IN THE COURT OF APPEALS OF IOWA

FILED
NOV 16 2001
CLERK SUPREME COURT

No. 1-289 / 00-1239
Filed November 16, 2001

MELVIN E. MURKEN,
Plaintiff-Appellant,

vs.

RICK SIBBEL, and ANKENY COMMUNITY SCHOOL DISTRICT,
Defendants-Appellees,

and

RIC POWELL,
Defendant.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Plaintiff, a high school baseball coach, appeals from the district court ruling granting summary judgment in favor of parent and school district in plaintiff's action for defamation. **AFFIRMED.**

Max C. Burkey of Ekstrom & Burkey, Des Moines, and Michael McMurry of McMurry Law Firm, Ankeny, for appellant.

Mark D. Lowe of Hopkins & Huebner, P.C., Adel, for appellee Sibbel.

Ronald L. Peeler of Ahlers, Cooney, Dorweiler, Haynie, Smith & Albee, P.C., Des Moines, for appellee School District.

Heard by Huitink, P.J., Vaitheswaran, J., Hayden, S.J.*
*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2001).

HAYDEN, S.J.

Melvin Murken appeals the decision of the district court which granted summary judgment to Rick Sibbel and the Ankeny Community School District in his action for slander. He claims the court erred by finding Sibbel's statements were protected by a qualified privilege, and were not motivated by actual malice. We affirm.

Murken is the head varsity baseball coach at Ankeny High School. Sibbel is a member of the Ankeny School Board. In addition, he is the father of Scott Sibbel, who was a member of the baseball team coached by Murken. Ric Powell is the Ankeny High School Athletic Director.

On July 9, 1999, Ankeny High School had two baseball games against Valley High School in West Des Moines. For a reason not apparent in the record, Scott Sibbel was pulled from the game by Murken. Ankeny lost both games. On the way back to Ankeny on the bus, some players, including Scott Sibbel, decided to boycott the team's next game, scheduled for July 12, 1999, due to their perception Murken had not been actively coaching the team. When he returned home, Scott Sibbel informed his father of his decision.

The elder Sibbel called the school superintendent, Dr. Ben Norman, that evening. Norman said he would alert Powell. Powell called Sibbel early on July 10, 1999, and asked Sibbel to meet with him. Sibbel related several concerns about Murken to Powell. Powell then met with members of the baseball team that afternoon. He made a list of the team's concerns. By the end of the meeting the risk of a boycott had been greatly diminished. Powell told the team members he would be available to meet with their parents in the evening on July 11, 1999.

Powell went to Murken's house on the morning of July 11, 1999, and informed him of recent events. Murken asked Powell to see the list he had made, and requested Powell make a check mark by those concerns which Sibbel had also raised in his meeting with Powell the previous day. Powell did not tell Murken about the parents' meeting set for that evening.

Sibbel and many other parents attended the meeting on the evening of July 11, 1999. There is conflicting evidence concerning the role Sibbel held at the meeting. The only clear facts are Sibbel stated he was a school board member and he told parents they could express their concerns about Murken to school administration. Murken alleges Sibbel "took over" the meeting and encouraged parents to contact Norman if they wanted changes made regarding the baseball coach.

Ultimately, there was no boycott of the July 12, 1999, baseball game and Murken remains the Ankeny High School baseball coach.

On August 31, 1999, Murken filed suit against Sibbel and the Ankeny Community School District on the grounds of slander per se and slander. He claimed Sibbel "made statements regarding the Plaintiff that were false, that attacked the integrity and moral character of the Plaintiff, and that were intended to damage the Plaintiff with respect to his profession." Murken later amended his petition to include claims against Powell.

Sibbel and the school district filed motions for summary judgment. These motions were supported by affidavits. Murken filed a resistance, also supported by affidavits. The district court granted summary judgment. The court found Sibbel's statements were protected by a qualified privilege because he acted in

good faith. The court also found there was no evidence of actual malice. The court concluded, "The facts and circumstances of the record evidence a good faith intent and proper communication of legitimate educational concerns." Murken appeals.

I. Scope of Review

We review a district court's summary judgment for errors at law. *Sampson v. American Standard Ins. Co.*, 582 N.W.2d 146, 149 (Iowa 1998). Under Iowa Rule of Civil Procedure 237, summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998). We review the record in the light most favorable to the party opposing the motion. *Ranney v. Parawax Co.*, 582 N.W.2d 152, 153 (Iowa 1998). The burden of showing the nonexistence of a material fact is upon the moving party. *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 14 (Iowa 1999).

II. Qualified Privilege

The law of defamation consists of the twin torts of libel and slander. *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994). This case involves claims of slander, which is the oral publication of defamatory matter. *Id.* To prevail in an action for slander, a plaintiff must prove either the published statement was slanderous per se or it caused actual harm to plaintiff's reputation. *Id.* An attack on the integrity and moral character of a party is considered slanderous per se. *Id.*

For purposes of the motion for summary judgment, defendants concede the claims of slander. They contend Sibbel's statements were protected by a

qualified privilege. A qualified privilege applies to publications without regard to whether they are slanderous or slanderous per se. *Taggart v. Drake University,* 549 N.W.2d 796, 803-04 (Iowa 1996). Qualified privilege is an affirmative defense which must be pled and proven. *Vinson v. Linn-Mar Cmty. Sch. Dist.,* 360 N.W.2d 108, 116 (Iowa 1984). Ordinarily the availability of the privilege is for the court rather than the jury to decide. *Id.*

"The qualified privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within narrow limits." *Vojak v. Jensen,* 161 N.W.2d 100, 105 (Iowa 1968). A qualified privilege applies to statements:

> made in good faith on any subject in which the person communicating has an interest, or in reference to which that person has a right or duty, if made to a person having a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion.

Marks v. Estate of Hartgerink, 528 N.W.2d 539, 545 (Iowa 1995) (quoting *Knudsen v. Chicago & N.W. Transp. Co.,* 464 N.W.2d 439, 442 (Iowa 1990)). The elements of a qualified privilege are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in its scope to this purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties. *Id.* at 546.

Murken claims Sibbel's statements were not made at a proper occasion, in a proper manner, or to proper parties. Murken asserts Sibbel should have shared his concerns only with Powell, and that it was inappropriate to share them with superintendent Norman or other parents. Murken relies upon *Swensen-Davis v. Martel,* 354 N.W.2d 288, 290 (Mich. Ct. App. 1984), where a teacher brought a libel suit against a parent based on a letter written to the principal. The

Michigan Court of Appeals found the parent's statements were protected by a qualified privilege. *Swensen-Davis,* 354 N.W.2d at 290-91. The letter was written as part of the grievance procedure in the school district's "Fair Treatment Policy." *Id.* at 290. In a footnote the court stated, "That the alleged defamatory statements were made solely in the context of the established procedure only reinforces our conclusion that the statements were qualifiedly privileged." *Id.* at 291, n.2.

Murken interprets *Swensen-Davis* to provide that only statements made under an established procedure should be protected by a qualified privilege. We find Murken unduly limits the holding in *Swensen-Davis.* The court stated its conclusion was *only reinforced* by the fact the parent acted within established procedure. *Id.* at 291. A fair reading of the case does not lead to the conclusion Murken suggests.

We determine the district court correctly found Sibbel's statements were protected by a qualified privilege. Sibbel had a good faith interest in the coaching of his son's baseball team. His statements were made to the school superintendent, the athletic director and other concerned parents. The occasions where he aired his concerns were appropriate to the situation.

III. Actual Malice

A qualified privilege protects only statements made without actual malice. *Taggert,* 549 N.W.2d at 804. Actual malice requires proof the statement was made with ill-will, hatred, the desire to do another harm, or wrongful motive. *Marks,* 528 N.W.2d at 546. Actual malice occurs when a statement is made with knowledge that it is false or with reckless disregard for its truth or falsity. *Kelly v.*

Iowa State Educ. Ass'n, 372 N.W.2d 288, 296 (Iowa Ct. App. 1985). Because we have found Sibbel's statements were protected by a qualified privilege, Murken has the burden to show actual malice. *See id.*

This case is similar to *Sewell v. Brookbank,* 581 P.2d 267, 269 (Ariz. Ct. App. 1978), where a teacher filed libel and slander claims against parents who had an informal meeting with a school principal, and later presented their concerns to the school board. The Arizona Court of Appeals found there was no evidence of actual malice. *Sewell,* 581 P.2d at 271. The court found the parents were not acting with malice, even though they continued to pursue the matter after they were not satisfied with the principal's response. *Id.* The court stated, "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.*

In the present case, we find no evidence was presented to show Sibbel acted with actual malice. In his response to the motion for summary judgment Murken did not assert any evidence to show Sibbel acted with a wrongful motive. As in *Sewell,* we determine parents have a right to meet to discuss their legitimate concerns regarding their children and the school system.

We affirm the decision of the district court which granted summary judgment to defendants Sibbel and the Ankeny Community School District.

AFFIRMED.