

**Attorney-Client Privileged
Work Product Privileged**

To: Jonathan Fishbane
Date: May 7, 2019
Re: Defamation Liability

“It seems to be well settled in this State that words spoken or written by public servants in judicial and legislative activities are protected by absolute privilege from liability for defamation. *However false or malicious or badly motivated the accusation may be*, no action will lie therefor in this State.” Weeks v. Town of Palm Beach, 252 So.3d 258, 261 (Fla. 4th DCA 2018), quoting Hauser v. Urchisin, 231 So.2d 6, 8 (Fla. 1970) (emphasis added).

The absolute privilege protects the statements of all public officials, regardless of the branch of government or the level of the official. Florida State Univ. Bd. of Trustees v. Monk, 68 So.3d 316 (Fla. 1st DCA 2011).

“[T]he Florida Supreme Court has decided that the scope of an official's duties extends beyond enumerated, required tasks, and includes discretionary duties that are associated with a given position.” Weeks at 262, quoting Stephens v. Geoghegan, 702 So.2d 517, 523 (Fla. 2d DCA 1997).

The protection does not merely apply to statements made within the scope of the official's statutory authority or power, but applies more broadly. Goetz v. Noble, 652 So.2d 1203 (Fla. 4th DCA 1995).

So, the pertinent questions are:

1. Will Lichter be considered a “public servant” and thereby be eligible for the protection?

My understanding is that the Mason charter school is a public school, funded, at least in part, with public education funding, and created under the authority of the Collier County School Board. Therefore, I believe Lichter, as board member and president of the school, would be eligible for the public official privilege.

2. If Lichter is considered a “public servant,” were the statements made within the scope of her official duties?

I believe this analysis will not hinge on the malicious nature of the words themselves, but instead on whether it is within the purview of Lichter's discretionary duties to comment

on the character of a parent and of a school board member. If it is considered within the scope of her duties to so comment, then she is protected. The fact that she commented falsely, maliciously and with bad motivation will not undo the immunity.

But I think this is definitely a point of vulnerability. Without having great knowledge of what actual duties she should or could legitimately be doing on behalf of the board of the school, I would think a good argument could be made that commenting on the personal character of a parent and of a member of the Collier County School Board is not included.

3. If Lichter's actions are found to be outside of the scope of her official duties and therefore not protected by the privilege, can the Mason charter school be held liable for her actions?

Florida's sovereign immunity statute, at §768.28(9)(a) provides, "The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

Therefore, if a potential plaintiff is successful in arguing that Lichter was acting outside of the scope of her official duties, and is therefore subject to liability, then this same finding would necessarily provide immunity for the school pursuant to the section quoted above, and also in accordance with the common law surrounding the doctrine of *respondeat superior*.

So, if Lichter was acting within the scope of her duties, then she has an absolute privilege from liability for defamation and, accordingly, the school has no exposure either. If she was not acting within the scope of her duties, then she may have liability, but the school will not. Therefore, under either scenario, the school should not be subject to liability.

It should be noted that the public official immunity is in fact an immunity and should not be treated by the Court as merely a defense. Therefore, the issue of whether the immunity applies should be considered and determined by the Court early in the case as a matter of law. If the immunity is applicable, the public official should not be required to defend the suit at all. Stephens v. Geoghegan.