Case No. 09-41075

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN DOE, Father of Minor Daughter H.S.;
JANE DOE, Mother of Minor Daughter H.S.;
H.S., Minor Daughter of John and Jane Doe,

Plaintiffs - Appellants

V.

SILSBEE INDEPENDENT SCHOOL
DISTRICT; RICHARD BAIN, JR., Superintendent;
GAYE LOKEY, Principal; SISSY MCINNIS;
CHRISTIAN ROUNTREE; RAKHEEM BOLTON;
DAVID SHEFFIELD,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas,
Cause No. 1:09-cv-374, Judge Thad Heartfield

APPELLANTS' JOINT REPLY TO APPELLEES' BRIEFS

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ORAL ARGUMENT REQUESTED

April 22, 2010

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants request oral argument. Plaintiffs-Appellants request leave to orally submit argument on this appeal as oral arguments could significantly assist the Court in its decisional process as the factual history surrounding the issues in this matter are complicated and procedural history of the case can be placed in context through oral argument.

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REPLY TO DEFENDANTS, SILSBEE INDEPENDENT SCHOOL DISTRICT'S, RICHARD BAIN, JR.'S, GAYE LOKEY'S, AND SISSY MCINNIS' APPELLEES' BRIEF

Appellees' Misstatement of Facts Pleaded by Plaintiffs In Their Amended Complaint

In their Dismissal Motion's arguments, Defendants-Appellees altered and supplemented Plaintiffs'-Appellants' plead facts set forth in Plaintiffs' Amended Complaint, with the effect that the court accepted and relied on their recast version instead of the facts pled by Plaintiffs. In their brief they continue to exercise license.

Defendants-Appellees state in their brief:

a. "[P]rotected First Amendment right to cheer — or not to cheer — as she pleased — during school basketball games." [R. 352-353]." (Brief of Appellees Silsbee Independent School District, Richard Bain, Jr., Gaye Lokey, and Sissy McInnis ["SISD Brief"], pg. 1-2.) However, Plaintiffs never claimed a First Amendment right of H.S. "to cheer — or not to cheer — as she pleased."

b. "Appellant H.S. was suspended from the cheer squad for two games. [R. 387]." (SISD Brief, pg. 2.) However Plaintiffs claim H.S. was expelled or removed, not suspended from "the cheer squad," which had the effect of

permanently banning her participation on the cheer team for the balance of her high school career; her senior year.

Defendant Bain did not reinstate H.S. to the Silsbee High Cheerleading Squad ("SHCS"). Defendant Bain merely lifted the ban on her ability to "tryout" or audition for the 2009-2010 school year. (Amended Complaint, Section V, ¶ W6; RE at 000042; CR at 349.)

These male athletes got off and this female athlete – a cheerleader – was "put down." It seems blatantly oppressive for Defendants to condition H.S.' participation in her contract regulated, public school program on whether she cheers for her rapist when he was being individually rewarded for having been allegedly fouled in a game. Bolton is no Kobe Bryant and the Silsbee High School team is not the Lakers!

When the 2008-2009 basketball season was over, Rakheem Bolton was finally removed from the basketball team by intervention of the University Scholastic League ("UIL"), and placed in the Chapter 37 Tex. Educ. Code Arm ("TEC") Alternative Education Program for the remaining few days of the school year (to obviously accommodate his rejoining the SHS football program in the fall of the 2009-2010 school year). Bain lifted the ban on H.S.' future participation in the SHCS for the 2009-2010 school

year. Bain's action was apparently unrelated to any administrative appeal by HS' parents or action by the SISD Board of Trustees, occurring without a ruling or action by the SISD Board of Trustees.

Consequently, Superintendent Bain removed the ban on H.S.' future school year participation on the SHCS, but did not *reinstate* her to the team.

c. Defendants state that "H.S. later filed charges against Rountree and Bolton, claiming she had been sexually assaulted at the party by Bolton, abetted by Rountree. [R. 332]." (SISD Brief, pg. 3.)

In Defendants' subtle tilt of the facts, they argue that the minor "H.S. later filed charges," and that she "claim[ed] she had been sexually assaulted at the party . . . ."

In fact, "[A]ccording to the police investigation of the events at the Riley home on October 18-19, 2008, Riley called 9-1-1," (Amended Complaint, Section V, ¶ I3; RE at 000023; CR at 330), and "early on the morning of October 19, 2008, Silsbee Police officers were dispatched to the Riley house [and] upon their arrival at 2:40 a.m., according to the police report, the officers learned that a Sexual Assault of a Minor, H.S., had occurred." (Amended Complaint, Section V, ¶ L3; RE at 000024; CR at 331.)

Plaintiffs alleged, "According to the police investigation of the events at the Riley home on October 18-19, 2008, the police transported H.S. to her home, and H.S.' mother transported her to Beaumont, to the Child Abuse and Forensic Services[,] assisted by Hardin County Crime Victims ("HCCV"), where it was verified that male(s) had engaged in sexual contact with her." (Amended Complaint, Section V, ¶ O3; RE at 000024-25; CR at 331-332.) The Plaintiffs further alleged, "According to the District Attorney's file, on October 20, 2008, Justice of the Peace Robert W. Ward issued Warrants of Arrest for Christian Paul Rountree and Rakheem Jamal Bolton, and ordered that each be held on $100,000 bond; a third male, a minor, was implicated but not charged." (Amended Complaint, Section V, ¶ P3; RE at 000025; CR at 332.)

d. Defendants state, "After charges were filed by the family of H.S. against Rountree and Bolton, SISD administrators immediately assigned the boys to Disciplinary Alternative Education Program ('DAEP'), a separate school district facility." (SISD Brief, pg. 3-4.) This was subtle, but strictly untrue, and not as pled.

Plaintiffs allege, "After the arrest of Rountree and Bolton on October 20, 2008, with the assistance of the Hardin County Crime Victim's

Assistance Center, on Tex. Code Crim. Proc. Ann., Chapter 7A ("Chapter 7A"), an injunction/protective order was issued preventing Rountree and Bolton from proximic accessibility to and communication with H.S. and her family." (Amended Complaint, Section V, ¶ L4; RE at 000028; CR at 335; *see also* Amended Complaint, Section V, ¶ P5; RE at 000033; CR at 340-341.)

Although Defendants argue the "SISD administrators immediately assigned the boys to . . . (DAEP) . . . ," (SISD Brief, pg. 3-4) one of the facts pled by Plaintiffs alleged, "While under the pretrial protective order, Rountree and Bolton remained active students in the Silsbee High School and its programs, but were housed in the SISD's Chapter 37 [TEC] program." (Amended Complaint, Section V, ¶ N4; RE at 000028; CR at 335.) Plaintiffs further alleged, "While awaiting the January 27, 2009 Grand Jury, and attending school in the DAEP facility, Rountree and Bolton received tutoring." (Amended Complaint, Section V, ¶ P4; RE at 000029; CR at 336.) For the record, "tutoring" is a benefit not available to DAEP assigned students.

e. Defendants argue, "After considering evidence adduced by Defendant-Appellee David Sheffield ("Sheffield"), the grand jury returned

no-bills for both boys. [R. 338].” (SISD Brief, pg. 4.) In fact, Plaintiffs alleged, “Sheffield said that although the evidence against Rountree and Bolton was strong and exceeded the requisite requirement for probable cause, the Grand Jury was racially divided and that the black grand jurors would not vote to return an indictment against Rountree and Bolton because of the race factor.” (Amended Complaint, Section V, ¶ T4; RE at 000030; CR at 337.) Plaintiffs further alleged, “The Grand Jury voted not to indict the ‘rapists,’ and the judicial order which kept the two males away from H.S., was permitted by Sheffield to lapse, without renewal.” (Amended Complaint, Section V, ¶ X4; RE at 000031; CR at 338.)

f. Defendants argue Rountree and Bolton “were then readmitted to regular classes at Silsbee High School, and allowed to participate in school activities. . . . [and] Bolton rejoined the high school basketball team. [R. 62].” (SISD Brief, pg. 4.)

Plaintiffs alleged, “According to Bain, after the January 27, 2009 Hardin County Grand Jury failed to indict either Rountree or Bolton, the SISD attorney advised against any disciplinary action by the SISD against Rountree and/or Bolton . . . .” (Amended Complaint, Section V, ¶ Q5; RE at 000034; CR at 341.) Plaintiffs set forth in detail the applicable policies and

rules of SISD which should have guided the prescribed discipline which SISD, in this case, elected not to pursue with regard to Rountree and Bolton in ¶¶ R5-U5 of Plaintiffs' Amended Complaint. (Amended Complaint, Section V, ¶¶ R5-U5; RE at 000035; CR at 342.)

As for Bolton's post-January inclusion on the SHS varsity basketball team, Plaintiffs allege, "In fact, SISD weighed its basketball program's and Bolton's interests against H.S.' welfare and psychological interests, and during the week of February 16, 2009, gave greater weight to its basketball program and Bolton, and added Bolton to the High School's Varsity Basketball team, where H.S. as the cheerleader would be forced to interact and cheer for the five man team including her rapist." (Amended Complaint, Section V, ¶ X5; RE at 000036; CR at 343.) "H.S. cheered faithfully cheered [sic] for the basketball teams which included Bolton." (Amended Complaint, Section V, ¶ Y5; RE at 000036; CR at 343.) Defendants are wrong when they claim H.S. did not cheer for the team.

g. Defendants argue, "Cheerleader sponsor McInnis spoke to H.S. about her responsibility under school rules to cheer for all Silsbee players during games, but H.S. refused to do so. She was suspended for cheerleader rules violations, and was not allowed to cheer at the next two games. [R. 346-

347].” (SISD Brief, pg. 4.) Nowhere in Plaintiffs’ Amended Complaint does such an interaction appear, although such spin might be arguably applied to the “cheer for Bolton or go home” instruction on February 27, 2009.

Plaintiffs allege, “McInnis and Lokey criticized H.S. for not cheering Bolton individually, increasing and aggravating her anxiety and stress, and further impairing her recovery from the traumatic events of October 18-19, 2008.” (Amended Complaint, Section V, ¶ A6; RE at 000037; CR at 344.)

Bolton was “added . . . to the High School’s Varsity Basketball team” during the week of February 16, 2009. (Amended Complaint, Section V, ¶ X5; RE at 000036; CR at 343.) Plaintiffs allege, “On February 17, 2009, C.S. and his plaintiff’s attorney met with Sup’t. Bain and when asking about the forced exposure of H.S. to Bolton and Rountree, were told by Bain that he and his lawyer considered there to be two sides to the rape, and that Bain was not going to take any action to insulate H.S. from Rountree and Bolton.” (Amended Complaint, Section V, ¶ B6; RE at 000037; CR at 344.) Bolton’s addition to the team by Defendants may not have been an “in her face” demonstration by Defendants of their siding with Bolton’s “side of the rape story,” but Defendants’ subsequent remarks would make it seem so.

Plaintiffs further allege, "On February 27, 2009, when at a playoff basketball game in Huntsville, Texas, H.S. cheered for the team and did not cheer for the individual performance of Bolton when he was at the free throw line. H.S. *never* refused to cheer for the team, symbolically protesting and refusing only to cheer for her unpunished rapist, Bolton, who had been added to the basketball team during the week of February 16, 2009, communicating through non-disruptive and symbolic speech not merely her disapproval of Bolton's and Rountree's behavior, Bolton's inclusion into a close setting with her, but also to warn others of Bolton's dangerous propensities." (Amended Complaint, Section V, ¶ C6; RE at 000037-38; CR at 344-345.)

h. Defendants minimize their actions as being no more than a "two game suspension" for H.S.' violation of school rules. The District Court weighed the facts pled by Plaintiffs and the argument offered by Defendants, not even by way of affidavit, and decided to endorse the nonfactual argument of Defendants.

Plaintiffs allege, "H.S. was called out of the gym during a break, and in public, was criticized by Bain, an Assistant Superintendent, [and] Lokey, and told to either stop her silence when Bolton was at the free throw line,

and cheer her attacker, [or] go home to Silsbee." (Amended Complaint, Section V, ¶ D6; RE at 000038; CR at 345.) Continuing, "On March 4, 2009, although C.S. had requested that any letters of discipline intended for H.S. by McInnis or Lokey be given to them [sic] before being given to H.S. because of her emotional distress, McInnis and Lokey refused the requested courtesy and McInnis delivered a letter which she signed to H.S.; that letter clearly was in violation of the SHCS Constitution and permanently removed H.S. from the SHCS." (Amended Complaint, Section V, ¶ L6; RE at 000039; CR at 346.) "According to the policies [and] the SHCS Constitution, if a cheerleader is removed from the squad, as was H.S., the student is also removed [sic] denied the opportunity to participate the following school year." (Amended Complaint, Section V, ¶ M6; RE at 000039; CR at 346.) "H.S. was effectively excluded from [all] future participation in the SISD's cheerleading program, because as a junior, H.S. was removed and barred from the squad, with the effect that she was banned from future participation throughout the balance of her enrollment/attendance at Silsbee High School, since 2009-2010 is H.S.' senior and final year." (Amended Complaint, Section V, ¶ N6; RE at 000040; CR at 347.)

H.S. was removed from the SHCS, not merely "suspended" or "not allowed to cheer at the next two games." The SHCS rules of SISD then banned H.S. from future participation.

i. Arguing the availability and fairness of process, Defendants claimed that H.S.' father complained under "applicable SISD board policies challenging his daughter's suspension from the cheer squad. [R. 347]." (SISD Brief, pg. 4.) In fact, Plaintiffs alleged, "H.S. told her father who immediately went to the school and met with Lokey . . . . The meeting was concluded, and C.S. appealed unsuccessfully to Bain, after which he appealed to the SISD Board." (Amended Complaint, Section V, ¶ O6[1]; RE at 000040; CR at 347; *see also* Amended Complaint, Section V, ¶ G7; RE at 000046; CR at 353.) There was no act by the SISD Board, which elected to stand by, mute, and let the clock run out on Bain's decision. But for conflation of the events removing Bolton from the 2008-2009 SISD picture, it is reasonable to infer that Bain would not have lifted the future ban from H.S.' right of future audition.

"Bain then lifted the ban on H.S.' future participation in the SISD's cheerleading program, permitting her to attend tryouts before the end of the 2008-2009 school year. She attended, was selected, and was elected by her

classmates as an officer. Still, the same scenario will be enacted in the 2009-2010 school year if Bolton is permitted to represent SISD." (Amended Complaint, Section V, ¶ W6; RE at 000042; CR at 349; *see also* Amended Complaint, Section V, ¶ H7; RE at 000046; CR at 353.)

Reply to Argument

a. First Amendment Free Speech

School boards have limited authority to regulate student speech or expression. School boards may make rules establishing view point neutral dress codes and rules. Such a rule is not at issue in this case by the pleadings. The SISD school board did not mandate any rule at issue in this case. Specifically, the Superintendent, the High School Principal, and the Cheerleader Sponsor seemingly ordained that female students who had been victims of sexual offenses by other students, whether harassment, dating violence, or brute rape must not silently protest and must specifically "cheer" (if cheerleaders) for their attackers *when their attackers were wearing the school's colors and engaged in "free-throw shooting."* More specifically, the administrators mandated that the membership "contract" governing a student's membership on the SHCS be disregarded in its

disciplinary process, and membership be conditioned on never-ending cheer or presumably an acceptable quality.

In their arguments, Defendants miss the point! Plaintiffs have not broadly claimed H.S. has a First Amendment right in choosing when "to cheer – or not cheer – for her school team, as she chooses . . . . because [H.S.] was angry with one of her classmates, a Silsbee High School basketball player . . . ." (SISD Brief, pg. 7.)

Plaintiffs have claimed H.S. had a protected right to protest Bolton and his addition to the basketball team by refraining from cheering for him, when he individually performed at the free throw line, in nondisruptive and symbolic speech. (Amended Complaint, Section V, ¶ C6; RE at 000037-38; CR at 344-345.)

The Defendants' regulation of H.S.' nondisruptive "conduct, in which she quietly 'folded her arms'" was not viewpoint neutral regulation. Further, there was no pled requirement of Defendants that all members of the SHCS constantly cheer, in an acceptable volume, like automatons.

Plaintiffs' Amended Complaint does not state that H.S. "'quietly folded her arms' *while the other cheerleaders cheered* . . . " (SISD Brief, pg. 9), nor does it assert that Defendants required non-stop cheering by all

members of the SHCS during the game when any Silsbee player was on the court, or that SHCS members were forbidden to display folded arms, momentary silence, even turning away or looking down when a player – here Bolton – performed. Defendants appreciated the sufficiently particularized message of H.S.; otherwise they would not have ordered H.S. to stop or go home.

To find that Defendants' regulation of H.S.' conduct was viewpoint neutral, the Defendants and the trial court were required to reach beyond the allegations of Plaintiffs' Amended Complaint.

To claim that Defendants' regulation of H.S.' conduct was viewpoint neutral, Defendants must ignore their instruction to H.S. and her parents on February 27, 2009, that she "either stop her silence when Bolton was at the free throw line, and cheer her attacker, [or] go home to Silsbee." (Amended Complaint, Section V, ¶ D6; RE at 000038; CR at 345.) Defendants' regulation of H.S.' conduct regulated her specific refusal to cheer for Bolton only when he performed alone, and was not viewpoint neutral; Defendants' actions are not subject to the *Canady* analysis.

The regulation of H.S.' conduct was instead viewpoint sensitive. H.S.' intended message was not attempting to communicate a lewd,

disruptive, or drug-promoting message, and was not by definition school sponsored speech, although it was at a school sponsored event.

Defendants argue that H.S.' intention was "to publicly express personal dislike for a team member." (SISD Brief, pg. 8.)

Plaintiffs' Amended Complaint alleges that H.S.' symbolic speech was communicating "not merely her disapproval of Bolton's and Rountree's behavior, [and] Bolton's inclusion into a close setting with her, but also to warn others of Bolton's dangerous propensities." (Amended Complaint, Section V, ¶ C6; RE at 000037-38; CR at 344-345.) For a 16-year-old girl to have "personal dislike" for a male student with a violent disposition who had raped her and then was unquestioningly placed on the basketball team, for which she cheered, is understandable; Defendants' diminishment of H.S.' circumstance and message is not. But her message was more than mere personal dislike.

Defendants argue that H.S.' conduct was "simply a choice of silent personal expression that happened to occur in the context of a school-sponsored activity, and since [H.S.'] choice was violative of reasonable, appropriate school rules, Appellant must accept the consequences – in this

case, a two-game suspension – if she insists on defying those rules." (SISD Brief, pg. 8.)

Plaintiffs agree H.S. engaged in "silent" expression and the District Court should agree H.S.' speech was nondisruptive. Indeed, the only disruption related to H.S.' conduct on February 27, 2009 was H.S. being made the centerpiece of gathered school officials who demanded she cheer for Bolton when at the free throw line or go home, and then her being sent home.

Defendants argue that H.S.' conduct occurred "in the context of a school-sponsored activity . . . ." (SISD Brief, pg. 8.) The "context" alone is insufficient to qualify H.S.' silent expression as being "school sponsored speech" and amendable to regulation as such. In fact, Defendants seem to clearly avoid claiming H.S. engaged in "school-sponsored speech."

Defendants argue that H.S. chose speech which "was violative of reasonable, appropriate school rules . . . ." "in the context of a school-sponsored activity" (SISD Brief, pg. 8) and therefore she was appropriately punished.

H.S.' silent folding of arms, when Bolton was at the free throw line, is acknowledged to be "speech." The instruction to cheer for Bolton when he

alone performed at the free throw line or go home, later expanded to expulsion from the SHCS, was not a "reasonable, appropriate school rule." There was no pedagogical purpose served by Defendants' ultimatum, and besides, through all that occurred, there is no pleading supporting Defendants' inferred claim that H.S.' gesture was school sponsored speech.

The Plaintiffs' Amended Complaint demonstrates that Defendants silenced H.S. because they did not want to tolerate her protest of Bolton and his presence on the team; not because they were concerned that H.S.' expression might reasonably be perceived to bear the imprimatur of the school.

As far as Defendants' passing invocation of heightened pleading requirements inferred into FRCP 8(a)(2), Plaintiffs respond that "1983" or constitutional claims are not subjected to a heightened regimen of pleading. In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the court specifically said no heightened pleading requirement was created.

The District Court did not view Plaintiffs' pled facts and claims most favorably to Plaintiffs, but instead accepted Defendants' arguments of unpled "facts," skepticisms.

b. Fourteenth Amendment Due Process/Equal Protection Claim

Again, Defendants misstate facts, to wit: "When [H.S.] refused to cheer at the game, Ms. McInnis, the cheer squad sponsor, took her aside and explained the squad's rules, and the consequences of infraction. [R. 63]." (SISD Brief, pg. 9-10.) Defendants apparently refer to Defendants' Answer (Dkt. No. 10) and not Plaintiffs' Amended Complaint. However, even when considering Defendants' referenced document, there is no statement by Defendants that "Ms. McInnis, the cheer squad sponsor, took [H.S.] aside and explained the squad's rules, and the consequences of infraction."

Generally, a complaint will be dismissed pursuant to FRCP 12(b)(6) and only if there is no law to support the claims made, or if the facts alleged are insufficient to state a claim or lack facial plausibility, or if on the face of the complaint there is an insurmountable bar to relief. *See* 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (3d. ed. 2006).

Defendants moved to dismiss Plaintiffs' Original and then Amended Complaint for failure to state a claim. "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a

claim for relief that is plausible on its face." *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009).

"The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. Plaintiffs pled plausible facts sufficient to support the existence of their claims of unconstitutional deprivation of her protected property and liberty interests. (Amended Complaint, Section V, ¶¶ E-S, A2-E2, L3, O3, L4-M4, B5, D5, J5-K5, M5, P5, R5-X5; RE at 000011-16, 000017-18, 000024-25, 000028, 000031, 000032-33, 000035-36; CR at 318-323, 324-325, 331-332, 335, 338, 339-340, 342-343.)

Defendants claim "[H.S'] father protested her two-game suspension from the cheerleading squad to Superintendent Bain, who granted the father's request and reinstated [H.S.] for the remainder of the school year." (SISD Brief, pg. 10.)

First, H.S. was removed from the SHCS for her high school career – banned, not merely suspended for two games.

Bain denied, as opposed to granted, H.S.' father's appeal to reinstate H.S. After the unsuccessful appeals to Lokey and Bain, H.S.' father made an unfruitful appeal to the SISD Board of Trustees. What may have changed

H.S.' fate was the 2008-2009 basketball season concluding with Bolton being assigned to the DAEP by way of discipline, apparently over his behavior to Dr. Robinson. Only then did Bain cleverly lift the ban on H.S. and permit her to reapply to the SHCS. (Amended Complaint, Section V, ¶¶ O6[1]-S6, W6; RE at 000040-41, 000042; CR at 347-348, 349.)

Regardless of society's loosened views on the immorality or acceptability of sexual activity, the forcing of unwanted sex on any person, especially a minor, is a matter of significance with consequences to the victim's psyche which should not be trivialized. The sexual event which H.S. was forced to accept was not as seemingly argued by Defendants as an episode in the lives of star-crossed teenagers, but something far more sinister. Bolton was abetted in his sexual assault of H.S. by Rountree, and comforted by the Defendants' subsequent accepting views and their power.

Defendants dismissively refer to H.S.' father and mother as "disgruntled parents who have attempted to invoke Fourteenth Amendment due process provisions in pursuing their disagreements with public school officials *in minor matters*" (SISD Brief, pg. 10; emphasis added), and persistently refer to H.S. in marginalizing fashion as "the cheerleader." Plaintiffs pled terms of a "contract" with SISD which governed the terms of

[H.S.'] membership on the SHCS, and constituted an objective expectancy of continued team membership absent the existence of reasons and compliance with delineated procedures. By Texas courts' reading of "bodily integrity," physical injury is not required to bolster emotional injury. Plaintiffs pled plausible facts to support both. Deprivation of psychological integrity merits due process protection according to Texas law.

No due process was provided to H.S., and her father's unsuccessful petitions of grievances weighed in, short of due process, and were not of the fundamentally fair flavor where a meaningful hearing would produce a decision. Plausible facts were pled by Plaintiffs implicating the deprivation of property and liberty interests, as well as the equal protection aspects of the Fourteenth Amendment.

As to their equal protection claim, Plaintiffs specifically pled that there were differing treatments afforded to H.S. and Bolton by Defendants. H.S. was summarily removed from the cheerleading team because she momentarily remained silent when her attacker was performing alone at the free throw line, and Bolton was immune from discipline for allegedly sexually assaulting H.S., destroying private property (breaking a window), and threatening to shoot classmates, Ms. Riley, and a teacher. Bain

announced Bolton's immunity to discipline to have been foreordained by the advice of SISD's lawyer. (Amended Complaint, Section V, ¶ Q5; RE at 000034; CR at 341.)

It is true that Texas public school students do not possess a constitutionally protected interest in their participation in extracurricular activities; however Plaintiffs pled a plausible basis for a Fourteenth Amendment protected property interest by pleading the existence of a "contract" (state-created agreement) between Defendants and Plaintiffs. Had there been no "contract" or governing "Constitution" controlling H.S.' membership in the SHCS, then, absent some other form of an objective expectancy of H.S.' continued membership in the SHCS, no property interest would exist because constitutional guarantees of "free and appropriate public education" do not include rights to a students' extracurricular activity participation. The Defendants choose to create a property interest and cannot, when it becomes inconvenient, disavow its existence.

When dealing with the deprivation by a state actor, under the color of state law, of a student's opportunity to participate in extracurricular activities, this Court has held, "'Rights, privilege, and immunities not

derived from the federal Constitution or secured thereby are left exclusively to the protection of the states.' The privilege of participating in interscholastic athletics must be deemed to fall in the latter category and outside the protection of due process." *Mitchell v. Louisiana High School Athletic Ass'n, et al.* 430 F.2d 1155, 1158 (5th Cir. 1970).

Defendants cite, "the strictures of due process ***never arise*** unless the plaintiff can demonstrate the deprivation of a cognizable liberty or property interest." *Board of Regents v. Roth,* 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In a matter arising out of a student's athletic eligibility when transferring into Texas schools and being prohibited from athletic eligibility by UIL rules, Judge Jolly writing for the court stated, "However, no Constitutional right exists to participate in interscholastic sports." *Niles v. University Scholastic League*, 715 F.2d 1027 (5th Cir. 1983).

In *Hardy v. University Interscholastic League,* 759 F.2d 1233, 1234-1235 (5th Cir. 1985), Judge Higginbotham, in a case where an adverse ruling on Constitutional issues had not been appealed, stated, "Participation in interscholastic athletics is not an 'interest' protected by the Due Process Clause. [citing *Niles,* supra.]"

While "participation in interscholastic athletics" is not per se a protected property or liberty interest, Plaintiffs contend that the objective representations of Defendants made to Plaintiffs in the SHCS "contract" and Constitution, which limited the exclusions of H.S. from participation in the SHCS, created a protected interest. Plaintiffs believe that this Court's recognition that a student's desire to participate in available, structured extracurricular activities without more is not a constitutionally protected interest was never intended to permit school districts or governmental entities to make hollow promises and empty objective representations, which could be escaped without check.

Consequently, when Defendants claim "no specifics are alleged as to the manner in which [Bolton was] preferred, or how [H.S.] was negatively affected . . . ," they were in error.

As to whether *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), imposes a new *sub silentio* heightened pleading requirement on plaintiffs in § 1983 cases, Plaintiffs note after *Leatherman v. Tarrant County*, 507 U.S. 163 (1993) and *Crawford – El v. Britton*, 523 U.S. 574, 598-599 (1998), it has been generally held that a plaintiff in a § 1983 action is not held to comply with a "heightened" pleading requirement in order to overcome

"qualified immunity." The Supreme Court followed suit in *Twombly* and rejected a heightened pleading requirement.

Plaintiffs plead sufficient facts in their Amended Complaint to demonstrate plausible claims.

REPLY TO DEFENDANT, DAVID SHEFFIELD'S APPELLEE'S BRIEF

This case is on appeal because the District Court opined that Plaintiffs had failed to state constitutional claims against Sheffield, who, at least, gave a press release and then went into the community to disparage the credibility of H.S., a minor female, who claimed that relative(s) and friend(s) of Sheffield's supporter had sexually assaulted her.

Initially, Sheffield claimed absolute immunity for his post-grand jury press conference and disclosures to a local lawyer and his daughter.

Now Sheffield claims that his comments to the local newspaper and to Bo Horka and his daughter did not violate Article 20.02 of the Texas Code of Criminal Procedure ("Article 20.02"), no Fourteenth Amendment right exists, and no First Amendment right was pled. No discovery was permitted to probe Sheffield's complete comments to the Horkas.

Nevertheless, Sheffield claims H.S. had no constitutionally protected interest in the secrecy afforded by Article 20.02, because Sheffield was merely

proscribed by statute from violating Article 20.02 and not subject, as was H.S., to being criminally punished for a violation.

Sheffield argues that Article 20.02 creates no constitutionally protected interest, which position Sheffield claims is buttressed by the fact that federal indictees, under a similar statute, have no relief from prosecution available to them for violation of the federal statute, with the only remedy for the errant conduct of a prosecutor belonging to the government in the form of contempt, public censure or disciplinary proceedings. In support of his argument, Sheffield argues *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988); and *McQueen v. United States*, 5 F.Supp.2d 473, 482-84 (S.D. Tex. 1998).

Sheffield finishes his argument that no "protected interest" of privacy attended the grand jury proceedings with a version of the "flood gate" argument that if this Court confirms Plaintiffs' claim of a protected interest, then prosecutors would be so chilled that they would stop reporting the issuance of indictments and/or not argue the merits of a grand jury's indicting inaction.

Article 20.02 establishes a reasonable expectation of privacy interest, *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir.), cert. denied, 516 U.S. 817 (1995), for those who testify before a Texas grand jury. The grand jurors can't disclose and its servant, Sheffield, can't disclose evidence or testimony, directly or

indirectly. After all, the grand jury's ability to receive, if able, "free and untrammeled disclosures by persons who have information with respect to the commission of crimes," *Huntress v. State ex rel. Todd*, 88 S.W.2d 636, 643 (Tex. Cir. App.–San Antonio 1935, writ dism'd.), is more important than Sheffield's press conferences and disclosures of grand jury secrets to private citizens. Horka and his daughter, despite Horka's former career, were private citizen recipients of Sheffield's grand jury critical anecdotes about H.S.' credibility.

In *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), a rape victim alleged that the defendant sheriff held a press conference in which he released highly personal information about the rape in order to retaliate against the plaintiff, because the plaintiff and her husband publicly criticized the sheriff's lack of diligence in investigating the crime. The Sixth Circuit ruled that the complaint stated a proper First Amendment retaliation claim and a proper constitutional privacy claim because "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical purpose is being served." *Id*. at 686; *cited with approval in Keenan, et al. v. Tejeda, et al.*, 290 F.3d 252 (C.A. 5th 2002).

In *Fadjo v. Coon*, 633 F.2d 1172 (C.A. 5th 1981), this Court reviewed a case where confidential and privileged information obtained by the state

investigator from the plaintiff was subsequently revealed by the investigator to a private citizen and thence to insurance companies. The court in *Fadjo* concluded that while the "information was properly obtained, the state may have invaded [the plaintiff's] privacy in revealing [the information] to [the private citizen] and the insurance companies. . . ." and "[the plaintiff] clearly states a claim under the confidentiality branch of the privacy right." *Id*. at 1175.

No legitimate state interest can be shown to justify Sheffield's comments to the press or the Horkas.

As to whether those comments by Sheffield were clearly understood to reflect negatively on the credibility of H.S., the claimed rape victim, was not a fact to be decided by the District Court. It is clear, as stated in *Bloch*, *supra*,

> Crimes of sexual violence necessarily include a nonconsensual sexual act. The crime of rape for example cannot be separated from the sexual act itself. For this reason, a historic social stigma has attached to victims of sexual violence. In particular, a tradition of "blaming the victim" of sexual violence sets these victims apart from those of other violent crimes. Releasing the intimate details of rape will therefore not only dissect a particularly painful sexual experience, but often will subject a victim to criticism and scrutiny concerning her sexuality and personal choices regarding sex.

Bloch at 685.

Where the only obvious and publicly known witness before the Grand Jury was H.S., and rape or sexual assault by Bolton and Rountree was the issue, it

could hardly have escaped Sheffield that his unnecessary remarks were tantamount to saying, "I don't believe her! She wasn't raped!"

H.S. pled Sheffield deprived her of protected liberty, not property, interests when acting in a non-prosecutorial function or capacity. (Amended Complaint, Section VI, ¶¶ A, 1-2; RE at 000047-48; CR at 354-355.) Further, H.S. pled Sheffield retaliated against her for reporting the sexual assault by persons who are supported by Sheffield's supporter, Tyler. *Id*.

The liberty interests claimed by H.S. are identified as being free from false stigmatization plus, and disclosing confidential information (privacy).

Although Texas' recognition of psychological injury without accompanying physical injury in *Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.–Houston [14th Dist.] 1996, writ dism'd. w.o.j.) has been criticized, it is nevertheless the law, and recognizes as a protected liberty interest in Texas emotional harm from words and deminimis conduct.

The reporting of Bolton and Rountree as assailants is protected speech; and the request by H.S.' father for a copy of Sheffield's investigative file is protected speech.

The testimony and credibility of H.S. before the Grand Jury are confidential.

H.S.' emotional integrity, even in the absence of physical injury, is a protected interest under state law. *Id*.

Whether mere words are sufficient to inflict an emotional injury which implicates the Constitution is a question to be resolved on a case by case basis.

Coach Spacek "threatened to hang [the student] if he did not improve his grades. . . . [and allegedly] reached for a white extension cord, told [the student] to look at the ceiling, and attempted to grab [the student]. [Coach] Ramsey allegedly retrieved what [the student] believed to be a handgun, placed [the student] in a headlock, put the weapon against [the student]'s head, and threatened to kill him if his grades did not improve." *Spacek* at 91. Since the student made no § 1983 claim against Coach Ramsey, not even for placing the gun against the student's head, the only § 1983 claim made by the student was against Coach Spacek. *Id*. at 92. The claims against Spacek arose out of his "direct participation" by threatening to hang the student, and "failing to intervene" when Ramsey put the gun against the student's head. *Id*.

While the Texas Court of Appeals stated, "Mere words at common law, however violent do not constitute a simple assault, and do not rise to a constitutional violation under 1983 . . . . However, as discussed further under

[*Spacek*'s] third point of error, the record reflects a fact issue regarding whether the coaches' actions went beyond mere words." *Id*. at 93.

The *Spacek* court discussed the damage done by Spacek's words and reaching for the extension cord by noting, "We also find unpersuasive Spacek's argument that because [the student] did not suffer a physical injury that was more than *de minimus*, his allegations of abuse do not rise to the level of a constitutional violation." *Id*.

However, while emotional harm caused by words and deprivation of statutory privacy are one interest claimed by Plaintiffs to be implicated, another is the stigma-plus liberty interest which always turns in part on the stigma of words.

In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Supreme Court held that governmental defamation (Ms. Constantineau was effectively labeled as an alcoholic or drunk, a drinker of alcohol to excess) mere words implicated a Constitutionally protected liberty interest, saying, "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," is a protected liberty interest. *Constantineau* at 544.

Less than a decade later, in *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court altered its view in *Constantineau* and its predecessor case. Davis had been published by the Louisville, Kentucky Division of Police as a shoplifter,

mere words. The Court reviewed *Constantineau* and noted there was "no constitutional doctrine converting every defamation by a public officer into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Paul* at 702. Consequently, Davis had no Constitutionally protected liberty interest unless he could show that there existed additionally a tangible interest beyond his reputation, even though Davis had no state, legal remedy for Chief Paul's defamation.

Still, the Court said,

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

Paul at 701.

In *Valmonte v. Bane*, 18 F.3d 992 (C.A. 2d, 1994), the Appellate Court held that the dissemination of information from the Central Registrar that "identifies individuals accused of child abuse or neglect, and its communication of the names of more on the list to potential employers in the child care field, implicates a protectible liberty interest under the Fourteenth Amendment. If so, we must also

determine whether the state's statutory procedures established to protect the liberty interest are constitutionally adequate." *Valmonte* at 994.

In this case, the procedures established by the State of Texas on Sheffield's release of confidential information regarding H.S.' testimony before the Grand Jury were quite simple and thoroughly adequate. Sheffield was to keep silent.

Sheffield's refusal to keep silent, from what is known and pled about what he has said, benefitted only Bolton and Rountree and disparaged only H.S.' credibility as to whether she was raped.

H.S.' interest in the confidentiality of her testimony and appearance before the Grand Jury is of such significance to the State that it is protected by state statute. Confidentiality is a sufficiently tangible interest when ordered by statute.

Four people were in the room on October 19, 2008, when 16-year-old H.S. claims she was raped. One of those persons was H.S. and the remaining three were Bolton, Rountree and their friend, a minor male. One of those four people testified before the Grand Jury. The only witness before the Grand Jury called by Sheffield, other than H.S., was the Silsbee Chief of Police, who did not participate in the criminal investigation.

When Sheffield spoke to the press and endorsed, by his noted lack of surprise, the non-indictment of Bolton and Rountree, he intended to be and was

reasonably understood to be commenting to the public on H.S.' lack of credibility and sexual virtue.

Sheffield argues that his comments to Horka and his daughter were non-public disclosures, and "nothing more than a reference to the fact that a grand jury failed to indict the alleged assaulters." (Brief of Appellee, David Sheffield, p. 20.) Plaintiffs alleged, "Horka's daughter said Sheffield had acted skeptical of the rape claims and minimized the evidence of the incident, treating it not as a criminal act." (Amended Complaint, Section V, ¶ I5; RE 000032; CR at 339.) The difference seems obviously a stronger repeat by Sheffield of the message in his earlier claim that H.S. was not credible when she had testified about the events of her claimed rape.

Sheffield's pled comments were attacks on H.S.' character and virtue, outside of the protections of absolute privilege.

Sheffield says that to have falsely stigmatized H.S., his attacks on her and her credibility during her appearance before the Grand Jury must have been public. Sheffield then contends his remarks to Horka and his daughter weren't public.

Sheffield's argument is wrong, for neither Horka nor his daughter had right or need to know Sheffield's assessment of whether H.S., as the only testifying witness to her rape, truthfully related the events of the crime or not, and neither

Horka nor his daughter were exempted from the proscriptions of Article 20.02. The breach of H.S.' interest in privacy/confidentiality regarding her Grand Jury appearance and testimony do not pivot on whether the post-non-indictment disclosures were made by Sheffield to the newspaper or to private citizens, since all non-official disclosures are forbidden.

To establish his argument that Sheffield's remarks to Horka and his daughter were not public, Sheffield cites *Tebo v. Tebo*, 550 F.3d 492, 503-504 (C.A. 5, 2008); *Bledsoe v. City of Horn Lake*, 449 F.3d 650, 653 (C.A. 5, 2006); *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); and *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000).

Mrs. Tebo claimed that her two adult stepsons and two doctors conspired to involuntarily commit her for mental treatment. At the referenced portion of the opinion dealing not with the deprivation of a privacy/confidentiality liberty interest, or free speech retaliation issue, this Court addresses Mrs. Tebo's *Paul v. Davis*, stigma-plus claim.

Mrs. Tebo claimed that written statements by the doctor(s) in a report constituted the required stigma. The Court agreed that the *mere words* in the report absent actual commitment could indeed constitute stigmatization. *Tebo* at 503.

The Court then noted, "However, Mrs. Tebo's argument fails to grapple with another aspect of the stigma requirement–the stigma must have been 'published' by the government." *Id*.

It is agreed that for the *Paul v. Davis* defamation-plus liberty interest, known as the "stigma-plus" liberty interest, to obtain Constitutional protection, there must be a published stigma, and the implication of another tangible interest. In *Tebo*, this Court describes the third element as violation of an independent Constitutional interest.

Sheffield, in thinly veiled comments, accused H.S., referring to her when speaking to the press as "evidence," of not supporting (by her testimony) the charge of rape. In so doing, he was pronouncing that from inside the Grand Jury room, it was clear she wasn't raped and her testimony was not credible. Plain and simple, Sheffield accused H.S. of testifying falsely under oath and imputed to her sexual misconduct.

Sheffield finds no support in *Tebo* for his argument that his disparagement(s) of H.S. to Horka and his daughter were not publication. *See Fadjo, supra*.

The third element of the "stigma-plus," while involving the other independent constitutional interest pled by H.S. of privacy/confidentiality, also is

satisfied by H.S.' pleading of bodily (psychological) integrity, and/or the cited secrecy statute.

Bledsoe was an employment case where Bledsoe claimed the City of Horn Lake had discharged him "in connection with false, publicized and stigmatizing charges without notice or opportunity to clear his name and whether the City deprived [him] of a property interest. . ." *Bledsoe* at 650.

Bledsoe lost because he didn't request a name-clearing hearing and he had no property interest.

In *Bledsoe*, the employment-related stigmatizing charges were admittedly made public, yet Bledsoe made no request for a name-clearing hearing. While the case at bar does not arise in a public employment context and is *not* subject to *Bledsoe*'s seven element analysis, both *Bledsoe* and the subject case are similar in that in both publication of the stigma occurred, except in *Bledsoe* it was conceded by the City.

Cannon, also a public employment case, states, "We have publication here because placing information in a public employee's personnel file, at least where it is open to public inspection as such files are in Florida . . . ." *Cannon* at 1301.

On the issue of publication, *Tebo*, *Bledsoe* and *Cannon* are inapposite to the point argued by Sheffield regarding his comments to Horka and his daughter, disseminated to the community and told to H.S.' father by a neighbor.

Next, *Hughes* involves a public employment case where a terminated "911 operator" sued her former employer because she was terminated for having allegedly made a false police report. Hughes claimed she was required to self-disclose and that self-disclosure constituted publication.

Plaintiffs make no claim that H.S. self-disclosed any information to the public regarding her experiences in this matter, other than the "outcry," whether regarding the claimed rape or her testimony and appearance before the Grand Jury. *Hughes* is likewise inapposite to Sheffield's argued point.

Finally, as to whether Plaintiffs pled First Amendment interests, Sheffield is alleged to have retaliated against H.S. "for reporting the sexual assault of [sic] persons who are supported by his political supporter Tyler, and because of her father's [C.S.'] persistence in the pursuit of justice for his daughter by pressing Sheffield to release the case file to C.S. for presentation to third parties . . . ." (Amended Complaint, Section VI, ¶ A, 2.; RE 000047-48; CR 354-355.) The Great Right has been invoked.

CONCLUSION

In conclusion, Plaintiffs-Appellants pray this Court reverses the District Court and remand this case for trial against Defendants-Appellees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief does not comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,617 words and 727 lines of monospaced face text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/ S / LW
Larry Watts
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Dated: April 22, 2010

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I, Larry Watts, certify that a true and correct copy of this document has been served on opposing counsel by electronic filing with the clerk's CM/ECF system on this the 22nd day of April, 2010.

/ S / LW
Larry Watts
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Dated: April 22, 2010