

EXAMINERS' ANALYSIS OF QUESTION NO. 11

A. Defamation claim against Mikey.

According to the Court in *Mitan v Campbell*, 474 Mich 21, 24 (2005), the elements of defamation are:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251 (1992) (libel); *Ledl v Quik Pik Food Stores, Inc.*, 133 Mich App 583, 589 (1984) (defamation).

Because he is a private person (as opposed to a public figure or limited public figure), Jones had to prove that the challenged statement was published negligently or with some degree of fault greater than negligence. See MCL 600.2911(7) and *Michigan Microtech v Federated Publications*, 187 Mich App 178, 184 (1991). "A communication is defamatory if it tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with that person." *Glazer v Lamkin*, 201 Mich App 432, 438 (1993).

Jones should succeed on his defamation claim. First, the facts show that Mikey made false and defamatory statements concerning Jones - that Jones repeatedly cheated as a baseball coach - which was not true. Second, there was no privilege for Mikey to make these statements to these third parties, i.e., to the parents and others in the community. Third, Mikey was at least negligent, though a good argument could be made that he acted with malice, in making the statement. Again, he made up the story and communicated it to others with the intent that Jones lose his coaching position, which is what occurred. Fourth, and finally, Jones has established special harm, he lost his job as a result of the false rumors, and he is entitled to economic damages as a result of the negligence-based defamation. MCL 600.2911(7); *Glazer*, 201 Mich App at 437. Loss of his sales job would suffice for economic damages, so long as he can prove causation.

Additionally, because Jones has a strong case to prove malice, if he attempts to and does prove that, he could recover for damages to his lost reputation. *Id.*

B. Negligence claim against Tom.

In *Zapalski v Benton*, 178 Mich App 398 (1989), the court held that parents cannot be held liable for their children's torts based merely on vicarious liability. Instead, a plaintiff must produce some evidence that the parents failed "to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so." *Id.* at 403.

Instead, plaintiff sought recovery under a negligent parental supervision theory. This being so, plaintiff could not merely allege vicarious responsibility for the tortious acts of the child, but was required to allege negligent conduct on the part of the parents themselves. *Dortman v Lester*, 380 Mich 80, 84 (1968). Parents may be held liable for failing to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so. *Id.*; *American States Ins Co v Albin*, 118 Mich App 201, 206 (1982). Liability for negligent supervision will not lie where supervision would not have made the parents aware of their child's tortious propensities. *Muma v Brown*, 378 Mich 637, 645 (1967). [*Zapalski* at 402-403.]

Here, there is no evidence that Tom failed to exercise proper control of Mikey, for there is nothing in the facts indicating any prior knowledge that he may act as he did. Nor are there any facts showing that Tom was aware that Mikey was making these untrue statements about Jones. Thus, there is no basis for a negligence claim.