already concluded, by its ruling on the motion for summary judgment, that the claim is without merit. The case survived a motion to dismiss because the Plaintiff did plead that the Defendants had acted with malice and

whether malice was needed or present was a fact intensive question that deserved discovery and investigation. When discovery was concluded the evidence, in the view of this Court, demonstrated that the Plaintiff was a public figure. There was, however, a complete lack of any evidence of malice under the Sullivan standard (New York Times Co. v. Sullivan, 376 U.S. 254 (1964)). As it panned out, the case was without merit.

The other requisite proof, however, also requires some factual basis. This Court cannot simply conclude that because a party failed to make out a case that it was initially brought in bad faith. No one has alleged a failure to properly investigate under Rule 11. The public figure question was fairly presented and argued in the motion to dismiss, the request for interlocutory appeal and, again, in the motion for summary judgment. This Court has never ruled on the nature of the claimed statements, themselves, except to find that there is no indication that any of the statements were intended as falsehoods or that the speakers were reckless as to whether they were speaking the truth. Whether the comments were mere opinion or whether they were truthful statements was not a question answered by this litigation. The case was dismissed because the Court found the higher standard of proof applied and was not met. There is insufficient evidence in this case to support a conclusion by anything other than speculation that the Plaintiff initially acted in bad faith. The Defendants have failed, therefore, to establish a claim for relief under section 78-27-56.

The Citizen Participation in Government Act is a relatively new law, enacted in 2001

which has not yet been significantly scrutinized by our appellate courts. It is the view of this Court, however, that the application of the act is broadly defined and would include the presentation of complaints and information relative to school teachers and coaches to the local school board.

Section 78-58-105 states that:

A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover: costs and reasonable attorney's fees, upon a demonstration that the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law;"

To recover, a defendant must, first of all, "maintain an action, claim, cross-claim, or counterclaim." The defendant must also show that no reasonable legal argument could be made to sustain the claim. This Court finds that the Defendant fails on both proofs.

This act (chapter 58 of title 78) plainly purports to create not only the possibility that an aggrieved party could claim attorney fees and costs but compensatory damages, as well. The law contemplates a lawsuit, complete with pleadings, discovery and all of the due process normally associated with litigation. Applying the doctrine of *ejusdem generis* to the statute, the Court concludes that the ambiguous terms "action" and "claim" should be given a meaning similar to the balance of the listed items, "cross-claim" and "counterclaim" meaning a request for relief formally plead. And, more importantly, plead in such a way that a formal response is called for

and thoroughly discovered and argued.

In this case the first assertion of a right to attorney fees under the statute arose contemporaneously with the execution of the final summary judgment. Although ample opportunity existed for a counter-claim for fees under this statute the Defendants never made such a formal claim. Whether a separate suit may now be instituted under the statute is not before this Court and the Court makes no opinion on the viability of such a lawsuit. But the Defendants have not, in this case, properly maintained an “action, claim, cross-claim, or counterclaim” as authorized by the statute.

The foregoing notwithstanding, the Court is also not satisfied that the Defendants have established that this case was commenced without a substantial basis in law. The statute does not require fees to be awarded for every successful defendant. A plaintiff need not, under this statute, always sue at his peril. A substantial basis in law is not, necessarily, limited to a successfully established legal claim. As noted above, this Court has not considered whether the statements about the Plaintiff which he asserts to have been defamatory were true or untrue, opinion or otherwise. That the Plaintiff was unable to successfully argue that he was a private person, able to pursue a defamation claim without showing malice is not sufficient to show that he should, therefore, pay fees under the statute. This Court is confident that it has ruled correctly. Nevertheless, there is no direct Utah authority and the Plaintiff’s position was not completely without merit.

Conclusion

The Court is satisfied that the Defendants' request for costs and fees was timely filed. \$942.09 of those costs are fairly taxed as costs in this suit and judgment in favor of the Defendants and against the Plaintiff in that amount should enter. While, for purposes of Utah Code Annotated section 78-27-56 the Defendant has demonstrated the Plaintiff's case to be without merit, there is not an adequate showing that it was brought in bad faith to justify an award of attorney fees. Moreover, the Defendant has failed to maintain an "action, claim, cross-claim, or counterclaim" as required by Utah Code Annotated section 78-58-105. There is also no basis for this Court to conclude that the Plaintiff's unsuccessful cause of action was without substantial basis in fact and law when it was filed. The request for attorney fees is, therefore, denied. Counsel should prepare an order reflecting this decision in accordance with the Rules of Civil Procedure.

Dated this 14th day of February, 2006


Judge Robert E. Taylor
Fourth District Court

The image shows a circular court seal for the State of Utah, Fourth District Court. The seal features a central figure and the text "STATE OF UTAH" at the top and "FOURTH DIST COURT UTAH" at the bottom. A handwritten signature is written over the seal and extends to the right.

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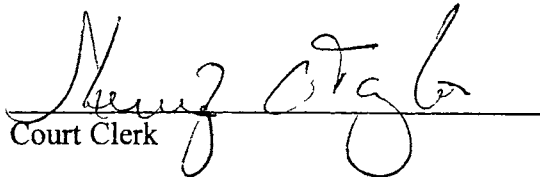
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