

West v. Dunson
Hearing Date:
Motion: Summary Judgment or SAI

Case No. 22CV02988
December 12, 2023

PARTIES/ATTORNEYS

Plaintiff	Gary West	GORDON REES SCULLY MANSUKHANI, LLP Roger B. Frederickson
Defendant	Benji Dunson Jr. Benji Dunson Sr. Julie Dunson	CODDINGTON, HICKS & DANFORTH Rebecca D. Martino, Esq. Lisa A. Corman, Esq.

PROPOSED TENTATIVE

Defendant Benji Dunson, Jr. was a freshman at Cabrillo High School in Lompoc, California. Plaintiff, Gary West, was the athletic director at Cabrillo High School, the interim head football coach, and taught a football class at Cabrillo High School. Benji Dunson, Jr. was a student in plaintiff's football class. On February 1, 2022, Benji Dunson Jr. attended class and asked if he could be excused to retrieve his backpack from another class. Accounts differ on what happened next. According to plaintiff he instructed Benji Dunson Jr. to wait, but after repeated requests that interrupted his class, he instructed Benji Dunson Jr. to retrieve his backpack and report to the counseling office. According to Benji Dunson Jr., plaintiff put his hand around Benji Dunson, Jr.'s neck, with fingers on the back side of his neck and thumb on the front of his neck, applying pressure. Additionally, during the incident, plaintiff pushed him down while his hand was around Benji Dunson, Jr.'s neck and made him take a step back. Then plaintiff told him to get out of his classroom. Benji Dunson Jr. reported this incident to his parents, Benji Dunson Sr. and Julie Dunson, who allegedly told others of the incident.

The operative pleading is the first amended complaint (FAC), which alleges causes of action against all defendants for: (1) defamation; and (2) intentional infliction of emotional distress.

Preliminary Issue

Defendant Benji Dunson Jr. appears to be a minor. (FAC, ¶ 2; see Motion for Summary Judgment or SAI.) In an action for damages against a minor, the minor must appear by general guardian or by guardian ad litem as provided by section 372 of the Code of Civil Procedure. A judgment which is rendered against a minor, without the appearance by guardian, is not void, but merely voidable. (*Field v. Hughes* (1933) 131 Cal.App. 144, 146.) It does not appear that any such appointment has been made in this case. **This must be rectified before the court makes any orders involving the minor.**

Current Procedural Posture

On August 18, 2023, defendants filed their motion for summary judgment or adjudication of 19 separate issues related to the oral statements allegedly made. On October 20, 2023, they filed a motion for protective order to prevent the forensic analysis of cellular phones of the defendants on the grounds that the request is duplicative and cumulative. On November 2, 2023, plaintiff moved for an order compelling defendants to further respond to plaintiff's demand for inspection of cellular telephones and/or for an order compelling defendants to submit their cellular telephone devices to forensic examination pursuant to the protocol for electronically stored information ("ESI") proposed by plaintiff, asserting the statements of defendants and the phones themselves are central to the case.

All of these motions are set for hearing on December 12, 2023. However, the court intends to continue the motion for summary judgment or adjudication of issues pending resolution of the discovery motions. The court makes the following observations that indicate why it is pursuing this course of action.

The motion for summary judgment or adjudication of issues focuses on the statements made by Benji Dunson Sr. to school officials, parents of students, and investigators (Issue 1 and 4) and his parents (Issue 2); statements made by Julie Dunson to school officials, parents of students, and investigators (Issue 7 and 10) and to Benji Dunson, Sr.'s parents (Issue 8); and Benji Dunson Jr. to school officials, parents of students, and investigators (Issue 13) and to student Christopher Hawk. These statements were all, it appears, made orally. Defendants assert, in their separate statement, that:

- Plaintiff admitted in response to a special interrogatory that he has no evidence of any writings that support his contention that Benji Dunson, Sr. made defamatory statements about him. (UMF Nos. 25, 83, 109, 141, 173);
- Plaintiff admitted in response to a special interrogatory that he has no evidence of any writings that support his contention that Julie Dunson

- made defamatory statements about him. (UMF 201, 228, 256, 284, 310, 337);
- Plaintiff admitted in response to a special interrogatory that he has no evidence of any writings that support his contention that Benji Dunson, Jr. made defamatory statements about him. (UMF Nos. 363, 391, 421, 449, 475, 500, 528).

In addition, according to defendants, “Plaintiff admitted that he has no facts that form the basis for his contention, as alleged in the first amended complaint, that defendants made statements to classmates of Benji Dunson, Jr. and to friends and family of Benji Dunson, Sr. and Julie Dunson “via text and social media.” (Undisputed Material Facts (UMF) Nos. 26 (Issue 1), 84 (Issue 3), 110 (Issue 4), 142 (Issue 5), 174 (Issue 6), 229 (Issue 8), 257 (Issue 9), 311 (Issue 11), 338 (Issue 12), 364 (Issue 13), 392 (Issue 14), 422 (Issue 15), 450 (Issue 16), 476 (Issue 17), 501 (Issue 18), 529 (Issue 19).)

Defendants thus cabin the alleged defamatory statements to oral statements only and analyze the defamation cause of action based solely on those statements. Plaintiff acknowledges this in his opposition, in which he observed that the focus is on slander. (Civ. Code, § 46(3).) He also asserts: “Defendants have objected to Coach West’s request to inspect their cellular telephones and have refused to produce certain text messages in the discovery process. Although “meet and confer” efforts are ongoing, Defendants have sought a protective order (and Coach West filed motion to compel which is noticed to be heard on December 5, 2023). Accordingly, the focus of this opposition is upon slander, rather than libel. However, if such motion to compel is granted then this motion should be denied and/or continued so as to allow time for such additional discovery. See Cal. Civ. Proc. Code Section 437c(h).” (Opposition, p. 10, fn. 3.) However, if the motion for summary judgment or adjudication were to be granted, that would terminate this action entirely, making it unclear how plaintiff would procedurally bring any written statements before the court. Such a fragmented approach seems manifestly inappropriate. More to the point, however, if written statements do exist and are ordered produced by the court, the material facts asserted by defendants as outlined above will be entirely undermined (and a new motion may be required).

Accordingly, the better course is for the court to resolve the pending discovery motions first. If discovery is compelled, and if written statements are found, the next consideration is whether the court should nevertheless rule on the oral statements at issue in this motion. Arguably, at this stage, it should not. The Code of Civil Procedure authorizes a party to “move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one of more issues of duty.... A motion for summary adjudication shall be granted only if it completely disposes of a cause of action....” (Code Civ. Proc. § 437c, subd. (f)(1), italics added.) In *Lilienthal & Fowler v.*

Superior Court (1993) 12 Cal.App.4th 1848 (*Lilienthal*), a legal malpractice action, the court of appeal held that the trial court properly could rule on a summary adjudication motion directed at the claims pertinent to services rendered on one legal matter, which claims had been combined in the same cause of action with the claims arising from services performed on another legal matter. (*Id.* at pp. 1854–1855.) Reviewing an earlier (but not substantively different) version of the statute, the court observed that the term “cause of action” in a broad sense means “the invasion of a primary right (e.g. injury to person, injury to property, etc.).... However, in more common usage, “cause of action” means a group of related paragraphs in the complaint reflecting a separate theory of liability.... [¶] As used in [Code Civ. Proc.] [section] 437c(f), “cause of action” should be interpreted in the latter sense (theory of liability).’ ” (*Lilienthal, supra*, at p. 1853.) The court determined that the Legislature’s intent is best effectuated “by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action.” (*Id.* at p. 1854, italics added.) In *Lilienthal*, defendants’ motion was proper because plaintiffs sought “to recover damages based on two separate and distinct obligations” having “no relation to each other and involv[ing] legal services performed at different times, with different and distinct obligations, and distinct and separate alleged damages.” (*Ibid.*) Here, while each alleged statement at issue is a separate injury, it constitutes an invasion of the same primary right--the right to be free from injury to reputation--the single defamation cause of action, which has been alleged in the FAC (See *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.* (1993) 5 Cal. 4th 854, 865.) Thus, dismissal as to the oral statements would not dispose of the entire defamation cause of action.

In the end, before the court can rule on the summary adjudication/summary judgment motion, all relevant discovery should be exchanged and assessed, with view to whether it impedes or furthers the lawsuit. Absent such exchange, the present motion seems premature.

Appearances Required

The motion for summary judgment or adjudication of issues will be continued until after the discovery issue is resolved. The parties are directed to appear and be prepared to discuss these issues.