J.S. et al v. Blue Mountain School District et al Doc. 49 Att.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

J.S., et al.	:	**CIVIL ACTION NO.**
	:	**07-CV-585**
Plaintiffs,	:	
	:	
v.	:	**JUDGE:**
BLUE MOUNTAIN SCHOOL DISTRICT;	:	**JAMES M. MUNLEY**
DR. JOYCE E. ROMBERGER, Superintendent Blue Mountain School District; and JAMES S. MCGONIGLE, Principal Blue Mountain Middle School, both in their official and individual capacities,	:	**ELECTRONICALLY FILED**
Defendants.	:	

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants, Blue Mountain School District ("District"), Dr. Joyce Romberger ("Romberger"), and James McGonigle ("McGonigle")(collectively referred to as "Defendants"), by and through their counsel, Sweet, Stevens, Katz & Williams, LLP., herby submit Defendants' Brief in Response to Plaintiffs' Motion For Summary Judgment.[1]

[1] Defendants refer to their exhibits filed with their Motion for Summary Judgment and also their Statement of Uncontested Material Facts ("UMF") throughout this Brief.

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I. INTRODUCTION/PROCEDURAL HISTORY

This is a case wherein the minor Plaintiff, J.S., intentionally created a defamatory profile of her school Principal, Defendant McGonigle, on the popular internet website MySpace.com ("MySpace"). It is uncontested that the profile portrayed McGonigle as a pedophile and sexual predator (UMF 68-69). The defamatory profile was directed specifically toward "children" and had a URL address of www.myspace.com/kidsrockmybed (Ex. "B"). As a result of the profile, several disruptions took place at the school (UMF 74-83). J.S. received a ten day out-of-school suspension as her actions violated two District policies. The Third Circuit Court of Appeals has not yet addressed this specific factual or legal scenario. Both parties filed cross motions for summary judgment on November 21, 2007 and supporting briefs on December 10, 2007. The Defendants incorporate their supporting brief in this instant response as though it was fully set forth.

II. COUNTER STATEMENT OF FACTS

The Defendants refer this Court to the "Brief Statement Of The Case" articulated in Defendants' Brief in Support of their Motion for Summary Judgment (Dkt. #42, pp. 1-3) as well as Defendants' Statement of Uncontested Facts (Dkt. #33).

III. COUNTER STATEMENT OF QUESTIONS INVOLVED

The Defendants refer this Court to the "Statement of Questions Involved" articulated in Defendants' Brief in Support of Their Motion for Summary Judgment (Dkt. #42, p. 4)

IV. ARGUMENT

A. J.S.'s First Amendment Claim Must Fail Because The MySpace Profile Was Not A Parody Or Protected Speech As A Matter Of Law

The Plaintiffs argue that the profile is protected speech because it is a parody (Plaintiffs' Brief, pp. 16-19). The Plaintiffs are mistaken as the record belies Plaintiffs' self-serving assertion and reflects that the profile should not be considered a parody as a matter of law. [2]

It is axiomatic that for J.S. to have a valid First Amendment freedom of speech claim, she must demonstrate that the speech she used was protected speech. Compare, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)(defamatory speech is not protected speech); Hustler v. Falwell, 485 U.S. 46 (1988)(parody of public

[2] Plaintiffs contend that this Court should not even address this issue because Judge McVerry, in Layshock v. Hermitage Sch. Dist., 496 F.Supp.2d 587 (W.D.Pa. 2007), found that it was "irrelevant" to the question of whether the school had authority to impose its own punishment on the student. The Defendants submit that Judge McVerry was incorrect in his decision as the issue of whether the speech in question is protected or not, is not only relevant, but outcome determinative for the reasons set forth below. See, Wood v. Strickland, 420 U.S. 308, 236 (1975)(Courts role is to enforce constitutional rights, not "to set aside decisions of the school administrators which [we] may view as lacking a basis in wisdom or compassion.")

figure is protected speech). Defamation and parody are mutually exclusive. Browning v. Clinton, 292 F.3d 235, 248 (D.C.Cir. 2002)(" 'Hyperbole' is protected from defamation claims due to the 'constitutional protection afforded to parody, satire and other imaginative commentary'")(*quoting* Moldea v. New York Times Co., 22 F.3d 310 n.2, 314 (D.C.Cir. 1994)); 50 Am.Jur.2d Libel and Slander § 156 (2006). However, "a [party] who couches a defamatory imputation of fact in humor *cannot* simply avoid liability by dressing his wolfish words in humorous sheep's clothing." Hamilton v. Prewett, 860 N.E.2d 1234, 1245 (Ind.App. 2007)(emphasis in original).

The United States Supreme Court has defined parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule," or as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994). Parody involves "exaggeration or distortion" and is the means by which the author "clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticism or opinion…" New Times, Inc. v. Isaacks, 146 S.W.3d 144, 158 (Tex. 2004). A true parody "could not reasonably be understood as describing actual facts about respondent or action events in which he participated." Hustler v. Falwell, 485 U.S. at 57.

Here, in evaluating whether the MySpace profile was a parody or was defamatory speech, the Defendants submit that the record reflects that J.S. did not intend the profile to be a parody. For example, J.S. testified to the following at the Preliminary Injunction hearing with regard to her motives and intentions behind creating the MySpace profile:

> Q: Why did you make it [MySpace profile]?
> A: Because I was mad.
> Q: Why were you mad?
> A: Because of the dress code.
> Q: Can you explain?
> A: Mr. McGonigle, I thought he handled the situation inappropriately –
> Q: A previous incident?
> A: Yes – by yelling at me, and he didn't have to do that.
>
> Ex. "G," p. 12, ln. 7-19
>
> Q: Would you agree with me that this web site is written as if it was prepared by Mr. McGonigle?
> A: Yes.
> Q: And is there a particular reason why you prepared the web site that way?
> A: No.
> Q: Why did you do it?
> A: I don't know.
> Q: Have you no idea why you wrote this as if he had written it?
> A. No.
>
> Ex. "G," p. 21, ln. 15-25
>
> Q: Where did you get the information that you identified as general interests?
> A. What do you mean?
> Q: Where did you get that information?

> A: Like what part of it?
> Q: Pardon me?
> A: What part of the general interests?
> Q: Any of it. Each one.
> A: Well, I heard other students talk about Mr. McGonigle and whatever he does and I just wrote it down.
> Q: So is it your testimony that other students reference the fact that there was sexual relations occurring in Mr. McGonigle's office?
> A: Yes.
> Q: And is it your testimony that other students told you that he had been hitting on students on their parents?
> A: Yes.
> Q: Did you take any steps to determine whether those allegations were true before you put it on the web site?
> A: Well, I told the friends who complained about it that I'm pretty sure that's not what happened, but –
> Q: But you put it on the web site anyway?
> A: Yes.
>
> Ex. "G," pp. 16-17 (emphasis added)

During the Preliminary Injunction hearing, J.S. never testified that she intended for the MySpace profile to be a "parody." Only after this Court issued its decision denying Plaintiffs' emergency motion did J.S. change her testimony to reflect the Plaintiffs' current argument. Moreover, J.S.'s own testimony reflects that, in her opinion, she was asserting actual facts about McGonigle. The above testimony reflects that J.S. did not simply "make up" outrageous facts to be funny or to criticize McGonigle, rather, the above testimony reflects that she was writing defamatory and baseless information based on conversations she had with her friends. Accordingly, J.S.'s speech should not be afforded post hoc protection

when it was really attempting to convey knowingly untrue facts against McGonigle.

Separate and apart from J.S.'s intentions and motives, the profile should not be considered a parody as a reasonable person could view the profile as containing assertions of fact about McGonigle. If an attempted satire or parody fails to make clear to its readers that it is not conveying actual facts, it may be defamatory. RESTATEMENT (SECOND) OF TORTS § 566, cmt. D, at 176 (1977). Moreover, the Supreme Court has held that "quotations may be a devastating instrument for conveying false meaning." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991).

Here, there is absolutely no indication on the profile to indicate that the profile was a parody, expression of criticism, or expression of opinion (Ex. "B"). Anybody viewing the profile would think McGonigle himself wrote it. Simply because the information on the profile is very disturbing does not transform defamatory language into a parody. Unfortunately, society is filled with individuals with disturbed notions of what is considered acceptable or "normal behavior." Second, the profile contains correct identification characteristics which serve to confuse a reasonable person as to whether the information on the profile is true. For example, it is uncontested that the profile contains McGonigle's actual picture and accurately describes him as a Principal (Ex. "B"). Third, the profile,

written in the first person, conveys false facts that a reasonable person could take as true as the profile essentially contains quotations or information McGonigle personally wrote.

The Plaintiffs argue that because Defendant Romberger did not believe the defamatory accusations contained in the profile, no reasonable person could take the profile seriously. However, Defendant Romberger worked with and knew McGonigle for over 12 years (Ex. "K," p. 71, ln. 11). Therefore, unlike an average person, Dr. Romberger had an intimate personal knowledge of McGonigle and possessed far more insight into the type of person McGonigle was. Furthermore, Romberger was informed about the baseless profile by McGonigle himself, not a parent or student, prior to seeing the actual profile. (Ex. "K," pp. 31-32)

In sum, weighing the totality of the evidence, it is clear that the profile should not be afforded the protections of the First Amendment as the profile intentionally conveyed false facts that could be taken as true by a reasonable person and because J.S. never intended the profile to be a parody but rather as a means to injure and inflict harm on McGonigle.

B. Even If J.S.'s Speech Is Protected, J.S.'s First Amendment Claim Must Fail Because The MySpace Profile Was Reasonably Foreseeable To Cause A Substantial Disruption At The Middle School And Because The Profile Invaded The Rights Of McGonigle

The Plaintiffs argue that they are entitled to summary judgment on J.S.'s First Amendment claim because the profile did not cause "substantial and material disruption" in the Middle School (Plaintiffs' Brief, pp. 5-16).

The Defendants note at the outset that the Plaintiffs applied the wrong standard in evaluating whether the Defendants violated J.S.'s First Amendment rights. The Plaintiffs argued that this Court should only focus on the actual disruptions that took place to determine whether the Tinker[3] test was met (Plaintiffs' Brief, pp. 5-16). However, as already articulated in Defendants' Brief, this Court must examine not only the actual disruptions that took place but also examine whether it was reasonably foreseeable to conclude that the profile could cause a substantial disruption at the school (Dkt. #42, pp. 11-18).[4]

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[3] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[4] The Plaintiffs reliance on Saxe v. State College Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001) as the appropriate standard is misplaced. In Saxe, the Third Circuit was faced with the specific issue of whether the Defendant school district's Anti-Harassment Policy was unconstitutionally vague and overbroad. Id. at 204. The facts in Saxe in no way involved actual student disruption or the potential threat of student disruption. The facts only involved the plain language of the Policy. Moreover, the Third Circuit's interpretation of Tinker is no longer controlling given the Supreme Court's interpretation of Tinker in Morse v. Frederick, __ U.S. __, 127 S.Ct. 2618, 2625 (2007)("Tinker held that student expression may not be

The Plaintiffs rely exclusively on a set of district court opinions to support their position that the Defendants unconstitutionally punished J.S. for protected speech. However, such opinions are not binding on this Court as the Third Circuit has yet to specifically address an "off campus" internet speech case such as this one. In addition, the Defendants note that the Layshock court, the case Plaintiffs mostly rely on to support their argument, stated that its decision was a "close call."[5] The Defendants also submit that the holdings of the other circuit courts, which were already cited in Defendants' Brief, are more persuasive than the district court cases Plaintiffs rely upon. Accordingly, for all the reasons already articulated in Defendants' Brief, it was reasonably foreseeable to conclude that continued substantial disruptions would take place.

The Defendants also submit that Tinker compels this Court to find in favor the Defendants on another ground. The Tinker court stated the following:

> But conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (emphasis added). Id. at 513.

Here, this Court should also dismiss J.S.'s First Amendment claim because her speech "invaded the rights" of McGonigle. Tinker's "invasion of the rights of

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suppressed unless school officials reasonably conclude that it will materially and substantially disrupt the work and of the school").

[5] Layshock v. Hermitage School Dist., 2007 WL 2022096, at *12.

others" language has been interpreted to include "speech which could result in tort liability." Bystrom By and Trough Bystrom v. Fridley High School, Independent School Dist. No. 14, 822 F.2d 747,752 (8th Cir. 1987). In this case, for reasons already stated, J.S.'s speech was clearly defamatory. Accordingly, as defamatory language could result in the tort of defamation, pursuant to Tinker, the Defendants did not violate the First Amendment rights of J.S.

C. Defendants' Policies Were Not Unconstitutionally Vague And Overbroad

The Plaintiffs argue that the Defendants' Policies were unconstitutionally vague and overbroad (Plaintiffs' Brief, pp. 21-23). The Defendants submit that the plain language of the District policies in question demonstrate that Plaintiffs' claim lacks any merit.

To support their argument, the Plaintiffs first argue that the District policies are unconstitutional because "they do not contain limiting language (1) confining the policy to school grounds and school-related activities; or (2) confining punishment to speech creating a substantial and material disruption (Plaintiffs' Brief, p. 22). However, as already articulated in Defendants' Brief in Support of their Motion for Summary Judgment, the District policies specifically incorporate the law of the Public School Code, PDE Regulations, and other applicable constitutional or statutory provisions which limit or confine the punishment authority of the District (Ex. "J," p. 40).

The Plaintiffs also rely on the hypothetical answers offered by McGonigle during his deposition in response to questions about the scope of the District policies (Plaintiffs' Brief, p. 22). However, McGonigle's answers to hypothetical questions are not in any way relevant to the issue of whether the District policies are constitutional given the facts of this case. As the district court stated in Busch v. Marple Newtown School District, 2007 WL 1589507, at *15, fn. 30 (May 31, 2007):

> We note again that the deposition testimony of Principal Cook and Reilly included numerous questions regarding hypothetical situations that asked these witnesses to determine whether they would permit certain presentations on religious topics and if not, how those presentations differed from others that were permitted. While we have considered the testimony on these topics, we will not make legal determinations based on witness's opinions in response to hypothetical questions. We decide the equal protection claim based only on the actual occurrences in this case. Id. at *15, fn. 30

Finally, the Plaintiffs argue that the Acceptable Use Policy ("AUP") was unconstitutional because Dr. Romberger testified the AUP policy governs what students do from their home computer (Plaintiffs' Brief, p. 23). This is not the case. Dr. Romberger testified to the following during her deposition:

> Q: The Acceptable Use Policy, does that govern what students may do from their home computers or other computers outside the school?
>
> A: It governs in two ways. If they're doing an assignment and they give us something plagiarized, our

> staff does run plagiarism software to see if it's taken from a website. It also indicates that they cannot take anything from a website without authorization and that's what I felt, that these students took if from our website without permission and posted it and used it. It was our website. (Ex. "K," pp. 69-70)

Neither the plain language of AUP policy or Dr. Romberger's testimony indicates that a student will be punished for merely using his or her home computer. Rather, both the plain language of AUP policy and Dr. Romberger's testimony reflect that a student could only be punished when such action is brought into school. This was the case here. Accordingly, for all the foregoing reasons, Plaintiffs' claim should be dismissed.

D. Defendants Did Not Violate The Snyder's Substantive Due Process Rights

The Plaintiffs argue that the Snyder's substantive due process rights were violated (Plaintiffs' Brief, pp. 24-27). The Defendants submit that the Snyder's parental rights due process claim fails as a matter of law.

The Defendants already adequately briefed this issue in their original supporting brief (Dkt. #42, pp. 28-29). However, to reiterate, the Snyder's have failed to articulate or present any evidence as to how the Defendants' actions actually interfered with their parental discipline of J.S. It is simply uncontested that the Snyder's <u>did</u> discipline J.S. for her actions. As already stated, there is no constitutional right of parents to be the exclusive disciplinarian of their children.

Given that the MySpace profile was brought onto school grounds in violation of two District policies and because it was reasonably foreseeable that the profile would create further substantial and material disruptions, the Defendants had the authority to punish J.S. for her actions.

V. CONCLUSION

For all the foregoing reasons, the Defendants submit that Plaintiffs' Motion for Summary Judgment should be denied and Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,

SWEET, STEVENS, KATZ & WILLIAMS LLP

Date: January 7, 2008

By: /s/ Jonathan P. Riba

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IN THE UNITED STATES COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

<table>
<tr><td>J.S., a minor, by and through
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STEVEN SNYDER, individually and
on
behalf of their daughter,

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v.

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JUDGE: J
AMES M. MUNLEY

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<u>CERTIFICATE OF SERVICE</u>

I, Jonathan P. Riba, Esquire, counsel for Defendants Blue Mountain School District, Dr. Joyce Romberger and James McGonigle, hereby certify that a true and correct copy of the foregoing Brief in Response to Plaintiffs' Motion for Summary Judgment is available through the Court's ECF filing system and was also served by U.S. First Class Mail this day upon:

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