

Honorable Kimberley Prochnau
Noted for: July 22, 2011 at 9 a.m.
(with oral argument)

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

HUGH K. SISLEY and MARTHA E.
SISLEY, both individually and on behalf
of their marital community,

Plaintiffs,

v.

SEATTLE SCHOOL DISTRICT NO. 1,
a public corporation,

Defendant.

NO. 10-2-10522-1 SEA

DEFENDANT'S REPLY IN
SUPPORT OF SUMMARY
JUDGMENT

I. REPLY STATEMENT OF MATERIAL FACTS

The material facts supporting defendant Seattle School District's ("the school district's") summary judgment motion are undisputed. Although plaintiffs' response brief contains a heading on page 6 proclaiming "Defendant's Motion Must Be Denied Because There Are Questions of Material Fact," they do not identify any material facts in dispute. The only sentence beneath this heading merely restates the legal principle that the facts should be construed in the light most favorable to the non-moving party on summary judgment.

The following material facts are undisputed:

1. From the early 1990's until 2005, the property manager for many of Hugh and Drake Sisley's rental properties, Keith Gilbert, was a violent, convicted white supremacist. *See* Def.'s

1 opening memo in support of summary judgment, pp. 3-5 and evidence cited therein.

2 2. Hugh Sisley gave Mr. Gilbert the power to select, manage and evict tenants residing on
3 Mr. Sisley's rental properties surrounding Roosevelt High School even though Mr. Sisley was
4 aware Mr. Gilbert was a racist "known for his strong-arm tactics during evictions and other
5 actions related to the rental properties." *Id.*, pp. 5-7.
6

7 3. Hugh Sisley's rental properties managed by Mr. Gilbert were cited dozens of times over
8 more than a decade for housing and building code violations. *Id.*, pp. 2-3, 5-6.

9 4. Several newspaper articles between 1998 and 2007 identified Mr. Gilbert as a "racist
10 and a bigot" who the Sisley brothers used to manage their run-down properties. *Id.*, pp. 5-7.¹
11

12 5. The student reporter who wrote the article at issue reviewed these newspaper articles as
13 part of her research. *Id.*, pp. 7-8.

14 6. The only part of the student reporter's article plaintiffs allege was defamatory is the
15 phrase the Sisley brothers have been "accused of racist renting policies." *Id.*, p. 7.

16 7. The high school newspaper is entirely student-run, with no school district employee
17 playing any role in editing or censoring the students' reports. *Id.*, pp. 8-9.

18 **II. REPLY ARGUMENT**

19 **A. Plaintiffs Are Unable To Prove Public School Districts Can Be Liable to** 20 **Members of the Public for Students' Speech**

21 If this case were to proceed to trial, the jury would be instructed the school district is a
22 municipal corporation that "can act only through its officers and employees." WPI 50.18.
23 Plaintiffs fail to cite any authority holding that public school districts act through their students
24

25 ¹ Plaintiffs move in limine to exclude these newspaper articles. The school district responds to plaintiffs' motion in
26 a separate brief.

1 and can be liable, either directly or vicariously, for students’ alleged intentional torts of
2 defamation. *Compare* Def.’s opening memo, pp. 10-12 to Pltfs’ response memo, pp. 8-9.
3 Plaintiffs also fail to cite any authority holding that public school districts owe an actionable tort
4 duty to members of the community to control or censor student speech. *Id.* This lack of legal
5 authority supporting plaintiffs’ novel liability theory justifies summary judgment.
6

7 **B. Plaintiffs Are Unable to Prove Public School Districts Can Be Liable to Others**
8 **for Failing to Censor Students’ First Amendment Protected Speech**

9 There is no dispute public school districts may be liable to students for attempting to
10 control or censor students’ speech in violation of their First Amendment rights. *Id.* The parties
11 agree public school districts may not censor the content of student speech unless censorship is
12 “reasonably related to legitimate pedagogical concerns.” *Id.*

13 Plaintiffs argue the school district could have constitutionally suppressed the student
14 reporter’s speech because accuracy in student newspapers serves a valid educational purpose.
15 Even if true, plaintiffs fail to prove censorship was warranted in this instance. In any event, the
16 dispositive point is no authority holds that school districts may be liable to members of the
17 public for failing to censor students’ speech.
18

19 **C. Even if the School District Could Be Liable for a Student’s Alleged Defamation,**
20 **Plaintiffs Are Unable to Prove the Student Defamed Them**

21 **1. Plaintiffs are unable to prove the report of an accusation is defamatory**

22 The parties agree that whether a statement is one of fact or nonactionable opinion is a
23 question of law for the Court to decide. Yet, plaintiffs argue “the defense of ‘opinion’ in
24 defamation litigation has been seriously abrogated” by *Milkovich v. Lorain Journal Co.*, 497
25 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Pltfs’ response memo, pp. 10-11.
26

1 Plaintiffs are incorrect. Courts still routinely dismiss defamation claims based on
2 nonactionable opinion. *See, e.g., Tan v. Le*, 161 Wn. App. 340, ___ P.3d ___, 2011 WL 1491697
3 (2011) (applying *Milkovich*; copy attached as Appendix 1 for ease of reference); *Gardner v.*
4 *Martino*, 563 F.3d 981 (9th Cir. 2009) (distinguishing *Milkovich*). *Milkovich* did not overrule
5 *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), and
6 other cases cited by the school district holding that calling someone a “racist” is a nonactionable
7 opinion. *See* Def.’s opening memo, pp. 15-16. Plaintiffs are wrong to suggest otherwise.

9 Plaintiffs heavily rely on two inapposite cases. The *Taylor v. Carmouche*, 214 F.3d 788
10 (7th Cir. 2000) case involved a public employee’s claim of First Amendment retaliation for
11 calling her supervisor a “racist.” The court dismissed the retaliation claim because the question
12 of whether a supervisor is a “racist” is not an issue of public concern that could support a
13 retaliation claim. *Taylor*, 214 F.3d at 793-94. No defamation claim was involved.

15 Similarly misplaced is plaintiffs’ reliance on *MacElree v. Philadelphia Newspapers,*
16 *Inc.*, 544 Pa. 117, 674 A.2d 1050 (1996). That case involved denial of a Rule 12 motion, not
17 Rule 56. The court acknowledged that “accusations of racism have been held not to be
18 actionable defamation” and “where there is no possibility that harm can be established, ... the
19 communication is therefore not defamatory” *Id.* at 127, 674 A.2d at 1055. The court denied
20 the Rule 12 motion at the pleading stage because the plaintiff might be able to show harm. *Id.*

22 Here, under Rule 56, plaintiffs have made no effort to meet their burden of showing the
23 student’s article caused damage to their reputations, effectively conceding any damage to their
24 reputation is, at best, speculative. Def.’s opening memo, p. 20. Thus, even under the *MacElree*
25 court’s reasoning, summary judgment is appropriate.

1 **2. Plaintiffs are unable to prove the statement is false**

2 Plaintiffs must prove no one has ever accused them of racist renting policies, either
3 overtly or by implication. The student reporter testifies she heard or read of the accusation and
4 prior newspaper articles infer the same. All plaintiffs offer is a conclusory denial, which is
5 insufficient. *See* Pltfs’ response memo, p. 11; CR 56(e).
6

7 **3. Plaintiffs are unable to prove fault**

8 Plaintiffs have the burden of proving fault. Def.’s opening memo, pp. 18-19. Although
9 they question the degree of fault they must prove, they fail to offer any evidence or argument
10 establishing the school district or the student reporter had doubts about whether the Sisley
11 brothers had been accused of racist renting policies. *See* Pltfs’ response memo, pp. 11-12.
12

13 **4. Plaintiffs are unable to prove damage to their reputation**

14 Plaintiffs have the burden of proving the newspaper article caused damage to their
15 reputations. They offer no such evidence; conceding alleged damage to their reputations is, at
16 best, inadmissibly speculative. *See* Def.’s opening memo, p. 20.

17 **D. Plaintiff Martha Sisley’s Defamation Claim Should Be Dismissed Because**
18 **There Is No Evidence She Was a Target of Defamation**

19 Plaintiffs concede Martha Sisley was not an identified target of the allegedly defamatory
20 statement. *See* Pltfs’ response memo, p. 12. They provide no basis for distinguishing *Sims v.*
21 *KIRO, Inc.*, 20 Wn. App. 229, 234, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), which
22 is squarely on point. *See* Def.’s opening memo, p. 20. Thus, her claim should be dismissed.
23

24 **III. CONCLUSION**

25 Based on the foregoing reasons, and the reasons set forth in the school district’s opening
26 memorandum, summary judgment dismissing this lawsuit is appropriate.

1 RESPECTFULLY SUBMITTED this 18th day of July, 2011.

2 FREIMUND JACKSON TARDIF &
3 BENEDICT GARRATT, PLLC

4
5
6 JEFFREY FREIMUND, WSBA No. 17384
7 Attorneys for Defendant Seattle School District
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 **PROOF OF SERVICE**

2 I certify that I electronically filed the foregoing document with the Court through King
3 County ECF and served on all parties or their counsel of record a copy of this document on the
4 date below addressed as follows:

5 Jeffrey C. Grant US Mail Postage Prepaid
6 Skellenger Bender, PS ABC/Legal Messenger
7 1301- Fifth Avenue, Suite 3401 Hand delivered
8 Seattle, WA 98101-2605 Email

9 I certify under penalty of perjury under the laws of the state of Washington that the
10 foregoing is true and correct.

11 DATED this 18th day of July, 2011, at Olympia, WA.

12 _____
13 KATHRINE SISSON
14
15
16
17
18
19
20
21
22
23
24
25
26