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

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IN THE UTAH SUPREME COURT

MICHAEL P. O'CONNOR, Plaintiff/Appellant, vs. 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 JOHNSON, JEFF BURNINGHAM, and JOHN DOES 1-50, Defendants/Appellees.	**Case No. 20060090**

BRIEF OF APPELLEES

APPEAL FROM A GRANT OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH, JUDGE JAMES R. TAYLOR PRESIDING

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JURISDICTIONAL STATEMENT

The plaintiff, Michael P. O'Connor ("O'Connor"), appeals from a grant of summary judgment in favor of the defendants who had not already been dismissed from the case (the "Parents"). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Issue: Whether O'Connor has met his burden of identifying, as to each defendant, a statement capable of sustaining a defamatory meaning.

   Standard of Review: Whether a plaintiff has met the burden of identifying, as to each defendant, a statement capable fo sustaining a defamatory meaning is a question of law. *See West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994).

2. Issue: Whether O'Connor was a "public official" for purposes of defamation.

   Standard of Review: The determination of a defamation plaintiff's public official status is a question of law, reviewed for correctness. *See Wayment v. Clear Channel Broadcasing, Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271.

3. Issue: Whether O'Connor adduced evidence that the Parents acted with "actual malice."

   Standard of Review: "Whether the evidence is sufficient to support a finding of malice is a question of law." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992).

4. Issue: Whether the Parents' statements were absolutely privileged.

   Standard of Review: "The existence of a privilege is a question of law for the [C]ourt." *Id.* at 900.

5. Issue: Whether the Parents' statements were qualifiedly privileged.

Standard of Review: "The existence of a privilege is a question of law for the [C]ourt." *Id.*

6. Issue: Whether O'Connor adduced evidence that the Parents acted with "common law malice."

Standard of Review: "Whether the evidence is sufficient to support a finding of [common law] malice is a question of law." *Id.* at 905.

7. Issue: Whether issues regarding the district court's award of costs are properly before this Court.

Standard of Review: Whether issues are properly before this Court is a question of law. *See State v. Jameston*, 800 P.2d 798, 801-02 (Utah 1990).

8. Issue: Whether the Parents' Verified Memorandum of Costs was timely filed.

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

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution amend. I

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

Utah Constitution art. I, § 1

> All men have the inherent and inalienable right to . . . petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Utah Constitution art. I, § 15

> No law shall be passed to abridge or restrain the freedom of speech or of the press. . . .

Utah Code Ann. § 53A-3-421(1)(a)

> No civil action by or on behalf of a student to the professional competence or performance of a licensed employee of aschool district, . . . or a violation of ethical conduct by an employee of a school district, may be brought in a court until at least 60 days after the filing of a written complaint with the local board of education of the district, or until findings have been issued by the local board after a hearing on the complaint, whichever is sooner.

Utah R. App. P. 3(d)

> The notice of appeal . . . shall designate the judgment or order, or part thereof, appealed from.

STATEMENT OF THE CASE

O'Connor brought a lawsuit alleging defamation against thirty-one named defendants. Four of those defendants were dismissed from the lawsuit. The remaining defendants (the Parents) moved for summary judgment. The district court granted the motion and dismissed, with prejudice, O'Connor's claims against the Parents. The district court also awarded costs to the Parents. Prior to the district court's order awarding costs to the Parents, O'Connor filed a notice of appeal from the order of dismissal.

STATEMENT OF FACTS

"[W]e thought I would put my name in for an opportunity."

While attending Brigham Young University ("BYU"), O'Connor was a student teacher and assistant coach to Dave Houle, a full-time teacher and coach at Mountain View

High School in Orem, Utah. (R. 1145a, 1146a.)[1] Following graduation from BYU, O'Connor worked as the head coach of the girls' basketball team at Bellflower High School for about seven years. (R. 1147a.)

Beginning in about 1998, O'Connor applied for four other coaching positions in California. (R. 1145, 1145a.) He received one offer, which he declined. (*Id.*) Then, in the spring of 2001, Dave Houle called O'Connor and told him that there might be a teaching and coaching position opening at Mountain View High School in Orem. (R. 1145a.) O'Connor traveled to Utah to submit an application with the Alpine School District and apply for the position. (R. 1144, 1145a.) Although he was interviewed for the position at Mountain View High School, the job was offered to someone else. (R. 1144.)

After her husband did not get the job at Mountain View High School, O'Connor's wife found a posting on the Alpine School District's web page for a position at Lehi High School as the head coach of the girls' basketball team. (R. 1146.) O'Connor and his wife "thought [he should] put [his] name in for an opportunity," so he called Lehi High School and left a message, saying that he had an application on file with the district and was interested in the position at Lehi High School. (R. 1144.) The Lehi High School principal, Mr. Sheldon Worthington, then called O'Connor and initiated an interview. (R. 1144.) After the District agreed to allow O'Connor to teach sociology and American problems classes

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[1] Some pages in the Record have information on both sides; however, Record numbers appear only on the front of each page. Accordingly, for clarity, citations in this brief to the front side of a page in the Record are made by simply referencing the appropriate page number, i.e., R. 100. Citations to the reverse side of a page in the Record are made by referencing the appropriate page number and adding an"a," i.e., R. 100a.

(courses for which he lacked a teaching endorsement), O'Connor accepted an offer to teach and coach at Lehi High School. (R. 1142, 1143, 1143a, 1144a.)[2]

Head Coaching Responsibilities

As head coach, O'Connor oversaw the budget for the Lehi High School girls' basketball program, which was allocated from public funds. (R. 1136.) He also oversaw a number of fundraising efforts, which raised money through donations directly from members of the community. (R. 1137, 1137a.) O'Connor decided which girls made the team, and he was responsible for the activities of those girls while on the team. (R. 1121.) He was also responsible for a coaching staff of four assistant coaches. (R. 1140, 1141a.) O'Connor directed the team's travel, not only with respect to regular season road games, but also to the annual state playoff tournament and to an annual invitational tournament in Arizona. (R. 1106, 1108a, 1137a.) He was also responsible for the girls' participation in a spring league, summer workouts, and a team camp during the spring or summer. (R. 1103a.)

"There's yelling, yeah. There's nothing wrong with that."

With O'Connor at the helm, the Lehi High School girls' basketball team's winning percentage improved (R. 659), but his approach to communicating with the girls caused concern among some parents. (R. 1105a.) In this regard, O'Connor testified as follows:

> Q. Okay? You were approached by the parents who had some concern on how you were treating their daughters, screaming at them, yelling at them; right?

---

[2] O'Connor states that "while successfully coaching in California," he "was recruited to coach at Lehi High School." (Appellant's Brief, p. 7.) There is no Record evidence regarding his success in California, and he was "recruited" by only to the extent that Principal Worthington returned his phone message and initiated the interview process.

A. I've had some come to me, yes.

Q. So it's not true that you were not aware of the concern that you were screaming and yelling at the players?

A. It wasn't – I mean it depends how we're defining screaming and yelling here.

Q. Well, right now we're defining it the way the parents did when they approached you and asked you not to do it.

A. I've had some come to me about their daughter being yelled at, yes.

(R. 1105a.)

Q. Did you ever scream and rave at the girls?

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

(R. 1106a.)

Q. You see where it says "Harrison said the team gets yelled at sometimes when they fail to run plays or follow directions, but said she's grown accustomed to that in sports." Is that a true statement?

A. There's yelling, yeah. There's nothing wrong with that.

(R. 1098a.)

Q. Well, you had – you indicated there's at least two that talked to you about screaming at their children.

A. One during that season, one during her sophomore season two years prior.

Q. So you knew that there were those concerns as well? At least on the part of those parents?

A. That particular parent. And we worked that out with that daughter.

Q. And you didn't scream at her anymore?

A. We worked around that.

Q. Had you screamed at her?

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

(R. 1104a.)

"[She was] our best player . . . [and] all our girls knew that."

During the 2003 to 2004 season, there also developed a concern among players and parents that O'Connor favored one girl on the team over the others and treated her differently. (E.g., R. 1157.) Specifically, Michelle Harrison ("Michelle") was considered by O'Connor to be the "best player" on the team, and he believed that "all [the] girls knew that [she was]." (R. 1110.) Indeed, as O'Connor observes in his brief, "[s]ubsequent to the filing of this appeal, [Michelle] 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." (Appellant's Brief, p. 7.) Accordingly, when Michelle was a sophomore, O'Connor named her to be one of the two team captains, and he told the seniors on the team that they could take turns filling the other captain slot. (R. 1110.) O'Connor also testified that Michelle was not required to abide by standards imposed on other team members in that, at two different tournaments, he allowed Michelle to travel and room with her mother (and stay out late on one occasion), while the rest of the team was required to travel on the team bus and stay together. (R. 1127, 1127a.) Michelle was also allowed during games to wear a different color of shoes than the other girls, who were all required to all wear the same color of shoes. (R. 1167.) O'Connor denied

other allegations of preferential treatment toward Michelle (e.g., R. 1106, 1107a.) but acknowledged "that there were problems with team unity." (R. 1126.) Ultimately, O'Connor admitted telling the team that if they caused Michelle to leave Lehi High School he would quit as their coach. (R. 1102a.) When school administrators discussed the asserted preferential treatment with Michelle's mother, she responded: "Well, I can do whatever I damn well please. . . . No one would have stopped me." (R. 1164.)

"[I]t would be out of compliance now but it wasn't then."

In addition to issues related to O'Connor's coaching style and preferential treatment of Michelle, there were concerns raised by some parents that O'Connor may have improperly recruited Megan Heriford ("Megan") to transfer from Mountain View High School to Lehi High School. (R. 1159a.) In this regard, O'Connor testified that he knew Megan before she transferred to Lehi High School and that her parents contacted him regarding their desire that she transfer to Lehi High School for her senior season. (R. 1139, 1139a.) O'Connor testified that Megan's parents told him that they wanted Megan to transfer to Lehi High School in order to have "an opportunity to play." (R. 1139a.) Correspondingly, Parents of girls already on the team were concerned

> that the only reason [Megan] was coming to play for Lehi is because she could not make the team from Mountain View, that she wasn't going to have a starting role or a major role or that she would see little or no playing time, where coming to Lehi she would be able to make a contribution to the program. But by thus doing, she would displace other girls who had been in the program.

(R. 1159a.)

O'Connor testified that he advised the Herifords to contact the Lehi High School assistant principal in charge of athletics to make sure that if Megan transferred, it would be in compliance with the rules of the Utah High School Athletic Association ("UHSAA"). (R. 1139a.) O'Connor then also called the assistant principal himself to notify him that "that [the Herifords] were thinking of transferring [and] that they may be calling him." (*Id.*)

At the time, a student could transfer schools in compliance with UHSAA rules by either (1) obtaining written consent from the principals of both schools, or (2) physically moving into the new school's boundaries. (R. 1138.) The Herifords moved to within the Lehi High School boundaries (*id.*), and Lehi High School conducted "home visits . . . to the residence to make sure that they did, in fact, have a residence in the attendance area." (R. 1159a.) Principal Worthington testified that, after the school's investigation, he concluded that O'Connor had not engaged in wrongful recruiting under the UHSAA rules in effect at the time. (*Id.*) The evidence is unclear, however, as to whether Lehi High School actually notified the concerned parents of the results of this investigation, where Principal Worthington testified as follows:

> A. Did I believe he was wrongfully recruiting? No.
>
> Q. Did you discuss that with the parents, your belief?
>
> A. I didn't specifically. My assistants did. They said that they would follow up to make sure that we were totally compliant with UHSAA rules and that was done.

(*Id.*) Principal Worthington also testified that, although permissible at the time, Megan's transfer to Lehi High School would be out of compliance with current UHSAA rules. (R. 1159a.)

"You're going to get fired . . . if you don't answer to what you're doing with the money."

Finally, concerns were raised that O'Connor may have been mishandling monies raised by the girls. (E.g., R. 776.) Ms. Judi Harrison, Michelle's mother, told O'Connor of this concern in November of 2003, stating: "You're going to get fired for the money if you don't answer to what you're doing with the money." (R. 776, 1138a.) In response, O'Connor called a meeting for all of the parents with girls on the team. (R. 776.) At least one parent of each girl on the team attended the meeting. (R. 1137.) There, although O'Connor explained his position with respect to team finances (R. 837-41) and "kept asking for questions" the parents "didn't ask [any questions]." (R. 775.)

Some parents took their concerns regarding O'Connor's possible mishandling of funds to school administrators. (R. 1248, 1269.) The school investigated and concluded that there had been no mishandling of funds by O'Connor. (R. 1248, 1268.) But the school did not communicate the results of their investigation to the concerned parents, as Principal Worthington testified:

> A. I can see how parents might misconstrue or misunderstand, not having knowledge of how public education funds are used, how they're recorded, the purchasing procedures. So I - this is not the first time that a coach or staff member has been questioned about monies.
>
> Q. Do you believe that it's constructive - well, you believe that that issue had been resolved through your investigation, correct?
>
> A. I believe it was resolved.

Q. And you believe that was communicated back to the parents?

A. I don't know to what degree. I think it was mentioned, but I didn't write, I mean I didn't make an attempt to communicate to every parent.

(R. 1248.)

Timeline of Relevant Communications

Some of the foregoing concerns were raised with school administrators in November 2003, prior to the start of basketball season. (R. 1160.) At that time, Principal Worthington discussed the concerns with his assistant principals, and they decided to simply monitor the situation. (*Id.*) In March 2004, after the conclusion of the state tournament in February, several parents again raised their concerns with school administrators. (R. 1160a, 1168a.) In response, the principal, athletic director, and assistant coaches met with a number of parents individually. (R. 1159, 1166a, 1167.) After talking to, and receiving letters from, a number of the parents, administrators met with O'Connor and informed him of the parents concerns. (R. 1159, 1159a.) O'Connor, however, expressly refused to meet with the parents as a group to discuss their concerns. (R. 1138.) Accordingly, the parents held a meeting of their own on March 9, 2004, and minutes were kept of this meeting. (R. 1015-17.)

On April 14, 2004, Principal Worthington sent a letter to the parents, in which he stated in part:

> I recently had the opportunity to speak with several of you about ways to improve . . . basketball program. . . .
>
> It was interesting to me that <u>everyone</u> no matter whose daughter was on the team wanted the same thing. It was also interesting that even though individual perceptions were at times directly in

> opposition with each other, everybody spoke with a conviction and passion that was compelling. Where in lies the truth? The truth lies in each one's perception. Individual perception becomes the truth no matter what did or didn't happen. The question really becomes, "What is each person, parent, player, and coach willing to do?" If one is not willing to try to change their perception, there is no point in trying because whatever is done will never be good enough. If this is your reality, perhaps the best thing for you to do is to move to another community and program . . . .
>
> Upon review of the whole situation we have set forward the following guidelines and recommendations:
>
> 1. We have spoken to Coach O'Connor and given him recommendations shared with us by all parents. He has committed to examine and improve the program wherever he can. He has our full support.
>
> . . . .
>
> 4. Parents are invited to express any concerns they might have to LHS administration. We will carefully consider each concern brought to our attention and pass it along.
>
> . . . .
>
> 6. We ask that you communicate to the coaches individual concerns of schedule conflicts, injuries, illness, etc., and items related to [team parties and rides to practice]. All other communication should go through administration.
>
> 7. We ask our coaches to coach. **Do not contact any coach for anything other than the aforementioned items. Violation of this rule will jeopardize your daughter's position on the team.**

(R. 1171-72 (emphasis in original).)

By June, some parents still had concerns regarding O'Connor. (R. 1152, 1152a.) One parent, Gary Burningham, approached Alpine School Board member Donna Barnes for

direction. (*Id.*) Being fairly new to the Board, Ms. Barnes contacted the School Board president, who told Ms. Barnes: "This is not without precedent. You need to tell them that they should build a case." (R. 1151a.) Ms. Barnes then told Mr. Burningham: "you have to make your case." (R. 1152a.) Thus, several weeks later, Mr. Burningham delivered to Ms. Barnes a set of letters, some from parents and some from other relatives and friends of girls on the team. (R. 1152a, 1015-87.) Ms. Barnes read the letters and then gave them to the secretary of the school superintendent.[3] (R. 1151, 1152a.)

A few weeks later, concerned parents and others attended the regularly-scheduled School Board Meeting on July 20, 2004. (R. 1008-13.) At that meeting, five parents addressed the board regarding their concerns with the Lehi High School girls' basketball program.[4] (R. 1011-12.) Ms. Barnes testified about the School Board meeting as follows:

> Q. Okay. Do you personally believe that the parents were exercising their rights as parents living in the school district to voice concerns at a school board meeting about what they perceived to be problems?
>
> A. That's the policy of the board, that if there are concerns, they may address the board in an open board meeting. It happens routinely.

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[3] O'Connor cites pages 1233-37 and 1243 and asserts that Ms. Barnes was "[a]cting in her private capacity and not as an official act of the School Board" (Appellant's Brief, p. 9), but he identifies no evidence in these pages to support that conclusion.

[4] O'Connor states that "four of the Parents" addressed the School Board, "the maximum allowed to speak by the Board." (Appellant's Brief, p. 9.) Five parents addressed the Board, but one of them was not named as a defendant; thus, only four "Parents" addressed the Board. Also of note, O'Connor is unable to point to any evidence that the Board allowed only five people to speak. While not important substantively, this is another example of O'Connor's tendency to recite "facts" that are not supported by the Record.

. . . .

Q. Was everyone courteous and attempting to –

A. Very courteous, very professional in their behavior.

Q. Okay. And certainly there's nothing unusual about parents writing letters to be reviewed by the board as supplemental information to –

A. We get those routinely also.

Q. Okay. And did you consider those to be constructive letters in attempting to resolve a problem?

A. I did.

(R. 1151a, 1239.) The letters that Mr. Burningham had given to Ms. Barnes were not distributed during the meeting. (R. 1151.) After the meeting, the School Board gave the letters to Principal Worthington. (R. 1157.) He chose not to read them. (*Id.*) Instead, he gave them to a vice principal, Rick Robbins, and asked him to show them to O'Connor. (R. 1165.) Three school administrators – (1) Mr. Robbins, (2) the athletic director, Mr. Allan, and (3) another Vice Principal, Mari Braithwaite – then met with O'Connor to show him the letters. (*Id.*) However, none of these administrators read the letters themselves. (R. 1157.)

"[T]here is no problem so I have nothing I need to work on."

O'Connor's response to the letters was "that there was no problem." (R. 1165a.) Even when "Mr. Robbins mentioned . . . that there was a perception that there is [a problem] and as the coach we need to take ownership in those perceptions," O'Connor's response "still was that there is no problem so I have nothing I need to work on." (*Id.*) Indeed, although Mr. Worthington and Mr. Allan offered "to meet with [O'Connor] with parents, to go to their

homes if we needed to and visit with them," O'Connor "didn't respond." (R. 1155a.) Principal Worthington was then informed that O'Connor had said he might cut from the team two daughters of parents he believed had been particularly outspoken. (R. 1158.) Principal Worthington responded by telling O'Connor that he could not cut girls "based on what their parents had done":

> I indicated to him that these girls, one girl was, as a sophomore started every game on the season, was a major player; the other one received a large amount of playing time. I told him that if they were cut from the team, it would have to be that those that were coming into the program were clearly superior ball players than they were.

(R. 1158a.)

> Q. What did Coach O'Connor say to you in response to your telling him that he could not cut these two girls?
>
> A. Coach O'Connor was upset about that. He reiterated the fact that he should be able to cut who he wants to, that that was his decision to make as coach.

(*Id.*) Because O'Connor refused to agree not to cut girls from the team on the basis that their parents had expressed concerns regarding him, Principal Worthington relieved O'Connor of his duties as head coach of the girls' basketball team. (R. 1157a.) In this regard, Principal Worthington testified as follows:

> Q. If Coach O'Connor had committed to you that these girls would not be cut from the team, would he have been released?
>
> A. No.
>
> Q. So that was the straw as it were?
>
> A. Yes, sir.

(*Id.*)[5] O'Connor, however, was retained as both a teacher and a coach at Lehi High School. (R. 1250.)

O'Connor's Publication of the Letters

After being given the letters that the parents submitted to the School Board, O'Connor shared them with Michelle's mother. (R. 1110a.) Michelle's mother then arranged a meeting between herself; O'Connor's attorney, Mr. Rust; and a newspaper reporter. (R. 1088, 1089.) At that meeting the letters were present and discussed. (R. 1089.) O'Connor, though not present at that meeting (R. 1189a), also shared portions of the letters with the newspaper reporter when she interviewed him. (R. 1109.)

The Lawsuit

O'Connor filed a defamation lawsuit against twenty-seven Parents.[6] (R. 1-8.) When asked during discovery to identify a defamatory statement made by each of the Parents, O'Connor designated as defamatory (1) the oral statements of some of the Parents at the March 9, 2004 parents meeting, (2) the oral statements made by some of the Parents at the July 20, 2004 School Board meeting, (3) and thirty-seven different letters, comprising at least 60 pages. (R. 1008-82, 1085-87.) In no legal pleading has O'Connor identified, as to each

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[5] Citing pages 1224-25 of the Record, O'Connor states that "[a]s a direct result of the Parents' defamatory publications, [he] was terminated as the girls basketball coach." (Appellant's Brief, p. 10.) However, pages 1224-25 are from the affidavit of Michelle's father, in which he simply gives his "opinion that the reason Principal Worthington did not renew [O'Connor's] coaching position in the fall of 2004 was because of the defamatory comments of [the Parents]."

[6] O'Connor originally named thirty-one defendants; four were later dismissed. The Parents are those defendants who were not dismissed prior to summary judgment.

of the Parents, a separate statement attributable to each that he believes is defamatory. (E.g., R. 1178-1222.) Indeed, even in his brief on appeal, O'Connor identifies no specific language he believes is defamatory. (Appellant's Brief, generally.) Rather, in his statement of facts, he summarizes the letters broadly, in his own words,[7] without quoting them, and without identifying specific statements attributable to specific Parent defendants. (*Id.*, pp. 7-11.) Then, in the argument section of his brief, he simply says: "[The] defamatory communications are amply cited in the Material Facts submitted to the trial court and supported as required by Utah R. Civ. P. 56." (*Id.*, p. 14.)

During his deposition, O'Connor testified as a lay fact witness with some specificity regarding which specific statements he regards as defamatory. (E.g., R. 1130, 1131a.) In so doing, as to at least four of the letters, O'Connor could not identify anything about the letter that he believed to be defamatory, only that the letter "was with the rest of the letters" (R. 1099), was "used as part of the whole group" (R. 1101), was "just part of everything else" (R. 1101a), or was defamatory when "looking at the whole picture" (R. 1130a). Furthermore, seven of the letters O'Connor designates as defamatory were authored or co-authored by persons who were not named as defendants in the underlying lawsuit – Chad Hillstead, Kade Hillstead, Michael Hyde, Amanda Hyde, Kayla Burningham, Breezy Chandler, and Mrs. Jex. (R. 8, 1185-86.) Additionally, one of the letters was co-authored

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[7] In at least one blatant respect, O'Connor's characterization of the letters is wholly unsupported by the Record. Specifically, he states that the letters accuse him "of physical . . . abuse," and he supports this statement with a citation to sixty pages of the Record. (Appellant's Brief, p. 8.) Nowhere in those pages is there any reference to O'Connor physically abusing the girls. (R. 718-78.)

by John Jex, who was dismissed from the lawsuit. (R. 896-97, 1185.) Likewise, three of the statements made at the March 9, 2004 parents meeting (which O'Connor designates as a source of defamation against him) were made by persons who were not named as defendants in the underlying lawsuit – Robert Gray, Michael Hyde, and Cindy Hyde. (R. 1015-17.)

Filing of the Verified Memorandum of Costs and Notice of Appeal

On January 11, 2006, the trial court entered its final judgment in favor of the Parents. (R. 1366.) The Parents' Verified Memorandum of Costs was thus due on January 19, 2006. *See* Utah R. Civ. P. 6(a), 54(d)(2). The Parents mailed their Verified Memorandum of Costs from Salt Lake City to the court in Provo, and to O'Connor's counsel, on January 18, 2006. (R. 1487, 1540.) The filed Verified Memorandum of Costs bears a date stamp of January 20, 2006, at 9:30 a.m. (R. 1494.) The trial court ultimately awarded costs to the Parents. (R. 1553.)

On January 17, 2006, prior to filing of the Verified Memorandum of Costs, or the trial court's ruling on O'Connor's Motion to Tax the Verified Memorandum of Costs, O'Connor filed his Notice of Appeal from "the final judgment issued . . . on January 10, 2006." (R. 1495, 1552-60.)

SUMMARY OF THE ARGUMENT

O'Connor nowhere identifies, as to each of the twenty-seven Parent defendant, a specific statement that is capable of sustaining a defamatory meaning. Rather, he has dumped on the Court the burden of combing the record to identify and analyze such a statement as to each Parent defendant.

The trial court granted summary judgment on the basis that O'Connor is a public official and produced no evidence that the Parents acted with actual malice. A public official is a public employee whose position is one that attracts public comment and scrutiny of the person holding it, regardless of whether there has been any particular controversy raised. O'Connor's varsity head coaching position plainly fits this description, and he has adduced no evidence that the Parents' statements were made with actual malice.

Even if O'Connor were not a public official, the Parents' statements were absolutely privileged. The United States and Utah Constitutions each protect the right of citizens to petition government officials for redress of grievances. This right is absolute in the context of quasi-judicial proceedings of boards that hold discretion to apply the law to the facts. This Court should hold that, given the statutory authority vested in school boards of this state, the Parents communications to the Alpine School Board were absolutely privileged.

The Parents' communications of which O'Connor complains, were also qualifiedly privileged. A qualified privilege protects statements between persons sharing a common interest. The Parents and school administrators shared a common interest in the welfare of girls on the team and in the qualifications of public school teachers. When a common interest exists, a plaintiff must prove common law malice to sustain a defamation action. O'Connor has adduced no evidence of common law malice.

Finally, O'Connor's Notice of Appeal did not designate the trial court's ruling on costs as part of the judgment appealed from, as required. Thus, issues regarding the award of costs are not properly before the Court. Even if they were, the Parents' Verified Memorandum of Costs was timely filed.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE PARENTS BECAUSE O'CONNOR HAS NOT IDENTIFIED, AS TO EACH OF THE PARENTS, A STATEMENT THAT IS CAPABLE OF SUSTAINING A DEFAMATORY MEANING.

This Court should affirm the trial court's grant of summary judgment in favor of the Parents because O'Connor has not identified, as to each of the Parent defendants, a statement that is capable of sustaining a defamatory meaning. This is so in two respects. First, O'Connor has fundamentally failed to even identify a specific, separate statement as to each Parent defendant that he claims is defamatory. Second, communications that O'Connor references generally as forming the basis of his defamation claims are not capable of sustaining a defamatory meaning.

A. O'Connor Has Failed to Identify a Specific Allegedly Defamatory Statement as to Each Parent Defendant.

O'Connor begins the argument section of his brief on appeal by asserting that "the communications at issue were capable of sustaining a defamatory meaning." (Appellant's Brief, p. 13.) However, he has failed to identify a specific, allegedly defamatory statement as to each Parent defendant, and his claims against the Parents must, therefore, fail.[8]

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[8] This argument was raised and briefed in the trial court (R. 987, 1319-20); and, although the trial court did not base its summary judgment ruling on this ground, the "long-standing rule is that this Court may affirm a judgment of a lower court on a ground other than that relied on by that court." *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988).

In Utah, a defamation Plaintiff need not identify in his complaint "with complete specificity when, where, to whom, or by whom, the alleged defamatory statements were made." *Zoumadakis v. Uintah Basin Med. Center, Inc.*, 2005 UT App. 325, ¶ 3, 122 P.3d 891. Even at the pleading stage, however, the plaintiff is required to "set forth in words or words to that effect" the "language complained of." *Dennett v. Smith*, 21 Utah 2d 368, 445 P.2d 983, 984 (Utah 1968). This case is well past the pleading stage. At this point, a plaintiff's identification of the when, where, to whom, by whom, and specific words that support his defamation claims must, as to each claim, be specific enough to allow a court to determine "[w]hether *a* [*particular*] statement is capable of sustaining a defamatory meaning." *West v. Thompson Newspapers*, 872 P.2d 999, 1008 (Utah 1994) (emphasis added). For example, in *West*, both the trial and appellate courts examined specific phrases within newspaper editorials to determine whether the words used were defamatory. *See id.* at 1001-03, 1008-11; *see also, e.g., Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶ 51, 116 P.3d 271 (setting forth two specific sentences as alleged defamation); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 898 (Utah 1992) (identifying and analyzing specific quotations from a newspaper article that plaintiff believed to be defamatory).

Here, O'Connor merely summarizes in his own words over sixty pages of allegedly defamatory material. Moreover, he admits that a number of these communications are not defamatory of themselves but only defamatory "with the rest of the letters" or viewed "as part of the whole group." (R. 1099, 1101.)[9] Additionally, seven of the letters O'Connor

[9] In a sense, O'Connor thus seems to be pursuing a joint and several liability theory of defamation where, because all of the Parents were speaking on the same general topic,

designates as defamatory were authored or co-authored by persons who are not named as defendants in this case. One of the letters was co-authored by John Jex, who was been dismissed from the lawsuit; and, three of the statements made at the March 9, 2004 parents meeting were made by persons who were also not named as defendants in the underlying lawsuit. With respect to his burden to identify, as to each Parent defendant, a particular statement which he believes to be defamatory, O'Connor has overlooked the caution that "[t]his [C]ourt is not a depository in which the appealing party may dump the burden of argument and research." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998). While O'Connor cites proper authority for what constitutes defamation in Utah, he does not engage in application of that authority to any single specific statement by any single Parent defendant. "Implicitly, rule 24(a)(9) [of the Utah Rules of Appellate Procedure] requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *Id.* In this respect, O'Connor has not complied with rule 24, but rather has "shift[ed] the burden of research and argument to [this] [C]ourt." *Id.*

In *Doggett v. Regents of Univ. of California*, 2003 WL 21666102 (July 1, 2003 Cal. Superior), although the plaintiff alleged the defendants had said or implied "[t]hat Plaintiff was a 'traitor' . . . [t]hat Plaintiff 'couldn't be trusted'. . . [and t]hat no one likes a 'snitch, tattle-tale,'" he lost on summary judgement because he had "fail[ed] to identify any

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they are each responsible for the specific words used by every other Parent, and even by parents, friends, and family members of girls on the team not named as defendants. Yet O'Connor cites no authority for such an approach. On the contrary, the settled rule is that for each defamation claim there must be *a particular statement* made by *a particular person*, capable of sustaining a defamatory meaning.

defamatory statement attributable to any individual defendant." *Id.* at *2-*3. O'Connor's case suffers from the same deficiency. He has failed to identify at least one specific, allegedly defamatory statement published by each of the Parents leaves both the Parents and this Court in the untenable position of having to sift through and dissect the numerous letters and oral communications he identifies, predicting the phrases he may find objectionable, and then setting forth analysis based on these guesses that the words do not sustain a defamatory meaning. That is not this Court's burden. Nor is it the Parents'. Speaking of the specificity with which plaintiffs must plead defamation, this Court has said: "[T]he defendant should not be required to resort to the ofttimes expensive discovery process to drag from a litigant what he really intends to do to his adversary by a vehicle shrouded in mystery." *Dennett*, 445 P.2d at 984. Here, the expensive discovery process has ended, O'Connor has had ample chance to identify the defamatory statements upon which he relies, and still the identity of those statements remains "shrouded in mystery." *Id.* Accordingly, the Court affirm summary judgment in favor of the Parents on the ground that O'Connor has failed to identify as to each Parent defendant "a statement . . . capable of sustaining a defamatory meaning." *West*, 872 P.2d at 1008.

B. Communications that O'Connor References as Forming the Basis of His Claims Are Not Capable of Sustaining a Defamatory Meaning.

Without assuming O'Connor's burden to identify the specific statements upon which he bases his defamation claims, the Parents note that communications representative of those he identifies as the basis for his claims are not capable of sustaining a defamatory meaning.[10]

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[10] This argument was raised and briefed in the trial court (R. 987.)

This is because the letters and other communications upon which O'Connor purports to base his defamation claims contain expressions of opinion and/or verifiable fact. "[E]xpressions of pure opinion fuel the marketplace of ideas[,] . . . are incapable of being verified, [and] cannot serve as the basis for defamation liability." *West v. Thompson Newspapers*, 872 P.2d 999, 1015 (Utah 1994).[11] Additionally, "[i]n this state, truth is an absolute defense to an action for defamation." *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991). By way of example, O'Connor identifies the following letter from Parent defendant Ruby Ray as the sole possible basis for his defamation claim against her:

> To Whom It May Concern: I write this letter to address my concern of the program at Lehi High School, Girls Basketball. I have watched my granddaughter go from a very confident Young Lady, that loves basketball, to a timid not sure of her self player. She loves the game and wants to continue playing as long as time allows. However I know that as long as things stay the same at Lehi, and every play needs to run through one player, I don't see her wanting to play.
>
> In following the girls basketball program all season, I noticed that one player stood out in all the stats the paper would give. I don't for a minute discount her as a great player, however at games I was able to attend, I could see that she was left in even when Lehi was up by a very safe distance. I could not see why the others on the bench were left to sit and watch instead of building the team for the future. I know that it is important to develop your best players, however I think it is also just as important to develop your whole team. I am concerned, I think things need to be changed in the program.
>
> One last thing I would like you to consider, I think the pressure put on this one girl by the coach is not healthy. At the state

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[11] Notably, the trial court found that "[a]ll of the declarations [of which O'Connor complains] appear to be forthright descriptions of what they had observed coupled with their opinion as to the effect of the situation upon their children." (R. 1349.)

> tournament this past year she fell apart. I think she blamed herself, and I think the pressure she felt was just too much for a high school sophomore.
>
> Sincerely Ruby Ray

(R. 1082.) Many of the statements in this letter are mere opinion – i.e., "I know that as long as things stay the same at Lehi, . . . I don't see [my granddaughter] wanting to play." And, while others may be construed as factual assertions – i.e., "every play needs to run through one player" – O'Connor has cited no evidence to show that they are not true or are in dispute. This is especially true of allegedly defamatory statements regarding O'Connor's communications with the girls – i.e., "He also had her so scared of touching the ball, afraid she might be yelled at or called a name." (R. 1080) – where O'Connor admits to having regularly yelled at the girls. Even had O'Connor identified a specific statement by each Parent defendant, it is likely that any such statement would be an expression of opinion or of admitted fact. Accordingly, this Court should affirm on this additional ground the trial court's grant of summary judgment in favor of the Parents.

II.

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE PARENTS BECAUSE (1) O'CONNOR WAS A PUBLIC OFFICIAL AND (2) O'CONNOR FAILED TO ADDUCE EVIDENCE TO SUPPORT A FINDING OF ACTUAL MALICE.

O'Connor's claims against the Parents are for defamation. A defamation plaintiff that is deemed to be a "public official" may not recover "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, 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, 54 (Utah 1983). The trial court concluded that, in light of the undisputed facts, O'Connor was a public official. The trial court also concluded that there is no evidence to support a finding of actual malice on the part of the Parents. The trial court then granted summary judgment in favor of the Parents on the basis of these two conclusions. This Court should affirm the trial court's grant of summary judgment in favor of the Parents because, indeed, (1) O'Connor was a public official, and (2) O'Connor failed to adduce evidence to support a finding of actual malice on the part of the Parents.

A. O'Connor Was a Public Official.

O'Connor was a public official. To be a public official, one must, like O'Connor, be a public employee. *See Cox v. Hatch*, 761 P.2d 556, 560 (Utah 1988). However, "not all public employees are 'public officials,' and those who are 'public officials' do not have that legal status for every kind of defamation." *Id.* Thus, for "public official" status to apply in a particular case, two conditions must be met: "(1) . . . the person must occupy a position which invites public scrutiny, and (2) . . . the alleged defamation must relate to the conduct of the person while in that capacity." *Id.* As to the second of these elements, O'Connor does not dispute that the statements of which he complained relate to his conduct as a public high school coach. As to the first element, the undisputed evidence shows that O'Connor occupied a position that invited public scrutiny and was, therefore, a public official.

This Court has elaborated on the first of the two foregoing elements by explaining that a person is a public official when employed in a public position that "'has 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.'" *Van Dyke*, 663 P.2d at 54-55 (citation omitted). Stated another way, "'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.'" *Id.* at 55 (citation omitted). Under the foregoing standard, O'Connor clearly was a public official.

1. Public School Teachers are Public Officials.

O'Connor insists that the public official inquiry in this case is whether public school teachers are, in every instance, public officials.[12] As O'Connor observes, Utah courts have not addressed whether a public school teacher is a public official. However, this Court has observed that "[i]n civilized societies since antiquity it has been realized that the welfare, training and education of children are of such vital importance as to be a matter of public concern." *In re K.B.*, 7 Utah 2d 398, 401, 326 P.2d 395, 396 (1958). This Court has also stated, in the context of a "public official" analysis, that "'where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.'" *Van Dyke*, 663 P.2d at 54 (citation omitted). As the logical extension of these expressions, this Court should concur with those other jurisdictions holding that public school teachers are public officials. *See Corbally v. Kennewich Sch. Dist.*, 973 P.2d 1074, 1077 (Wash. Ct. App.

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[12] In reality, the question of O'Connor's public official status does not necessarily turn on such a broad inquiry. Rather, the issue may be narrowly cast as whether the head coach of a public high school varsity basketball team who has authority over a substantial budget, staff, roster, fundraising activities, and travel schedule, and who coaches an exceptionally talented and nationally recognized player, is a public official. This issue will be addressed following response to the broad assertion that public school teachers generally cannot be deemed public officials.

1999); *Campbell v. Robinson*, 955 S.W.2d 609, 612 (Tenn. Ct. App. 1997); *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. Ct. App. 1995); *Kelly v. Bonney*, 606 A.2d 693, 711 (Conn. 1992); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978); *Sewell v. Brookbank*, 581 P.2d 267, 270 (Ariz. 1978). Of particular note is the sound reasoning of the Connecticut Supreme Court and of the Minnesota Court of Appeals. The Connecticut Supreme Court explains:

> Robust and wide open debate concerning the conduct of the teacher in the schools of this state is a matter of great public importance. . . . [T]eachers' positions, if abused, potentially might cause serious psychological or physical injury to school aged children. Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms. Further, teachers exercise almost unlimited responsibility for the daily implementation of the governmental interest in educating young people. In the classroom, teachers are not mere functionaries. Rather, they conceive and apply both policy and procedure. As a result of that significant public interest, it is also likely that the media would not only provide a teacher about whom allegations have been made with an opportunity to respond, but that the media would encourage comment by the teacher. Therefore, we conclude that . . . the plaintiff school teacher was a public official for defamation purposes.

Kelly, 606 A.2d at 711. The analysis of the Minnesota Court of Appeals is similar:

> We conclude that a public school teacher is a public official. We note that Minnesota strongly emphasizes education. Also, teachers act with the authority of the government. Teachers who abuse their positions may affect many lives. . . . [O]ur society gives teachers great authority and holds them in a position of special trust. Given this authority, the public has a greater than normal interest in being able to debate and criticize freely the conduct of public school teachers.

Elstrom, 533 N.W.2d at 56 (quotation and citations omitted). Utah's commitment to education is no less than that of these states, and the authority and trust reposed in the teachers of this state is no less significant. Given these considerations, this Court should likewise conclude that public school teachers are public officials for defamation purposes.

2. Public High School Varsity Team Coaches are Public Officials.

However, the Court need not determine that all public school teachers are public officials to affirm the trial court's conclusion that O'Connor was a public official. O'Connor was not simply a public school classroom teacher. He was head coach of the Lehi High School girls' basketball team.[13] This Court may take note of the fact that "[h]igh school sports are played not only for the general training and education of the athletes but are sources of entertainment and interest in the community." (R. 1350); *see Standridge v. Ramey*, 733 A.2d 1197, 1202 (N.J. Super. Ct. App. Div. 1999) ("We may take note of the fact that the performance of high school athletic teams is often a matter of substantial public interest within a community."); Utah R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . generally known within the territorial jurisdiction of the trial court[.]"). Indeed, it may be noted that even the major newspapers in this state regularly report on high school athletics. As head coach, O'Connor had responsibility over the budget for the girls' basketball program, which was allocated from

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[13] *See Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182, 186 (Tex. Ct. App. 1993) (stating that "Johnson was more than a school teacher; he also was the athletic director and head football coach," and emphasizing that the court's conclusion that Johnson was a public official was "not based on Ed Johnson's status as a school teacher, for we do not hold, and no Texas case has held, that a school teacher is a public official").

public funds. He also oversaw the raising of thousands of dollars of other monies by the team directly from members of the community, and it was within his discretion how to spend those funds. O'Connor determined which of the girls who tried out for the team became team members. He oversaw team travel to games at other schools, state playoff tournaments, and an invitational tournament in Arizona. He coordinated the girls' participation in a spring league, summer tournament, and a team camp; and, he supervised four assistant coaches. Given the foregoing, it cannot be disputed that the coaching position just described 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 [this case]." *Van Dyke*, 663 P.2d at 55; *see Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182, 187 (Tex. Ct. App. 1993) ("As head [high school] football coach, [plaintiff] filled a position of such importance that the public not only had, but exhibited, an independent interest in his qualifications and performance, transcending any interest shown in other employees of the school system.").

3. O'Connor's Particular Coaching Position Made Him a Public Official.

Furthermore, as O'Connor himself highlights, he was the coach of an exceptionally talented player who was eventually named *the* top high school girls basketball player in Utah and one of the top twenty-four senior girl basketball players in the country. In *Madsen v. United Television, Inc.*, 797 P.2d 1083 (Utah 1990), this Court was asked to determine whether a police officer was a public official. The Court stated:

> In light of the particular facts of this case, we need not, and therefore do not, reach the issue of whether a police officer is

> ipso facto a public official. Here, plaintiff was or became a public official by virtue of the facts and circumstances which gave rise to [his] killing of [a suspect]. . . . The fact that plaintiff, acting in his capacity as a law enforcement officer, shot and killed a person he was attempting to apprehend propelled him into a category far-removed from that of an ordinary patrolman.

Id. at 1085. In other words, the plaintiff in *Madsen* was in a unique position relative to most other police officers, and that unique position put him more squarely in the public eye and gave the public more reason to scrutinize the manner in which he discharged the responsibilities of his position. *See id.* Similarly here, O'Connor was in a unique position relative to most other high school coaches in that he was coaching a player with inordinate talent. This situation placed O'Connor more squarely in the public eye and gave the public more reason to scrutinize the manner in which he discharged his coaching responsibilities (including balancing the competing interests of girls with varying skill levels). Hence, even if there were doubt that a public high school varsity basketball coach with authority over a substantial budget, staff, roster, fundraising activities, and travel schedule is ipso facto a public official, the added fact that O'Connor was coaching an exceptionally talented, nationally recognized, player tips the balance in favor of O'Connor's public official status. Anyone coaching Michelle would invite public scrutiny and discussion, entirely apart from the scrutiny and discussion occasioned by particular charges. *See Van Dyke*, 663 P.2d at 55.

4. O'Connor's Arguments Against the Conclusion that He Was a Public Official Are Unavailing.

The few arguments O'Connor makes in favor of a contrary conclusion reveal a misapprehension of applicable law. First, O'Connor misreads the requirement that a public

official be in a position regarding which "'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.'" *Id.* at 54-55 (citation omitted). Relying on this language, he asserts that a high school coach cannot be a public official because "[t]he coaching selection process is not put to public vote nor determined by public input but rather is handled internally at the administrative level. . . . Nor does the public have some right in the termination of a high school coach." (Appellant's Brief, p. 20.) O'Connor cites, however, no authority for the proposition that to be a public official the general public must have formal input in decisions regarding one's hiring or firing. In fact, this Court's holding in *Madsen* is directly at odds with that implied assertion, where the public has no formal input on the hiring and firing of police officers and yet the plaintiff police officer in that case was deemed to be a public official. *See* 797 P.2d at 1085.

Next, O'Connor asserts that, because extracurricular activities in public schools are a privilege and not a right, *see Starkey v. Bd. of Educ.*, 381 P.2d 718, 721 (Utah 1963), "the hiring, firing or retention of a high school English teacher is more important than that of a high school team coach." (Appellant's Brief, p. 21.) He continues: "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." (*Id.*) Thus, he concludes, "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." (*Id.*) However, public official status does not turn on whether the employee provides a

constitutionally protected service (such as, perhaps, English education). Nor does it turn on an objective determination of the value to the community of a public employee's position. Rather, it turns on whether the position held by the public employee is one that actually invites public scrutiny, regardless of whether such scrutiny is merited. Thus, the Supreme Court speaks in terms of "apparent importance" of the position and whether the "public *has* an independent interest in the qualifications and performance of the person who holds it," not whether the public *should have* such independent interest. *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S. Ct. 669, 676 (1966) (emphasis added); *see also Van Dyke*, 663 P.2d at 55 (rejecting the argument "that to label [the director of financial aid at Weber State University] a 'public official' would shield almost all defamatory comment directed against an individual of every rank" because such a contention "omits the element of [actual] debate on public issues").

Finally, O'Connor urges this Court to follow those jurisdictions that have concluded that public school teachers are not public officials for purposes of defamation. He cites cases from five such jurisdictions: California, Florida, Illinois, Maine, and New Jersey. However, all but one of the cases he cites deal solely with public school *teachers* generally, not with *varsity high school coaches*. As set forth above, the evidence is undisputed that O'Connor was a public official by virtue of his coaching position, regardless of whether all public school teachers are public officials. Additionally, the reasoning of the Connecticut and Minnesota courts set forth above is compelling in favor of a conclusion that public school teachers are public officials and rests on general principles espoused by this Court and public policy in this state. Accordingly, O'Connor's reliance almost exclusively on cases holding that public school teachers generally are not public officials is unavailing to him.

B. O'Connor Has Adduced No Evidence that the Parents Acted With Actual Malice.

As demonstrated, O'Connor was a public official. "[A] public official [may not recover] for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice[.]'" *Van Dyke v. KUTV*, 663 P.2d 52, 54 (Utah 1983). O'Connor has adduced no evidence that the Parents acted with actual malice, and his claims must, therefore, fail.

To show actual malice, O'Connor must present evidence that the Parents' statements were made "[1] with [actual] knowledge that [they were] false or [2] with reckless disregard of whether [they were] false or not." *New York Times v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726 (1964). To show reckless disregard for the truth, "'[t]here must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained *serious doubts* as to the truth of his publication.'" *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 972 (Utah 1981) (citation omitted; emphasis added). "This inquiry is 'a *subjective* one – there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity."'" *Revell v. Hoffman*, 309 F.3d 1228, 1233 (10th Cir. 2002) (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696 (1989) (emphasis added)). As the trial court concluded, "[n]owhere [in the Record] is there any indication that any of the persons who were criticizing [O'Connor] 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." (R. 1349-50.)[14]

O'Connor forwards two arguments in support of a contrary conclusion. First, he contends that the following "evidence" also suggests that the Parents statements were made with actual 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.... 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.

(Appellant's Brief, pp. 33-34.) However, although O'Connor did hold a meeting to explain his position with respect to team finances (R. 837-41), the Parents did not probe the situation by asking questions of O'Connor at that meeting (R. 775 (testimony of Judy Harrison that O'Connor "kept asking for questions and people just didn't ask them")). "Actual malice . . . is not based on whether a 'reasonably prudent' person would have conducted further investigation prior to publishing." *Revell*, 309 F.3d at 1233 (citation omitted). Moreover, O'Connor's assertion that the principal and/or others in the school administration told the Parents that their concerns were unfounded is simply at odds with the evidence in the Record. Principal Worthington testified in this regard as follows:

> Q. . . . [Y]ou believe that that issue [regarding financial improprieties] had been resolved through your investigation, correct?
>
> A. I believe it was resolved.

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[14] Indeed, as set forth above, the Parents' statements largely contained expressions of opinion, which are not even capable of being true or false.

> Q. And you believe that was communicated back to the parents?
>
> A. I don't know to what degree. I think it was mentioned, but I didn't write, I mean I didn't make an attempt to communicate to every parent.

(R. 1248.) In fact, the letter that Principal Worthington sent to the Parents following his "investigation" steadfastly avoided any conclusion regarding the validity of the Parents' expressed concerns; rather, it stated:

> It was . . . interesting that even though individual perceptions were at times directly in opposition with each other, everybody spoke with a conviction and passion that was compelling. Where in lies the truth? The truth lies in each one's perception. Individual perception becomes the truth no matter what did or didn't happen. The question really becomes, "What is each person, parent, player, and coach willing to do?" If one is not willing to try to change their perception, there is no point in trying because whatever is done will never be good enough. If this is your reality, perhaps the best thing for you to do is to move to another community and program that is best suited to your daughter's situation. . . .
>
> . . . We have spoken to Coach O'Connor and given him recommendations shared with us by <u>all</u> parents. He has committed to examine and improve the program wherever he can. He has our full support.

(R. 1172.) These facts are remarkably similar to the case of *Sewell v. Brookbank*, 581 P.2d 267 (Ariz. Ct. App. 1978), where the parents of school children

> did not present their list of grievances to [the plaintiff teacher] first, but instead, took it to his principal and, despite the fact that [the plaintiff] answered the complaints and the principal told [the parents] he thought [the plaintiff] was a good teacher, [the parents] persisted by going to the superintendent and to the school board with the complaints.

Id. at 426. There court concluded, on the foregoing facts, that "there is [not] any evidence here which shows actual malice." *Id.* Its reasoning was as follows:

> The fact that [the plaintiff teacher] denied the charges and gave his version and the fact that the principal told the [parents] he thought [the plaintiff] was a good teacher does not mean that the [parents], by pursuing the matter, acted with knowledge of the falsity of their charges. They knew he denied the allegations, but because of the nature of the complaints, they did not know they were "false" and his mere denial does not mean such allegations were false. Nor does the evidence show a reckless disregard of the truth, i.e., a high degree of awareness of probable falsity. If we were to hold otherwise then one the teacher denies any allegation of incompetency even though the adequacy of his answers are still in question, the matter is ended. We cannot condone such a result which would allow school officials to shield the incompetent teacher and thus defeat the legitimate interest of the parents in their children and the school system.

Id. (citation omitted). Based on the lack of evidence for O'Connor's assertions and the persuasive reasoning of the Arizona court in parallel circumstances, this Court should conclude that, indeed, O'Connor has failed to adduce evidence of actual malice.

O'Connor also contends that "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" and that this too is evidence of "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." (Appellant's Brief, p. 34.) Initially, as already set forth, the Parents had not been assured by the school administration that their concerns were baseless. To the contrary, they had been told, essentially, "to change their perception" or "move to another community." (R. 1172.) Moreover, O'Connor cites no evidence to support the assertion that

the Parents did not want "a further investigation" and would only be satisfied with "a change in the coaching position." Additionally, even if these was the Parents' sentiments,[15] a "high degree of awareness of probable falsity" is not established merely because the Parents insisted on a coaching change. To the contrary, an overwhelming sentiment that a coaching change was in fact needed, supports a conclusion that the Parents actually believed in the validity of their expressed concerns.

Having concluded that O'Connor was a public official, the Court should also conclude, for the foregoing reasons, that there is no evidence that the Parents' statements were made with actual malice; and, based on these conclusions, the Court should affirm the trial court's grant of summary judgment in favor of the Parents.

III.

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE PARENTS BECAUSE THEIR STATEMENTS WERE ABSOLUTELY PRIVILEGED.

This Court should affirm the trial court's grant of summary judgment in favor of the Parents because their statements were absolutely privileged.[16] An "absolute privilege . . . extends to the proceedings of administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial, or 'quasi-judicial' in character." *Mortensen v. Life Ins. Corp.*, 315 P.2d 283, 284

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[15] Here again, O'Connor fails to distinguish between the individual Parent defendants, proceeding as though all made the same statements and were motivated by the same sentiments. This is plainly not the case, and his failure to cite evidence with respect to each of the Parents should, alone, merit this Court's dismissal of his claims.

[16] This argument was raised and briefed in the trial court. (R. 985-86, 1313-14.)

(Utah 1957). In Utah,

> [n]o civil action by or on behalf of a student to the professional competence or performance of a licensed employee of aschool district, . . . or a violation of ethical conduct by an employee of a school district, may be brought in a court until at least 60 days after the filing of a written complaint with the local board of education of the district, or until findings have been issued by the local board after a hearing on the complaint, whichever is sooner.

Utah Code Ann. § 53A-3-421(1)(a). The School Board's invitation to the Parents to submit letters, and the comments by some Parents at the July 20, 2004 School Board meeting might, in light of Section 53A-3-421(1)(a), properly be seen as a part of "proceedings of administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts." *Mortensen*, 315 P.2d at 284. Hence, this Court should hold that an absolute privilege attaches to the Parents' statements made in this context and affirm the summary judgment in favor of the Parents.

IV.

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE PARENTS BECAUSE (1) THEIR STATEMENTS WERE QUALIFIEDLY PRIVILEGED AND (2) THERE IS NO EVIDENCE THAT THE PARENTS ABUSED THE PRIVILEGE.

"The publication of a defamatory statement is conditionally or qualifiedly privileged in certain situations in which a defendant seeks to vindicate or further an interest 'regarded as being sufficiently important to justify some latitude for making mistakes . . . .'" *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). "If a qualified privilege exists, the burden is on the plaintiff to prove that the privilege was abused." *Id.* "The plaintiff can show abuse

of the privilege by proving that the defendant acted with malice or that the publication of the defamatory material extended beyond those who had a legally justified reason for receiving it." *Id.* In this case, (1) the Parents' statements were qualifiedly privileged, and (2) there is no evidence that the Parents abused that privilege. Accordingly, this Court should affirm the trial court's grant of summary judgment in favor of the Parents.[17]

A. The Parents Statements Were Qualifiedly Privileged.

The Parents statements were qualifiedly privileged. Section 594 of the Restatement (Second) of Torts set forth one circumstance that gives rise to a qualified privilege, and this Court expressly adopted Section 594 in *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991). There, the Court summarized Section 594 by explaining that "[t]he law has long recognized that a publication is conditionally privileged if made to protect a legitimate interest of the publisher." *Brehany*, 812 P.2d at 58; *see also Alford v. Utah League of Cities & Towns*, 791 P.2d 201, 204 (Utah Ct. App. 1990). Section 594 reads in full as follows:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

Restatement (Second) of Torts § 594 (1977). Additionally, Section 597 is a particularized application of the principle set forth in Section 594, *see* Restatement (Second) of Torts § 594

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[17] This argument was raised and briefed in the trial court (R. 983-84, 1188-91, 1316-1318).

cmt. d,[18] and states in relevant part:

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects the well-being of a member of the immediate family of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the well-being of the member of the family.
>
> (2) An occasion makes a publication conditionally privileged when the circumstances induce a correct or reasonable belief that (a) there is information that affects the well-being of a member of the immediate family . . . of a third person, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the well-being of the member of the family, and (c) the recipient has requested the publication of the defamatory matter or is a person to whom its publication is otherwise within generally accepted standards of decent conduct.

Restatement (Second) of Torts § 597 (1977).

In *Brehany*, the Court also endorsed Section 596, explaining that a qualified "privilege also extends to statements made to advance a legitimate common interest between the publisher and the recipient of the publication." 812 P.2d at 58. Section 596 states in full as follows:

> An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to

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[18] Because the rule stated in Section 597 is merely a particularized application of the rule stated in Section 594, it would "not [be] much of a jurisprudential leap" for this Court to expressly adopt Section 597. *Atkinson v. Stateline Hotel Casino & Resort*, 2001 UT App 63, ¶ 19 n. 6, 21 P.3d 667 (noting that "[t]he appellate courts of this state [had] not previously adopted *section 324 of the Restatement (Second) of Torts*" and stating that doing so in that case was "not much of a jurisprudential leap since 'the rule stated in [section 324] is [merely] an application of the one stated in [section] 323.'" (citation omitted; emphasis and alterations in original)).

> believe that there is information that another sharing the common interest is entitled to know.

Restatement (Second) of Torts § 596 (1977).

As O'Connor correctly observes, no reported Utah cases have examined the application of the foregoing privileges – the "common interest" privilege or the "family relationships" privilege – in the context of allegedly defamatory statements made by parents to public school officials about a teacher or coach. However, the great weight of authority from other jurisdictions is that these privileges apply to the facts of this case. In each of the following cases, the court held that parent and school administrator defamation plaintiffs were protected by one of the foregoing qualified privileges. *See Daubenmire v. Sommers*, 805 N.E.2d 571, 593 (Ohio Ct. App. 2004) (holding that "educators and parents share a common interest in the training, morality and well-being of children in their care" which extends to "the coaching of [a high school] team and . . . the treatment of [team] player[s]"); *Gatto v. St. Richard School, Inc.*, 774 N.E.2d 914, 925 (Ind. Ct. App. 2002) ("Parents and schools have a 'corresponding interest' in the free flow of information about administrators and faculty members."); *Sewell v. Brookbank*, 581 P.2d 267, 270-71 (Ariz. Ct. App. 1978) (discussing the "legitimate interest of the parents in their children and the school system"); *Martin v. Kearney*, 124 Cal. Rptr. 281, 283 (1975) ("As parents of school children, defendants were interested persons directing their communications to other interested persons, the school officials"); *Hoover v. Jordan*, 150 P. 333, 334 (Colo. Ct. App. 1915) (holding that parents' petition to the school board charging that teacher was incompetent and immoral was protected under the common interest privilege). The statements on which

O'Connor bases his defamation claims were all expressions of concern by the Parents for their girls to school administrators who shared their interest in the girls' well-being and who could address the Parents concerns. Accordingly, Parents enjoyed a qualified privilege when making the statements of which O'Connor complains.

O'Connor asserts that the foregoing privileges should not apply to all of the Parents because some of them were not the actual parents of girls on the team. (Appellant's Brief, p. 41.)[19] He asserts that those of the Parents who were merely "friends or relatives" of girls on the team do not share a common interest with the girls' parents. (*Id.*)[20] Even if true, O'Connor's assertion does not deprive the "friend and relative" Parents of a qualified privilege in this case. In *Brehany*, this Court also adopted Section 595 of the Restatement (Second) of Torts, *see* 812 P.2d at 58, which states:

> (1) An occasion that makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the recipient or a third person, and (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that (a) the publication is made in response to a request rather than volunteered by the publisher or (b) a family or other relationship exists between the parties.

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[19] O'Connor cites no evidence to identify which of the Parents fit into this category.

[20] O'Connor also asserts that "the School Board members . . . had no common interest with the Parents." (Appellant's Brief, p. 41.) This assertion is belied by the above-cited authority from numerous jurisdictions holding to the contrary.

Restatement (Second) of Torts § 595 (1977). Applying this section to the receipt of public comment to school boards on the performance of school employees, the Florida Supreme Court explained as follows:

> Another ground for holding that the statement was conditionally privileged would be that the statement was made for the protection of the recipient's interest in receiving information on the performance of its employee. *See* Restatement (Second) of Torts § 595 (1976). In this connection, the value of the defendant's defamatory information to the school board in overseeing the operation of the public schools must be weighed against the extent of the harm likely to be done to the plaintiff's reputation as a result of the communication. L. Eldredge, *The Law of Defamation* § 86 at 471 (1978). Under the American Law Institute's approach, **the interest of the school board in the performance of a teacher, its employee, would give rise to a privilege in another to provide information concerning that performance even without a legal duty or a family relationship and even though the information is not requested but merely volunteered**, if the publication is "within the generally accepted standards of decent conduct." Restatement (Second) of Torts § 595 (1976).

Nodar v. Galbreath, 462 So.2d 803, 809 (Fla. 1984) (emphasis added). Plainly, under Section 595, which has been adopted by this Court, the statements by all of the Parents to the school board, principal, and athletics director were protected by a qualified privilege, so long as they were made within the generally accepted standards of decent conduct. And the following undisputed evidence (testimony from Alpine School Board member Donna Barnes) supports only the conclusion that the communications of which O'Connor complains were made within the generally accepted standards of decent conduct:

> Q. Okay. Do you personally believe that the parents were exercising their rights as parents living in the school district to voice concerns at a school board meeting about what they perceived to be problems?

A. That's the policy of the board, that if there are concerns, they may address the board in an open board meeting. It happens routinely.

. . . .

Q. Was everyone [at the meeting where the Parents addressed the board] courteous and attempting to –

A. Very courteous, very professional in their behavior.

Q. Okay. And certainly there's nothing unusual about parents writing letters to be reviewed by the board as supplemental information to –

A. We get those routinely also.

Q. Okay. And did you consider those to be constructive letters in attempting to resolve a problem?

A. I did.

(R. 1151a, 1239.)

O'Connor's remaining arguments against application of a qualified privilege to the Parents' statements are without factual, legal, or logical support. Specifically, he argues that the privilege should not apply because (1) the Parents' letters "were created not at the request of any public authority" (Appellant's Brief, p. 38); (2) the Parents' letters "were delivered . . . not to a governmental body but to [a] friend and neighbor Donna Barnes, who in her individual capacity had no authority to deal with them" (*id.*, pp. 38-39); and (3) "the School Board declined to take any action on the letters submitted to the Board and the statements made at the meeting" (*id.*, p. 41). As to the first argument, the evidence is undisputed that the Parents' letter were requested by a public authority, in that school board member Donna

Barnes, after her consultation with the school board president, told the Parents that if they had concerns they needed to "build a case" by preparing and submitting letters. (R. 1151a.) Moreover, as explained by the *Nodar* court, "the interest of the school board in the performance of a teacher, its employee, would give rise to a privilege in another to provide information concerning that performance . . . even though the information is not requested but merely volunteered" *Nodar*, 462 So.2d at 809. As to the second argument, O'Connor offers no support for the assertion that communications to a school board member must take place only within the confines of a duly convened board meeting for the qualified privilege to attach. As to the final argument, O'Connor again offers no support for the implied assertion that an otherwise privileged statement becomes unprivileged when, in retrospect, it is observed that the recipient declined to take action based on the communication. Such a rule, which would tie the qualified privilege to the response of the recipient, would cast a chill on public input to school boards and undermine the privilege.

In sum, this Court has already adopted the principles in Sections 594, 595, and 596 of the Restatement (Second) of Torts, and Section 597 is a logical extension of Section 594. The circumstances of this case trigger application of the principles outlined in these sections, O'Connor's contrary arguments notwithstanding. Hence, the Court should hold that all of the Parents' were qualifiedly privileged in making the statements of which O'Connor complains.

B. There Is No Evidence that the Parents Abused Their Qualified Privilege.

"[O'Connor], in order to circumvent [the Parents' qualified privilege], must show that [their] statements were published maliciously." *See Alford v. Utah League of Cities &*

Towns, 791 P.2d 201, 205 (Utah Ct. App. 1990). "Evidence of 'malice' in this context[21] may include indications that the publisher [1] 'made [the statements] with ill will, [2] [that the statements] were excessively published, or [3] [that the publisher] did not reasonably believe his or her statements.'" *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶ 53, 116 P.3d 271 (citation omitted). There is no evidence in the Record to support a conclusion that the Parents abused their qualified privilege by making their allegedly defamatory statements maliciously.

O'Connor's asserts to the contrary, arguing that "[t]here is sufficient evidence in the Record to conclude that the Parents made and repeated their defamatory statements with ill will." (Appellant's Brief, p. 34.) He contends that evidence of the Parent's ill will is to be found in (1) their repeating their statements "despite receiving explanations of no financial improprieties and receiving the principal's assurance that there were no coaching problems of the type alleged; (2) certain Parents' manifested intent to have O'Connor fired; and (3) that "[t]hey ultimately took their complaints to a public forum," i.e., a school board meeting. (*Id.*) O'Connor's argument in this regard is without merit. First, as set forth in Section II.B, above, the Record does not support the assertion that the Parents received assurances from the principal that their concerns were unfounded. Second, that some of the Parents may have wanted O'Connor fired was, plainly, an outgrowth of their concerns for the girls and the

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[21] The context referred to here is that of a conditional privilege. "[M]alice in the context of a conditional privilege 'is simply a means of determining when the privilege . . . is forfeited.'" *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶ 53 n.19, 116 P.3d 271 (citation omitted). In the public official context, on the other hand, a plaintiff must show "actual malice," which is different than the common law malice required in this context. *See id.*

basketball program.[22] "[I]f [an allegedly defamatory] publication is made for the purpose of protecting the interest in question, [i.e., the Parents' interest in their daughters' well-being; the common interest in public education, etc.], the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege." Restatement (Second) of Torts § 603 cmt. a (1977). Finally, O'Connor cites no authority for the proposition that privileged statements to a school board are lost if made at a public meeting, and there is authority for the contrary proposition – that the Parents did not abuse their conditional privilege by failing to insist that the school board meeting be closed to other members of the public. *See Daubenmire v. Sommers*, 805 N.E.2d 571, 577, 593 (Ohio Ct. App. 2004) (holding a qualified privilege exited where parents spoke out against coach at a community meeting where school board members were present); *Sewell v. Brookbank*, 581 P.2d 267, 269-71 (Ariz. Ct. App. 1978) (holding a qualified privilege existed where parents spoke out against teacher at a school board meeting).

V.

THIS COURT SHOULD DECLINE TO ADDRESS ISSUES REGARDING THE TRIAL COURT'S AWARD OF COSTS TO THE PARENTS BECAUSE THOSE ISSUES ARE NOT PROPERLY BEFORE THIS COURT, AND IN ANY EVENT THE PARENTS' VERIFIED MEMORANDUM OF COSTS WAS TIMELY FILED.

On January 17, 2006, O'Connor filed his Notice of Appeal from the trial court's entry of its final order of summary judgment. The trial court did issue its ruling regarding costs

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[22] Here again, O'Connor lumps all of the Parents together and fails to demonstrate that all of them insisted that he be fired, or that all of them attended the school board meeting.

and fees until February 14, 2006. In appeals to this Court, "[t]he notice of appeal . . . shall designate the judgment or order, or part thereof, appealed from." Utah R. App. P. 3(d). O'Connor filed his Notice of Appeal prior to the trial court's ruling on costs and did not designate that portion of court's final order in his Notice of Appeal. Accordingly, issues regarding the trial court's award of costs are not properly before this Court, and the Court should, therefore, decline to consider them. *See id.*

Even if the Court determines that this issue is properly before it, contrary to O'Connor's assertion, the Parents' Verified Memorandum of Costs was timely filed. It was due on January 19, 2006. Parent Defendants deposited it into the United States Postal Service, postage prepaid, on January 18, 2006. The rule regarding the manner of filing documents with the Court states: "The filing of pleadings and other papers with the court as required by these rules shall be made by filling them with the clerk of the court . . . ." Utah R. Civ. P. 5(e). This rule does not specify whether filing is complete upon mailing or upon receipt by the clerk, and no reported Utah case appears to have addressed this issue specifically with respect to rule 5(e) and the filing of a costs memorandum. In *Isaacson v. Dorius*, 669 P.2d 849 (Utah 1983), however, the court addressed whether a notice of appeal was filed by mailing. The appellant offered no evidence, but claimed that he had placed his notice of appeal in the mail on Thursday, December 10. *See id.* at 850. It was due on Monday, December 14, but not date-stamped by the clerk until December 16. *See id.* In dissent, Justice Stewart stated:

> Counsel acted prudently in attempting to effectuate a timely filing of a notice of appeal in accordance with our rules of procedure. The reason the notice was not actually filed with the

> court in the time prescribed by the rules was either because of the delay in the delivery of mail or because of the failure of the clerk to file the notice promptly upon receipt. In either event, the fault was not the appellant's. Indeed the appellant had the right to rely on the mail's being delivered in time and on timely filing by the clerk.

Id. at 851 (Stewart, J., dissenting). The majority rejected Justice Stewart's approach, stating that "[t]he dissents assume facts not in the record[, *i.e.*, that the notice of appeal was actually mailed on December 10,] in reaching a contrary conclusion." *Id.* at 850 n. 1. Contrastingly here, there is evidence that the Parents' Verified Memorandum of Costs was indeed mailed on January 18, 2006, the day before it was due. (R. 1540.) Accordingly, Parent Defendants urge the Court to adopt the approach of Justice Stewart with respect to a notice of appeal and conclude that filing of the Verified Memorandum of Costs was complete upon mailing.[23]

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment in favor of the Parents and the trial court's award of costs to the Parents.

DATED this 31st day of May, 2006.

SUITTER AXLAND, PLLC

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Attorneys for Appellees

[23] In this respect, it is notable that, according to the date stamp, if Parent Defendants' Verified Memorandum of Costs was not already at the Court on Thursday, January 19, on Friday, January 20, a postal delivery to the court, opening of the mail, and stamping of the document all must have occurred before 9:30 a.m., a somewhat remarkable proposition.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2006, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES** to be served via, first class United States mail, postage prepaid, upon each of the following:

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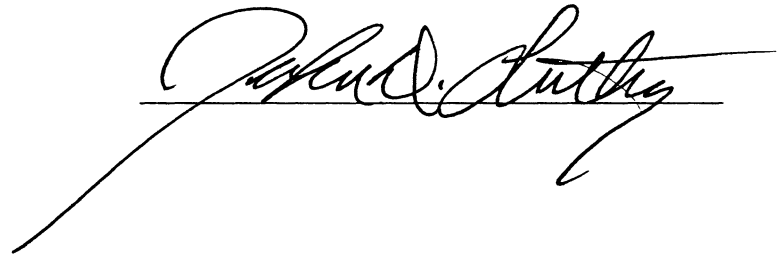

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