No. 2-02-1334

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TOM MYERS,

Plaintiff-Appellant,

v.

NELSON LEVY,

Defendant-Appellee,

On Appeal From the 19th Judicial Circuit Court, Lake County,
Illinois, Case 01 L 553
Honorable John Goshgarian, Judge Presiding

REPLY BRIEF FOR PLAINTIFF- APPELLANT TOM MYERS

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ARGUMENT IN REPLY

I. The facts must be viewed in the light most favorable to Coach Myers.

This Court on appeal reviews the grant of summary judgment de novo. *Jones v. Chicago HMO*, 191 Ill.2D 278, 291; 730 N.E.2d 1119, 1127 (2000). To do so, this Court must also strictly construe the evidence against Defendant Levy, and liberally in favor of Coach Myers. *Comastro v. Village of Rosemont*, 122 Ill.App.3d 405; 461 N.E.2d 616 (1st Dist. 1984).

Defendant Levy's "STATEMENT OF FACTS" section (Defendant's Brief, pp. 5-28) largely ignores these well-settled precepts. Rather, Defendant Levy's brief "spins" selected bits of evidence, and seasons his version with numerous unilateral, internal mental musings from his own self-serving affidavit. (See, e.g., Defendant's Brief, pp. 11, 14).[1] This approach is not merely unhelpful to this Court, but it also results in a factual recitation at odds with the material reality. Whatever weight a jury might give to any such musings admissible at trial, we think that cases are largely decided on objective facts and their reasonable inferences. On this appeal, moreover, Coach Myers is entitled to have his factual recitation credited by this Court. See, Myers' Opening Brief, pp. 8-15.

As we deal with Defendant Levy's arguments, we will note the material factual variances in Defendant's presentation. The material facts, viewed properly on appeal, establish key events which, together, refute Defendant's argument that his conduct was privileged. We will not repeat our opening brief's factual detail, but will summarize the material items:

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[1] Defendant's Brief also sprinkles its FACTS section with the irrelevant "beliefs" of various persons, rather than facts, see, e.g., Bruder "beliefs" p. 22; Myers "beliefs" p. 21; Guziac's "mental concerns" p. 25; Levy's "impression" p. 14.

First: Defendant Levy was unstinting in his praise for Coach Myers *before* their sons began competing: "a great coaching role model", etc. (Brief, pp. 9-11).

Second: Defendant Levy wrote the October 16, 2000 letter to LFHS, in which, inter alia, he described Coach Myers as a "buffoon" and as a "joke" (Brief, pp. 11-12) There can be no serious question that this letter is "defamatory per se" under Illinois law, and that damages are presumed. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 672 N.E.2d 1207 (1996); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 10; 607 N.E.2d 201 (1992); (Brief pp. 19-20). The letter also makes sweeping denunciations of Coach Myers' competence as a coach and as an educator.

Third, Defendant Levy wrote the November 8, 2000 "list" letter to LFHS. This letter and the accompanying lists of parents and players was willfully false in numerous aspects. For examples, Levy's letter grotesquely exaggerated the breadth and depth of parental unease with Coach Myers, it falsely represented that certain prominent citizens had signed the petition, and it falsely minimized the role of the parents in soliciting player signatures. (Brief pp. 12-13) Defendant Levy's letter also falsely stated that he had been "trying to get Tommy removed" for over three years, through conversations with Ms. Bruder. In fact, as Ms. Bruder testified, her *first* meeting on this subject with Defendant Levy was at a restaurant earlier that year. (Brief, pp. 13-14)

Fourth, Defendant Levy in October of 2000 had *threatened* Athletic Director Bruder (her word). (Brief p. 14.) Incredibly, Defendant Levy's self-serving, post hoc affidavit claims that he was referring to "other parents" when he made the threat. (Levy 87: 1-89: 12; Defendant's Brief p. 23).

Fifth, Defendant Levy's motivation in attacking Coach Myers was personal: his son and Coach Myers' son were competing to be the team's starting quarterback. This is a compelling inference to which Coach Myers is entitled on this appeal. (Brief, pp. 9-10; 14-15).

Sixth, Defendant Levy repeated his lies and defamations to outsiders: including other parents (such as Joanne Mullen), *The Chicago Sun-Times*, and *The Chicago Tribune* (Coach Myers "incompetent"). (Brief pp. 13, 15). To parent Joanne Mullen, Defendant Levy e-mailed on October 18, 2000, that he had "176 signatures" of parents, and that "Jill [Bruder] intends to recommend that Tommy not be reappointed". Both statements were flagrantly untrue, as Levy knew.

Defendant Levy told the *Chicago Sun Times* in January 2001, that "There has been constant unhappiness, widespread discontent, with Myers as football coach for more than a decade." Then he added to the Sun Times, "I was probably the number one antagonist of an organized effort that involved hundreds of people... the kids don't respect him." (Am. Comp. ¶ 9, admitted, App. Tab 3) One month later, Defendant Levy told the *Chicago Tribune*: "You've had an incompetent coach in place for a decade..." (Am. Comp. ¶ 11, admitted, App. Tab 3). These statements (other than the "number one antagonist" boast) are also defamatory per se.[2]

As will be demonstrated below, these material facts are more than sufficient to trump any "qualified" or "conditional" privilege which Illinois law recognizes. Defendant Levy's brief relies primarily on non-Illinois case law, and is even flatly inconsistent with Defendant Levy's legal position below.

Defendant Levy's actions crossed any fair line, and abused a dear constitutional privilege in a heartless way. If this Court protects Defendant Levy's actions, then we do not exaggerate to predict that it will be "open season" on coaches throughout the state.

II. Defendant Levy's interactions with LFHS were conditionally privileged (not

[2] The press statements were made after Coach Myers' termination. Of course, he was damaged by the per se defamations, apart from his loss of his football coaching position, as to Counts I and II.

"absolutely protected"); and his statement to parents and the media enjoyed *no* privilege whatsoever.

Statements to LFHS are at most qualifiedly privileged.

Defendant Levy's Brief asserts, somewhat inconsistently, that Defendant Levy's conduct was "conditionally privileged" (Defendant Levy's Brief p. 35), and then "absolutely protected" (Defendant Levy's Brief p. 38). Notably, in the Court below, Defendant Levy claimed only that his privilege was "conditional" (Defendant's summary judgment memo p. 7). Defendant Levy can direct this argument only to the Levy statements made to LFHS, and not defamations made to other persons.

Indeed, Defendant Levy's discussion of his newly-asserted "absolute protection" (Defendant's Brief, pp. 38-47) relies on cases from other jurisdictions, on cases exclusively dealing with a tortious interference claim, and on two Seventh Circuit cases which pre-date the relevant Illinois Supreme Court decisions. Notably absent from his discussion is the controlling Illinois case law.

New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny resolved the tension between defamation law and First Amendment rights. These cases have established that, as to matters of public interest, a defamation plaintiff must prove not merely that the defendant's statements were false and defamatory, but also that the defendant acted with "actual malice" *Gertz v. Welch*, 418 U.S. 323 (1974). Because defamation is a state law tort, the precise contours of the "actual malice" requirement have been left to the respective state courts.

Our Supreme Court has recognized these constitutional principles procedurally as creating a "qualified privilege", which a plaintiff can overcome by showing "actual malice". *See, Colson v. Steig*, 89 Ill.2d 205, 433 N.E.2d 246 (1982) (cited by Defendant Levy at Brief, p. 36). In *Colson*, plaintiff was an assistant professor at Northern Illinois University who sued for defamation the

chairman of his department. The Illinois Supreme Court upheld as an actionable defamation the following statement about plaintiff made by the defendant at a four-person department personnel committee: "I have information I cannot divulge which reflects adversely on John's performance as a teacher." Our Supreme Court recognized a "qualified privilege" to make "fair comment upon public figures and public employees." This qualified privilege could be overcome by a showing of "actual malice". The Court then twice defined "actual malice" to mean "that the utterance was made with knowledge of its falsity or in reckless disregard of whether it was true or false". *Id* at 212, 214.

Seven years later, our Supreme Court confirmed a plaintiff's burden to overcome such a "qualified privilege": "...a plaintiff must prove that the Defendant either intentionally published the material while knowing the matter was false, or displayed a reckless disregard as to the matter's falseness." *Mittelman v. Witous*, 135 Ill.2d 220, 237; 552 N.E.2d 973 (1989).

In *Kuwik v. Starmark Star Marketing and Administration, Inc.* 156 Ill.2d 16, 619 N.E.2d 129 (1993), our Supreme Court expressly expanded the "actual malice" definition which trumps a "qualified privilege". Notably, Defendant Levy devotes not one word to *Kuwik* (on which Coach Myers relied in his opening brief, pp. 21-22.) In *Kuwik* plaintiff was a chiropractor who sued insurance companies for defamation. The defendants had sent a letter to the State Department of Insurance questioning plaintiff's qualifications to practice her profession. As in the case at bar, the trial court in *Kuwik* granted summary for defendants; finding a qualified privilege which had not been abused by defendants. The Appellate Court reversed the summary judgment for defendant, and our Supreme Court agreed. The Court first noted that in Illinois the issue of whether a qualified defamation privilege exists is a question of law for the Court, while the issue of whether the privilege

has been abused is a question of fact for the jury. To determine whether a conditional privilege[3] exists, a court should look "only to the occasion, itself for the communication." *Id* at 27. Applying the Restatement (Second) of Torts, §594, 595 (1977), our Court concluded that the letter was "sent on occasions where not only the interests of defendants were involved, but where plaintiffs ... interests were involved as well", so a qualified privilege existed.

Our Supreme Court in *Kuwik* expressly expanded the definition of abuse of a qualified privilege; that is" what "actual malice" a plaintiff must how to defeat the qualified privilege. The Court first confirmed *Mittelman's* holding that "actual malice" must be proven by a "minimum standard of recklessness", once the qualified privilege has been established by the defendant. This inquiry was limited, however, to whether a defendant knew the matter was false or had a high degree of knowledge that the matter was false. *Kuwik*, at 30. Then the Court stated that "...we must expand the definition of abuse of a qualified privilege. "We now hold that to prove an abuse of the qualified privilege, the plaintiff must show" 'a direct intention to injure another, or *** a reckless disregard of [the defamed party's] rights and of the consequences that may result to him." *Kuwik* concluded that there were fact-questions about defendant's actual malice which precluded summary judgment.

Kuwik has been the law in Illinois for a decade. In *Colson* the defamation was made to a public university committee about the plaintiff teacher's professional competence. In *Kuwik* the defamation was made to the State Insurance Department about the plaintiff chiropractor's professional competence. In both cases trial court dismissals were reversed, and fact-questions remained surrounding the defendant's asserted qualified privilege.

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[3] Illinois cases in this context use the terms "qualified privilege" and "conditional privilege" interchangeably.

In the case at bar, similarly, the defamation was made (in part) to a public school committee about the Plaintiff coach's professional competence. Defendant here has also asserted a qualified privilege. As outlined above, here there are also fact-questions surrounding Defendant's actual malice. A jury should decide, under the *Colson - Kuwik* standard, whether Defendant Levy defamed Coach Myer and whether Defendant Levy knew of the falsities or acted with a "reckless disregard of Coach Myers' rights". We submit that the facts of the instant case are far more egregious than those of either *Colson* or *Kuwik*, and that Coach Myers has a much more powerful case than those.

In light of the above Illinois case law, which expressly involved defamations made to public entities, Defendant's *Noerr-Pennington* reliance ("absolutely protected") is a classic red herring. *Noerr-Pennington* arose in the anti-trust context, when business competitors banded together to lobby. There is a First-Amendment privilege against anti-trust liability, said the Supreme Court. Only if the lobbying effort is a sham can this privilege be defeated. Anti-trust law, of course, bans most competitor joint efforts, which are otherwise per se illegal.

As discussed above, the Illinois Supreme Court has never applied *Noerr-Pennington's* "sham" requirement to a defamation claim. Nor is there any constitutional necessity to do so. "Actual malice", as defined in *Kuwik*, protects legitimate First Amendment activity.

Neither the letter to the State Insurance Department in *Kuwik*, nor the statement to the public University Department in *Colson,* was part of any "sham". Had *Noerr-Pennington* applied, neither of those plaintiffs would have prevailed, as they did. Indeed, *Noerr-Pennington* was not even mentioned in either opinion; it was simply not relevant to the defamation claims before our Supreme Court.

Defendant Levy's Brief discusses some case law from other jurisdictions which Defendant

asserts have utilized *Noerr-Pennington's* "sham" in certain state tort claims, and some federal civil rights claims. (Defendant's Brief, pp. 40-41) But he cites no such Illinois Supreme Court cases, and no Illinois defamation cases which post-dated *Kuwik*.

Defendant Levy cites two Seventh Circuit decisions: *Stern v. US Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), a federal civil rights claim[4]; and *Havoco of America Ltd. v. Hollowbow,* 702 F.2d 643 (7th Cir. 1983), a tortious interference claim. Both of these cases were decided years prior to *Kuwik*, thus without its definitive statement of state law, and neither case dealt with defamation. Moreover, five years *after Havoco*, the Seventh Circuit decided *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988) which was a defamation case. *Stevens* upheld as defamatory this statement made by a local activist (like Defendant Levy here), about a high school teacher (like Coach Myers here), to the Public Board of Education (like LFHS here):

> "The teachers are afraid of her ... They are afraid of Miss Stevens. They have called me one by one and said, "You're absolutely right. We know what's going on, but if we speak up, she will write us up and we will be - then we'll get dismissed from the school." *Stevens* at 396.

The Seventh Circuit upheld the jury's verdict that "...this statement is false and that Tillman either knew it was false or acted with reckless disregard for the truth when making it." *Id* at 397. The Seventh Circuit cited *Noerr-Pennington*, but concluded that "only evidence satisfying the *New York Times* standard" would permit an award of damages. The knowing falsity test satisfied this constitutional standard. So the Seventh Circuit does not support Defendant Levy's claim to "absolute protection". Rather, to defeat a First Amendment privilege, the Seventh Circuit requires a plaintiff

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[4] In *Stern*, the Seventh Circuit found no federal civil rights claim, and did *not* reach the merits of the state defamation claim. But the Seventh Circuit did note that "knowing falsity" overrides First Amendment considerations in such cases. *Stern* at 1345. *Stern* does not support Defendant Levy.

to show that the defendant's statement was either knowingly false, or that defendant acted with reckless disregard for the truth.

The only "absolute" defamation privileges are those such as statements made in litigation, *Medow v. Flavin*, 336 Ill.App.3d 20, 782 N.E.2d 733 (1st Dist. 2003), and statements made by legislators during debates. *Ill. Constitution,* Art. IV, Section 12. *See, Rosner v. Field Enterprises, Inc.*, 205 Ill.App.3d 769, 790; 546 N.E.2d 131, 143 (1st Dist 1990).

Thus, as to both the defamation count (Count I), and the false light count (Count II), to defeat Levy's asserted First Amendment privilege, Coach Myers must show that the utterance was made with knowledge of its falsity or in reckless disregard of whether it was true or false, or of Coach Myers' rights and of the consequences that may result to him. The tortious interference count (Count III), enjoys a somewhat different history, which we discuss next.

Defendant Levy's brief does discuss, albeit inaccurately, cases which apply a part of *Noerr-Pennington* to Illinois tortious interference claims (Defendant Brief, pp. 34-37, 40-41).

Tortious interference with contract is a complicated tort in Illinois. There is a broad array of conduct causing a breach-of-contract, which is "justified", or "privileged". *HPI Health Care Services, Inc. v. Mt Vernon Hospital, Inc.*, 131 Ill.2d 145, 545 N.E.2d 672 (1989). The tort protects different interests than do defamation and false light torts. Over 35 years ago the Illinois Supreme Court decided *Arlington Heights National Bank v. Arlington Heights Federal S & L*, 37 Ill.2d 546, 229 N.E.2d 514 (1967); a claim for tortious interference with contract. Plaintiff Bank entered into a contract with the Village to acquire a vacated street. Defendant Savings & Loan, a competitor, appeared before the Village Board and successfully urged the Village to adopt an ordinance to block the transaction, which improved the S & L's visibility to passers-by. Our Supreme Court examined

the extent to which a private citizen is privileged to cause a contract breach by "petitioning his local legislative body." *Id* at 550. The Court expressly noted, as an example, that "an otherwise privileged libel" can subject the speaker to liability where "...it was motivated by actual malice." *Id*. Notably, there were no allegations that defendant uttered defamations or falsehoods in *Arlington Heights*. The Court noted that "both parties agree that actual malice must be shown... and that there must be a desire to harm, which is independent of and unrelated to a desire to protect the acting party's rights..." *Id* at 551. The Court had before it no evidence of such non-falsehood "actual malice".

King v. Levin, 184 Ill.App.3d 557, 540 N.E.2d 492 (1st Dist. 1989), cited by the Court below, was also solely a tortious interference claim. Plaintiff claimed that defendant made threats to the Illinois Housing Development Authority to file a lawsuit, which caused the Authority to exclude plaintiff's property from a bond sale. The case proceeded to jury trial, where the defendant prevailed. The Appellate Court noted that the Illinois Supreme Court in *Arlington Heights*, *supra*, had "applied a different exception than that which the Federal Courts have adopted" in *Noerr-Pennington*, and that "actual malice" places a defendant outside any privilege. *Id* at 560. The Court concluded that, to trump an otherwise privileged tortious contract interference, a plaintiff must establish either "actual malice" or "sham" from *Noerr-Pennington*. *Id* at 496.[5] And this is a question of fact for the jury. So the Appellate Court recognized that "actual malice" and "sham" are *different* concepts, and that proof of either defeats a tortious interference privilege.

Defendant Levy recognizes this (Defendant's Brief, pp. 40-41). He quotes at length from a San Francisco District Judge's (30 year-old) opinion that the "actual malice" standard of *Arlington*

[5] Defendant Levy's Brief (p. 45) incorrectly states that *King v. Levin* requires proof of both "actual malice *and* sham" to defeat a tortious interference privilege. *King* stands for the opposite: actual malice *or* sham, *King*, 540 N.E.2d at 496.

*Heights is "*inadequate to protect the breathing space*"* of the First Amendment and that the federal sham" standard should apply. (Defendant's Brief p. 40). *Sierra Club v. Butz*, 349 F.Supp. 934 (No Cal. 1972). Needless to say, no Illinois Court has agreed with *Sierra Club*, and our Illinois Supreme Court has clearly not adopted the *Sierra Club* view for Illinois defamation cases. When Defendant Levy states in his Brief (p. 41) that "the concepts of actual malice under Illinois law and "sham" under federal law ...practically merge", he is engaging in some wishful thinking. The concepts are distinct in Illinois tortious interference law, and quite different in Illinois defamation/false light law. This Court's *Ray Dancer, Inc. v. DMC Corp,* 230 Ill.App.3d 40, 594 N.E.2d 1344 (2d Dist. 1992), was also a tortious interference case, as well as an anti-trust case. It was not a defamation or false light case.

Only Count III of Coach Myers' complaint accuses Defendant Levy of tortious interference. Myers' evidence of "actual malice" is more than sufficient to satisfy *Arlington Heights* and *King*. Defendant Levy's motive (to harm the competition to make his son the starting quarterback) and his tactics (threatening the Athletic Director), evidenced a desire to harm Coach Myers, his reputation, and his livelihood, far beyond any asserted right to criticize the Coach to LFHS.

Defamations made to parents and to the press enjoy no qualified privilege.

The qualified privilege issue could only be argued as to the alleged falsehoods Defendant Levy communicated to LFHS officials.

The evidence is undisputed that Defendant Levy also defamed Coach Myers, and lied to, other parents and to the press. See Plaintiff's Opening Brief, pp. 13, 15. No qualified privilege is available as to these communications, and none is asserted by Defendant Levy.

III. Coach Myers is not a public figure.

Plaintiff agrees that he must show actual malice on the defamation claim (Count I) to defeat any qualified privilege as to Levy's letters to the LFHS officials. Plaintiff also agrees that he must show actual malice as an element of his false-light claim (Count II). Plaintiff also agrees that he must show either "actual malice" or "sham" to trump any qualified privilege defense on the tortious interference claim (Count III). As discussed, there is powerful evidence on this point; evidence which at a minimum creates triable jury questions of fact.

But there are also Defendant Levy defamations to parents and to the press. As stated above, these can carry no qualified privilege. And if Coach Myers is not a public figure, he need not show actual malice to prevail on these defamations.

We will rely on our Opening Brief on this point (pp. 27-29, Defendant Levy's Brief pp. 48-50). Coach Myers did not voluntarily inject himself into any public controversy. And his public employment, by itself, does not make him a public figure.

IV. The facts also support a trial on Coach Myers' false light claims.

Defendant's Brief (pp. 51-56) argues the weight to be given to various pieces of evidence on the false light claim (Count II).

Here Defendant's Brief refers only to allegations in the complaint; whereas, the case is here on summary judgment - where *all* the facts adduced during discovery are properly before the Court.

Defendant's Brief argues that Coach Myers "had no protected privacy interest in his performance" (Defendant's Brief, p. 51). This is *jabberwocky*. Notably, no such argument was made below in Defendant's Motion for Summary Judgment.

The elements of the tort of "false light" are well-established. A plaintiff must prove (1) that defendant placed the plaintiff in a false light before the public, (2) that such false light is highly

offensive to a reasonable person, and (3) that defendant acted with actual malice; that is, with knowledge of the falsity or a reckless disregard as to truth or falsity.[6] *Lovgren v. Citizens First National Bank*, 126 Ill.2d 411, 534 N.E.2d 987, 991 (1989); *Dubinsky v. United Airlines Master Executive Council*, 303 Ill.App.3d 317, 708 N.E.2d 441 (1st Dist. 1999).

Most recently, in *Muzkowski v. Paramount Pictures, Corp.*, 322 F.3d 918 (7th Cir 2003), the Seventh Circuit, applying Illinois law, permitted a baseball coach to proceed with his libel and false light claims against the defendant film producers. Defendants portrayed plaintiff as a thief, and as an unlicensed securities broker. These were defamatory per se, said the Seventh Circuit, noting also that the tort of false light "tracks our assessment" of the defamation law. Surely Plaintiff's evidence of Defendant's false and malicious accusations about Coach Myers' professional competence, Defendant's calling him a "buffoon" and a "joke", Defendant's almost pathological exaggerations of the depth and breadth of his cabal to oust the Coach, his threat to Athletic Director Bruder, and Defendant's eager denunciations to the media, ("no respect", "incompetent for a decade") support the false light claim. Coach Myers did not invite such scorns and personal attacks.

Defendant's arguments on this point should be saved for a jury.

V. Fact Questions Preclude Summary Judgment

Each side can argue itself blue in the face over the truthfulness, materiality, motive, and recklessness of the parties. But that is what juries are for - to sort out the various hues and, under proper instructions, give its own color to the case.

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[6] Defendant's Brief discusses at some length different tort: invasion of privacy (Defendant's Brief pp. 51-54). Such discussion is not helpful to this Court.

We respectfully submit, based on the facts in our Opening Brief (pp. 8-15), summarized above in this Reply, that Coach Myers can present a far more powerful case than those reported in *Colson, Stevens,* and *Kuwik*, all cases where the plaintiff's was permitted to go to trial.

Defendant's Brief argues that his alleged defamations were "substantially true", citing *Gist v. Macon County Sheriff's Department*, 284 Ill.App.3d 367, 671 N.E.2d 1154 (4th Dist. 1996). But *Gist* also noted that "A defendant bears the burden of establishing the 'substantial truth' of his assertions"; and that "substantial truth is normally a question for the jury" *Gist* at 371, 671 N.E.2d 1157. We doubt that Defendant could convince a reasonable jury that Coach Myers is "substantially a joke" or "substantially a buffoon". And Defendant Levy's grotesque exaggerations of the parental support he had gathered (his claimed 105 signatures verses his actual *29* signatures; and his false claims to the support of various prominent citizens) cannot fairly be deemed "substantially true" as a matter of law. And Defendant Levy's media statements, such as his claim of "widespread discontent" for "more than a decade", involving "hundreds of people"; and his accusation that Coach Myers was "incompetent... for a decade" are not susceptible, on this record, to an undisputed finding of being "substantially true". Those are jury questions.

There is in this record substantial evidence that Defendant Levy knew that his aspersions toward Coach Myers were untrue. But more to the immediate point, there is enough evidence to preclude a summary judgment. One needs merely to compare the facts of this case with those of *Colson* (1982), *Stevens* (1988), and *Kuwik* (1993).

Summary judgment is especially unfair, and difficult to justify, over issues such as "actual malice", which turn in part on a defendant's knowledge and state of mind, *see, e.g., Kuwik v. Starmark Star Marketing and Administration, Inc.* 156 Ill.2d 16, 619 N.E.2d 129 (1993).

We will not repeat here all the evidence set out in our Opening Brief, but a few examples illustrate the point. Defendant Levy's unstinting written praise for Coach Myers was evident prior to 2000: "a great coaching role model"; "character, kindness, fairness"; "unfailing positivity, sensitivity and sincerity"; "reassuring"; "caring"; "values"; "honesty"; a "positive influence". (C001013, C 001015, Opening Brief App. tab 3)

Suddenly, in 2000, Levy in writing describes the Coach as a "buffoon"; a "joke"; who "lacks concern for the young men"; "lacks the respect"; "a poor example"; "abysmal failure to support his players"; "sad, despicable and inexcusable treatment"; "program failed miserably"; "grossly unprepared"; "cared little or nothing about his players"; "fails as an educator and as a leader" (C00889-893 Opening Brief App. Tab 3); and Defendant Levy tells the newspapers that there has been "widespread discontent" for "more than a decade", that the "kids don't respect him", and that Coach Myers has been"incompetent" for a decade (C001093, C000742, Opening Brief App. Tab 3).

Levy is hoist on his own petard. His own prior words doom him. At trial he may attempt to argue that he lied when he praised Coach Myers, and really believed it when he later ripped the Coach. But it is for a jury to decide whether he was "lying then or lying now" (as cross-examiners are wont to argue). Moreover, Defendant Levy could only have intentionally inflated to LFHS the breadth and depth of his anti-Myers campaign. For example, he knew he didn't have 105 parent signatures, because he only had 29. And it is Athletic Director Jill Bruder's testimony that Levy threatened her; and third-party testimony that Defendant Levy hurled epithets at Coach Myers at games, and was focused on Levy's son's playing quarterback. Surely these facts, as well as the others discussed above, belie a grant of summary judgment.

Defendant Levy may have a privilege to communicate with LFHS about its football coach,

but it is equally clear that he crossed the line into "actual malice". The case law establishes that nothing in the First Amendment is offended by subjecting his reckless and vicious campaign to tort law scrutiny.[7] No reported case includes such a broad litany of abusive tactics and conduct.

Surely parents passionately love their children, and surely "Monday-morning quarterbacks" often criticize coaches, but our maligned coaches have rights, too. This Court must determine the appropriate balance. We submit that the facts, the case law, common sense, and good public policy all dictate that Coach Myers should be permitted to go forward.

The error of the Court below was in weighing that evidence, and then bestowing upon Defendant Levy an unprecedented virtually absolute privilege to lie to hurt Coach Myers.

We ask only for a trial .

CONCLUSION

For the reasons stated herein and in Coach Myers' Opening Brief, Plaintiff-Appellant Myers requests this Court to reverse the judgment below and remand Coach Myers' claims for further proceedings.

Respectfully submitted

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By one of his attorneys

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[7] No way (we hope) can Defendant Levy's conduct be deemed a "hallowed American tradition", as his Brief insists (Defendant's Brief p. 34).

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