SUPREME COURT OF KENTUCKY
2013-SC-000007-D
(2009-CA-001686)

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SUPREME COURT

SUD-CHEMIE INC.

APPELLANT

ON DISCRETIONARY REVIEW OF OPINION
OF COURT OF APPEALS IN APPEAL NO. 2009-CA-001686
ON APPEAL FROM JEFFERSON CIRCUIT COURT
NO. 2005-CI-008765

v.

JOSEPH E. TOLER

APPELLEE

BRIEF OF APPELLANT SUD-CHEMIE INC.

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CERTIFICATE

It is hereby certified that a copy of the Brief of Appellant Sud-Chemie Inc. has been mailed this 16th day of December, 2013 to Philip C. Kimball, Esq., 1970 Douglass Boulevard, Louisville, KY 40205, Samuel Givens Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601, Amber Shaw, Esq., 420 E. Main St., New Albany, IN 47150, Robert Colone, Esq., P.O. Box 272, Sellersburg, IN 47172, and Hon. Judith McDonald Burkman, Jefferson Circuit Court, Division 9, Jefferson County Judicial Center, 700 West Jefferson St., Louisville, KY 40202. It is further certified that the Record on appeal was not withdrawn from the Clerk's Office of the Jefferson Circuit Court.

Oliver B. Rutherford

INTRODUCTION

Employers are entitled to a qualified privilege for purported defamatory statements made by their employees during the course of an investigation which is necessary to the proper functioning of their business. The privilege exists to protect the reasonable belief of an employer that a statement was or was not made in a particular situation and insulate the employer from liability for being wrong in its belief. The limitation placed on the privilege in this context is that the employer cannot abuse the privilege (e.g., act with malice) and still enjoy its protection. The instant appeal turns on whether the trial court applied the correct standard for determining the circumstances under which a qualified privilege may be abused in a defamation case. More specifically, the issue presented is whether the mere denial of making the statement(s) at issue by a plaintiff-employee constitutes sufficient evidence of malice to have his or her case presented to a jury.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Süd-Chemie Inc. requests oral argument in this case because it believes oral argument will be helpful to the Court in deciding the issue presented. The instant appeal involves the application of the qualified privilege in the employment context. This case raises the following issue: whether an employee-plaintiff is entitled to present his or her defamation claim to a jury where the employee simply denies making the statement(s) at issue but does not introduce proof of malice required to defeat the privilege. Appellant Süd-Chemie Inc. believes oral argument may help avoid the potential for confusion regarding this issue.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellant Süd-Chemie Inc. ("Süd-Chemie" or "the Company") operates two plants in Louisville, Kentucky, and several more in various locations in the United States, and manufactures catalysts for various chemical operations. (VR No. 1: 7-21-09, 1:32:00; 3:09:45).[1] Overall, the Company employs approximately 650 employees. (3:10:00). Appellee Joseph E. Toler ("Appellee" or "Toler") was employed as a Shift Coordinator (formerly called a "Supervisor") at the Company's "South Plant" located on Crittenden Drive. (1:39:10). As a Shift Coordinator, Appellee was responsible for scheduling employees and overseeing production. (1:40:30). The Shift Coordinator position is a management position at Süd-Chemie Inc. (Id.).

As a Shift Coordinator, Toler supervised maintenance, operator, and laborer/helper workers and could recommend to his supervisors (the two Production Managers, Troy Wise or David Massey) that an employee be disciplined.[2] (1:40:50). Toler became a Shift Coordinator in 1999 and initially worked on the day shift. (1:39:00 - 1:41:00). Shortly thereafter, he began working on the night shift from 6:30 p.m. to 6:00 a.m. and he remained on the night shift until his employment was terminated by the Company in April 2005. (1:40:00).

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[1] All references to the video record herein are for "VR No. 1, 7-21-09:" unless otherwise noted.

[2] The terms and conditions of employment for maintenance, operator, and laborer/helper employees of the Company are governed by a Collective Bargaining Agreement ("CBA") with their respective union. As a supervisory employee, Toler was not affiliated with any union, though he was a union member when he worked for the Company in non-supervisory positions.

Toler acknowledged that using racist language in the workplace of the Company was a "firing offense" and that the Company had a "zero tolerance" policy with respect to the use of racist language in the workplace. (1:58:22; 2:20:50). Toler also acknowledged that it would be reasonable for an employee to report to management any incidents of racial discrimination or harassment and that the Company, in turn, had an obligation to investigate any such reports from employees. (2:21:20). Toler acknowledged that Scott Hinrichs ("Hinrichs"), the Company's Director of Human Resources, as well as Bill Furlong ("Furlong"), Plant Manager of the Company, would have a duty to investigate allegations of racial discrimination or harassment. (2:21:30).

The events giving rise to the termination of Toler's employment began in February 2005. On February 21, an operator named Allen Trice ("Trice") was sent home for refusing to follow an instruction of Toler. (1:59:40; 2:03:30; 3:14:05).[3] Trice's employment was subsequently terminated by the Company. (3:12:45).

Subsequently, Trice filed a charge of discrimination against the Company with the Equal Employment Opportunity Commission ("EEOC") on March 7, 2005, alleging that his employment was terminated unlawfully on the basis of his race. (Toler's Trial Exhibit No. 2; 2:00:00). The Company received Trice's EEOC complaint on March 17, 2005. (3:12:10).

The day before, on March 16, 2005, Hinrichs received notice that an employee of the Company, Mike Watson, was concerned about the involvement of Toler in the termination of Trice's employment. (3:31:15). The Company was then provided with several written statements from Company employees regarding racial comments made by Toler in the

[3] Trice is African-American. (1:59:35). Toler is Caucasian.

workplace. (3:31:15; 3:38:10). Four employees provided written statements to the Company on March 23, 2005: Mike Watson ("Watson"), Bob Dewees ("Dewees"), Glen Shull ("Shull"), and Don Votaw ("Votaw").[4] (3:32:00). Each of these employees, like Toler, is Caucasian.

Because Shull's written statement was unsigned, and the Company did not otherwise learn of his identity until discovery commenced in this litigation, the Company did not interview him along with the other employees as part of its investigation of the allegations against Toler. Nor did the Company rely on Shull's statement in forming its decision to terminate the employment of Toler. (3:23:40; 3:48:25). Importantly, as it relates to Toler's defamation claim, the Company did not read or show the statement it later learned was prepared by Shull to Toler. (3:23:35).

Votaw reported to the Company that Toler had referred to African-American employees as "stupid fucking niggers," "Jungle Bunnies," "dumbass niggers," "dumb nigger bitch," and "gorilla-looking nigger." (Toler's Trial Exhibit No. 1). Watson reported to the Company that Toler had commented, in reference to African-American employees, that "all I work around is a bunch of dumb niggers." (Toler's Trial Exhibit No. 1). Further, Watson testified at trial that he was unaware that Trice had filed an EEOC claim at the time he reported Toler's statements to the Company. (VR No. 2: 7-22-09, 10:13:00). Watson only learned that Trice had done so through this litigation. (VR. No. 2: 7-22-09, 10:13:00).

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[4] Watson, Dewees, Shull and Votaw all were named as defendants in this litigation. Dewees was dismissed from the lawsuit because he is deceased. (T.R. Vol. V, pp. 732-737).

Dewees provided a written statement relating to the Company that Toler had talked about "the lazy negor's [sic] on his shift and how he would fire their black ass if they didn't jump when he said so." (Toler's Trial Exhibit No. 1).

Votaw, Shull, and Dewees had no involvement in the disciplinary issue between Toler and Trice when they provided their written statements to the Company. (3:38:40). Watson's sole involvement in Trice's disciplinary process was limited to his participation in a meeting with Trice and Company representatives regarding a grievance filed by Trice under the CBA. (VR No. 2: 7-22-09, 10:03:30).

Jude Ware's involvement in the Toler matter was limited to confirming and collecting the statements of Watson, Votaw, Dewees, and Shull and providing them to the union's business agent for delivery to the company. (VR No. 2: 7-22-09, 10:35:10 - 10:38:30, 10:48:45). Ware was not aware that Trice had filed an EEOC charge against the Company when he gathered and delivered the employees' statements. (VR No. 2: 7-22-09, 10:43:45).

The Company, through Hinrichs, scheduled meetings with Votaw, Watson, and Dewees to discuss the allegations contained in their written statements. (3:32:50). Hinrichs interviewed these three employees between March 29, 2005, and April 5, 2005. (3:33:00). Hinrichs questioned Votaw, Watson, and Dewees regarding the details of their written statements. Each employee not only acknowledged and affirmed the written statement they provided, but also was unequivocal in their conversation with Hinrichs in confirming that Toler had made the racist remarks contained in those statements.[5] (3:33:15).

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[5] Notably, Hinrichs testified that the Company has a policy that states an employee may be terminated immediately for filing a false report with the Company. (3:46:30).

Hinrichs and William Furlong, the Company's Plant Manager, met with Toler on April 14, 2005, to discuss the allegations raised by the employees and to inform Toler of the filing of the EEOC charge by Trice in order to discuss with Toler the allegations of Trice contained therein. (1:45:45; 3:22:20; 3:28:00). Toler admitted that Hinrichs and Furlong, as Director of Human Resources Manager and Plant Manager, respectively, had an obligation to investigate any reports of racial discrimination and harassment made by employees of the Company and that it was reasonable for them to do so. (2:21:20). No one else was present at the meeting. (1:45:55).

During the meeting, Toler testified that Hinrichs and Furlong told him the names of the individuals who had provided written statements to the Company and gave him an opportunity to explain why he thought these individuals would make such accusations against him. (1:49:30; 1:50:00; 2:22:10; 2:35:50; 3:25:10). Toler further admitted that he was informed of the racist statements that these individuals attributed to him during the meeting. (1:48:10). Toler simply denied each of the employee's allegations.[6] (1:47:05; 3:25:45).

Toler testified that he told Hinrichs and Furlong that he believed the statements made by the individuals were part of a "union gang-up" against him. (1:50:08). When pressed to state the facts upon which he based this theory, Toler could only provide his own speculation and conjecture. With respect to Mike Watson, Toler acknowledged that he did not work with Watson and that he did not "hardly know the man," but that he believed he was "out to get

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[6] While Toler denied ever using racist language *in the workplace*, he acknowledged using racist language outside the workplace in reference to African-American individuals. (2:36:47).

him" nevertheless solely on the basis that Watson was a union steward. (1:51:54; 2:23:00).

Toler testified that he believed Don Votaw was "out to get him" because, on one occasion in March 2003, more than *two years* prior to the termination of Toler's employment, he reported that Votaw was not doing his job and this report resulted in proposed written discipline to Votaw *by another supervisor*. (1:50:45; 2:29:35; Süd-Chemie Inc.'s Trial Exhibit No. 1). Toler acknowledged, however, that the proposed discipline (a warning) was withdrawn and that Votaw lost no pay, seniority or other benefit because of the situation. (2:30:00; 2:31:00). In other words, Votaw was not disciplined by Toler. Further, Toler offered no evidence that Hinrichs or Furlong were aware of any prior disciplinary issues between Toler and Votaw when they made their decision to terminate his employment.

Toler offered no testimony that Jude Ware made any defamatory remark against him. Toler testified he never disciplined Ware. (2:35:35). Toler's sole basis for his belief that Bob Deweese was "out to get him" was that a "few" times while he supervised him in *2000*, Toler had "words" with Dewees over getting his job done; Toler admitted, however, that he never disciplined Dewees. (1:51:30; 2:23:55; 2:35:00). Again, Toler offered no evidence that Hinrichs or Furlong were aware of any prior disciplinary issues between the two when they made their decision to terminate Toler's employment.

At trial, Toler testified that the sole basis for his belief that Glen Shull was "out to get him" is that, *on one occasion*, he had to instruct Shull to do his job; Toler also admitted, however, that he did not impose any discipline on Shull and he further admitted that, in addition to Shull, he frequently had to instruct other employees in the maintenance department to do their jobs. (1:51:45; 2:26:45). Regardless, Hinrichs testified that he was

not aware that Shull had provided the statement because it was unsigned and, as a result, neither he nor Furlong showed or read the statement to Toler, or otherwise relied on the statement in making their decision to terminate Toler's employment. (3:23:40; 3:48:25).

Toler offered no evidence whatever that Hinrichs or Furlong harbored any ill-will towards him, had knowledge that the statements of the individuals about Toler were "false," or otherwise acted with a wrongful motive in forming the decision to terminate his employment. To the contrary, Hinrich's unrebutted testimony at trial was that in his experience with Toler, he found him to be a good employee who had the support of the hourly workers he supervised. (3:17:00).

These are the facts upon which Toler bases his claim that the individual defendants in this case somehow conspired to force the termination of his employment by the Company. Toler offered no testimony and there is otherwise no evidence in the record that the Company had any interaction with the individual defendants beyond the interviews between Hinrichs and them in March and April 2005. It bears mention again that Hinrichs testified that in the event an employee files a false report with the Company regarding any workplace matter, such action is grounds for the immediate termination of the individual's employment. (3:46:30). Hinrichs's unrebutted testimony was that he had no reason to believe that any of the statements provided to the Company by the individual defendants had been falsified in any manner, nor was there any other reason to disbelieve the statements at issue. (3:47:05).

Following its investigation, Hinrichs and Furlong exercised their business judgment and credited the statements of the employees with whom Hinrichs spoke and, in collaboration with each other, decided to terminate the employment of Toler on April 15,

2005. (1:49:20; 3:30:15). This lawsuit followed.[7]

Trial of this matter began on July 21, 2009. At the conclusion of Toler's case-in-chief, Süd-Chemie moved for a directed verdict, asserting that Toler failed to meet his burden of introducing sufficient proof that the Company acted with malice to overcome the qualified privilege.[8] In opposition to the motion, Toler asserted that he introduced proof of falsity (e.g., his denial of making the statements), and this was sufficient to create an issue of fact regarding malice for the jury. (4:13:00). The trial court agreed with the Company's position, and a directed verdict was granted in favor of Süd-Chemie.[9] (4:18:00; T.R. Vol. VI, pp. 783-784).

Trial proceeded the next day and Toler's defamation claim against the remaining individual defendants Watson, Ware, and Votaw was submitted to the jury. By a vote of 10-2, the jury returned a verdict in favor of these defendants. Judgment was entered by the trial court on September 1, 2009. (Appendix A, T.R. Vol. VI, pp. 783-784). Toler appealed. The Court of Appeals, in a decision rendered March 4, 2011, affirmed the jury verdict in favor

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[7] Toler's original Complaint raised a defamation claim along with claims for race and age discrimination under KRS Chapter 344. (T.R. Vol. 1, pp. 1-5). The trial court granted Süd-Chemie's original motion for summary judgment on Toler's reverse race and age discrimination claims on January 23, 2008, leaving only Toler's defamation claim. (T.R. Vol. 3, pp. 445-448). Toler does not allege that the Company independently made defamatory statements about him; rather, the basis of his claim against the Company is that it defamed him by republishing the statements of Votaw, Watson and Dewees during his disciplinary meeting with Hinrichs and Furlong.

[8] All parties agreed that the qualified privilege applied to Toler's defamation claim. (4:13:00).

[9] Directed verdict also was granted in favor of defendant Glenn Shull on the basis that Toler failed to prove any damage resulting from his alleged statements. (T.R. Vol. VI, pp. 783-784).

of Watson, Ware, and Votaw, but reversed the trial court's grant of a directed verdict in favor of Shull and Süd-Chemie. (Appendix B).

ARGUMENT

I. Standard of Review.

A directed verdict is appropriate where there is no evidence of probative value to support the opposite result or where there are no disputed issues of fact upon which reasonable minds could differ. Rothwell v. Singleton, 257 S.W.3d 121, 124 (Ky. App. 2008), quoting Gibbs v. Wickersham, 133 S.W.3d 494, 495-96 (Ky. App. 2004). A jury may not be permitted to reach a verdict based on mere speculation or conjecture. Gibbs, 133 S.W.3d at 496.

II. Directed Verdict for Süd-Chemie Inc. was Appropriate Because Toler Introduced No Evidence of Malice to Overcome the Qualified Privilege that Attached to the Statements at Issue.

Under Kentucky law, a plaintiff can establish a *prima facie* case of defamation by showing: 1) defamatory language; 2) about the plaintiff; 3) which is published; and 4) causes injury to his reputation. Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793 (Ky. 2004). Where the statements at issue concern allegations of unfitness to perform a job which are not truthful, the communication is *per se* defamatory, and proof of damages is not required. Stringer, 151 S.W.3d at 794-95. Kentucky courts, however, "have recognized a series of qualified or conditional privileges, including 'where the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice.'" Id. at 796 (internal citation omitted); Tucker v. Kilgore, 388 S.W.2d 112, 114-15 (Ky. 1965);

Holdaway Drugs, Inc. v. Braden, 582 S.W.2d 646, 649-50 (Ky. 1979); Dossett v. New York Mining and Manuf. Co., 451 S.W.2d 843, 846 (Ky. 1970); Wolff v. Benovitz, 192 S.W.2d 730, 733 (Ky. 1945). Stringer further affirms that "because of the common interests implicated in the employment context, Kentucky courts have recognized a qualified privilege for defamatory statements relating to the conduct of employees." Stringer, 151 S.W.3d at 795.

There is no dispute that a qualified privilege attaches to the statements at issue and relied upon by Süd-Chemie Inc. in terminating Toler's employment. (Toler's Brief to Kentucky Court of Appeals at 16). Certainly employers have a legal obligation under Title VII of the Civil Rights Act of 1964 and KRS Chapter 344, as well as a moral obligation, to investigate claims of race discrimination in the workplace, particularly when the claim of racism is said to emanate from a manager, who is the figurative embodiment of the company.

Courts have recognized such a privilege to encourage and permit the free flow of information within an organization and to permit organizations to render judgments based on such information without fear of reprisal. Stringer, 151 S.W.3d at 796-97. Employees are thus permitted to give vital information to supervisors without fear of prosecution, and employers are permitted to act on such information without incurring liability, so long as the information is given and used in good faith and without malice. Id. at 797. This rule of law exists because "employees and their private employers have a legitimate interest in free communications on work-related matters, especially when reporting actual or suspected wrongdoing." Wallulis v. Dymowski, 918 P.2d 755, 762 (Or. 1996).

The limitation placed on the employer's entitlement to the qualified privilege is that the privilege must not be abused (e.g., the employer must not act with malice). Stringer, 151 S.W.3d at 797; Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270, 276 (Ky. App. 1982). If an employer is entitled to the qualified privilege and it is not abused, a plaintiff may not recover for defamation. Id. Abuse of the privilege can occur through proof that: 1) the publisher knew the statements were false or acted with reckless disregard for their falsity; 2) by publishing the defamatory matter for an improper purpose; 3) by excessive publication; or 4) by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged. Restatement (Second) of Torts § 596 cmt. a; Kilgore, 388 S.W.2d at 115.

When a qualified privilege is established, the "presumption of malice" attendant to communications which are defamatory *per se* disappears. Stringer, 151 S.W.3d at 797. The burden then shifts to the plaintiff to establish the existence of malice. Id. In the instant case, this is where the positions of the parties diverge with respect to Toler's burden. At trial, Toler merely denied making the statements at issue and claimed that this denial was sufficient to create a fact issue regarding whether the Company acted towards him with malice. (4:13:00). The trial court disagreed and found that Toler was required to introduce sufficient proof of malice, beyond his mere denial, to create an issue upon which reasonable minds could differ.

The Court of Appeals reversed the decision of the trial court, opining that the existence of malice is, in all cases involving a qualified privilege, a question for the jury where a plaintiff denies making the allegedly defamatory statement:

> Thus, Toler argues that in the matter *sub judice*, in order to simply get his case to a jury, *he was not required to prove malice, but rather simply to raise a sufficient issue of material fact as to whether the statements at issue were false.* Toler argues that the jury would then be the proper body to decide whether Süd-Chemie's defense of qualified privilege applied to Toler's claim, that is, if the statements at issue were made with malice. Having reviewed the record and applicable law, we are compelled to agree with Toler concerning this issue. . . . [W]e believe that Stringer clearly stands for the proposition that the existence of malice is a matter for the jury to address, and we so hold.

(Appendix B, p. 18 and footnote 17) (italics added). In so holding, it is the position of Süd-Chemie that the Court of Appeals erroneously announces a bright-line rule that a plaintiff is not required to introduce proof of malice to get to a jury trial in cases involving a qualified privilege, so long as he denies making the defamatory statement at issue. Because a plaintiff necessarily denies making the statement at issue merely by bringing a defamation claim, the holding of the Court of Appeals eliminates a defendant's ability to apply the protections of qualified privilege through dispositive motion practice.

At least since 1885, the law of the Commonwealth of Kentucky has been that the mere denial of making a defamatory statement is insufficient proof of malice to overcome a qualified privilege. In Stewart v. Hall, 7 Ky. L. Rptr. 323 (Ky. 1885), this Court made the point in no uncertain terms:

> The essence of libel is malice. The mind must be at fault. If the language is actionable, then the publication is presumed to have been malicious, unless the occasion rendered it *prima facie* privileged. If so, then the legal effect of privilege is to rebut the legal inference of malice arising from the words, and the burden of proving malice in fact, or express malice, is then upon the plaintiff, **and this is not shown by the mere falsity of the publication**, in the absence of evidence that the publisher knew it to be false.

Id. at *3.

Further, the decision of the Court of Appeals improperly shifts the focus of the qualified privilege analysis from the belief of the employer regarding the veracity of the statements at issue to the actual veracity of those statements. The qualified privilege protects the erroneous beliefs of the employer regarding the truthfulness of the statements, so long as the employer did not know the statements were false or conduct itself with reckless disregard for the truth or falsity of the statements. Weinstein v. Rhorer, 42 S.W.2d 892, 894-95 (Ky. 1931) ("In the absence of malice an utterance may be qualifiedly privileged, *even though it is not true. . . .* ") (internal citation omitted) (italics added); Edwards v. Kevil, 118 S.W. 273, 275 (Ky. 1909) (holding that even though plaintiff could prove statements were false, such proof was irrelevant to contradict the defendant's proof that he had a reasonable belief and spoke in good faith); Dossett, 451 S.W.2d at 846 ("[T]he public interest requires that expressions of suspicions founded upon facts detailed and prudently made in good faith and as confidentially as circumstances will permit . . . do not give rise to an action for slander against the person expressing the suspicions.").

The lynchpin of the Opinion of the Court of Appeals is that Toler was not required to introduce any evidence of malice to have his defamation claim decided by a jury because his mere denial of making the allegedly defamatory statements was sufficient to create a "jury question." (Appendix B, pp. 17-19 and footnote 17). The Court of Appeals relies on Stringer, as does Toler, and Calor v. Ashland Hospital Corp., No. 2007-SC-000573-DG (Ky., August 26, 2010) (Opinion withdrawn and superseded on rehearing by 2011 WL 4431143

(Ky., September 22, 2011) (Memorandum Opinion)) in support of this conclusion.[10] Neither Stringer nor Calor, as decided on rehearing, permit the Court of Appeals's conclusion in this case.[11]

In Stringer, the Supreme Court granted discretionary review to determine, in part, whether the Court of Appeals erred in ordering the trial court to enter a directed verdict in favor of defendants on plaintiffs' claims of defamation. Stringer, 151 S.W.3d at 786. The defendants relied upon the defense of truth in their appeal.[12] Id. at 798. The Stringer Court determined that the Court of Appeals's holding was in error because the defense of truth was not available to the defendants and the plaintiffs had introduced sufficient evidence of malice to have the claim submitted to a jury. Id. The Court found that the statements of defendants "appear[ed] to have no factual basis whatsoever. . . ." Id.

In so holding, however, the Stringer Court clearly signaled that a plaintiff has the burden of introducing sufficient evidence of malice to avoid a directed verdict. Id. at 798.

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[10] Copies of the original Opinion of the Court in Calor and the Opinion upon rehearing are attached as Appendix C and D, respectively.

[11] Süd-Chemie is aware that the Calor Opinion of the Court is an unpublished Memorandum Opinion and, as such, is not binding upon the parties. Because the Court of Appeals, however, relied upon the original decision in Calor in this case, the Company feels compelled to address the application of Calor to this matter. At a minimum, the Calor Opinion, as decided upon rehearing, informs the issues presented in this case.

[12] In this appeal, and as it did before the trial court, Süd-Chemie relied on Toler's failure to submit any evidence of malice on the part of Süd-Chemie in its argument in support of the directed verdict, recognizing that truth would have been a question for the jury in this case. (4:09:00). The defense of truth did not form any basis for the trial court's judgment granting directed verdict in favor of Süd-Chemie. Rather, the trial court focused solely on the absence of proof of malice by Toler, though he had ample opportunity to present such evidence during his case-in-chief if it existed.

The Court did not hold, as does the Court of Appeals in this matter, that a plaintiff is relieved of his obligation to enter proof of malice if he simply denies making the statement at issue. The following excerpt from the Stringer Opinion confirms the point:

> Thus, a directed verdict in [defendant]s' favor would be appropriate *despite [plaintiff]s' prima facie case of defamation per se* if the jury could not have reasonably found both that the statements in question were false *and that the [defendant]s had waived any claim of privilege through abuse and/or malice.*

Id. at 798 (italics added), citing Columbia Sussex, 627 S.W.2d at 276 ("Privilege having been placed in issue, it thereupon falls upon plaintiff to defeat this defense by a showing that either there was no privilege under the circumstances or that it had been abused."). The corollary to this language from Stringer is that had plaintiffs not introduced proof of malice at trial, a directed verdict *would be appropriate*. Stated otherwise, a plaintiff is not automatically entitled to present his defamation claim to the jury merely by denying having made the statement at issue. The Court of Appeals found Toler was so entitled, and this error is at the heart of this appeal.

The holding of the Court of Appeals in this case deprives Süd-Chemie of the hallmark of the qualified privilege, which is that an employer is protected from liability, *even for publishing false statements*, so long as it: a) did not know the statements were false; or b) did not act with reckless disregard as to their truth or falsity. Restatement (Second) of Torts § 596, cmt. a. Here, by requiring Süd-Chemie to undergo another jury trial in a case where the plaintiff introduced no evidence of malice, the Court of Appeals stretches the Stringer holding beyond its outer limit.

Similarly, the Court of Appeals relies on Calor for support of its conclusion that Toler was not required to introduce any proof of malice to withstand a directed verdict. The Court of Appeals cites to the following language in the original Opinion of this Court in Calor, issued August 26, 2010, for support of its holding that Toler's denial was sufficient to get his case to the jury:

> "Whether the privilege is waved or abused, however, is a question properly submitted to a jury, and cannot be decided by a court as a matter of law."

Calor, No. 2007-SC-000573-DG, p. 14 (Appendix C). From this language, the Court of Appeals extrapolates that in any case in which a plaintiff denies making the alleged defamatory statement, he is entitled to have the question of abuse or waiver of a qualified privilege decided by a jury. (Appendix B, pp. 16-18). This Court granted a petition for rehearing in the Calor case and issued a substituted Memorandum Opinion on September 22, 2011. Calor v. Ashland Hosp. Corp., 2011 WL 4431143 (Ky., September 22, 2011) (Appendix D). In its Memorandum Opinion, the Court revised the sentence (cited above) from its original Opinion, which revision confirms the point made by Süd-Chemie in this case that Toler was required to introduce proof of malice to get his case to the jury. The Court states:

> In other words, one might say '[t]he determination of the existence of a privilege is a matter of law. However, whether or not such has been waived is factual. [And, a] jury should be instructed accordingly.' Columbia Sussex, 627 S.W.2d at 276; see also Stringer, 151 S.W.3d at 798 n. 62 (Ky. 2004). But, more importantly, '[a]lthough the law presumes malice where publications are slanderous *per se*, *yet where the publication is made under circumstance disclosing qualified privilege, it is relieved of that presumption and the burden is on the Plaintiff to prove actual malice.*' [Weinstein v.]Rhorer, 42 S.W.2d [892][,] 895 [(1931) ("Of course, upon the pleadings, as well as *upon the evidence*, *the court may rule* in these, as well as other

> actions, *that the plaintiff has failed to make out his case*, or that the pleadings are not sufficient; but when the petition is sufficient, and there is any evidence of actual malice or malice in fact, the case should go to the jury.")]. *This higher burden is met only by proof establishing an abuse of the privilege*.[13]

Calor, 2011 WL 4431143 at *9 (italics added). The Calor Court's reliance on Columbia Sussex and Rhorer further confirms that a plaintiff still must introduce sufficient evidence of malice to have his claim decided by a jury. As stated in Stringer, Columbia Sussex clearly requires that once a privilege is placed in issue, "it thereupon falls upon plaintiff to defeat this defense by a showing that either there was no privilege under the circumstances or that it had been abused." 627 S.W.2d at 276. As with its interpretation of the Stringer decision, the Court of Appeals's decision here is not compatible with Calor.[14]

Further complicating matters, on the same day as the instant Opinion was rendered, the Court of Appeals decided Harstad v. Whiteman, 338 S.W.3d 804 (Ky. App. 2011). The

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[13] This language from the Rhorer Opinion further confirms that trial courts may grant dispositive motions where a plaintiff fails to enter evidence of malice. Rhorer, 42 S.W.2d at 895.

[14] In reviewing the Calor Opinion of the Court of Appeals, it appears that the Court was concerned about the accuracy of the Court of Appeals's statement that "Kentucky caselaw is clear beyond dispute that the existence of a qualified privilege *and its application to the facts* are questions to be resolved by the trial court as a matter of law" and the court is the "sole arbiter as to application of a privilege." Calor, 2006-CA-000395-MR, p. 7 (italics added) (Appendix E). The Court of Appeals's determination in Calor that trial courts may be *sole arbiters* of malice questions appears to have gone too far. The Court in Calor, however, did not dispense with a plaintiff's burden to introduce proof of malice or else risk a directed verdict. It simply affirmed and underscored longstanding precedent that questions of abuse of malice will be decided by juries where evidence supporting a question of abuse is properly introduced by a plaintiff. See, e.g., Cargill v. Greater Salem Baptist Church, 215 S.W.3d 63 (Ky. App. 2006); Columbia Sussex, 627 S.W.2d at 276; Stewart v. Williams, 218 S.W.2d 948 (Ky. 1949); Baskett v. Crossfield, 228 S.W. 673 (Ky. 1920); Edwards v. Kevil, 118 S.W. 273 (Ky. 1909).

Harstad opinion directly refutes the Court of Appeals's holding in this case that a plaintiff has no obligation to introduce proof of malice to get his defamation claim to a jury and that a mere denial of making the statement is sufficient. These two opinions, Toler and Harstad, decided on the same day, cannot be reconciled and create substantial confusion in this area of the law.

In Harstad, the plaintiff brought a defamation claim after his employment with Asbury College was terminated. Id. at 806. Defendants moved for summary judgment, alleging that the statements at issue were protected by a qualified privilege and plaintiff had introduced insufficient evidence of malice to defeat the motion. Id. at 810-11. The Harstad Court granted the motion, finding that:

> Once a privilege has been placed in issue, 'it thereupon falls upon plaintiff to defeat this defense by a showing that either there was no privilege under the circumstances or that it had been abused.' [quoting Columbia Sussex, 627 S.W.2d at 276]. *If the plaintiff fails to adduce such evidence sufficient to create a genuine issue of fact, qualified privilege remains purely a question of law under the summary judgment standard.* Cargill v. Greater Salem Baptist Church, 215 S.W.3d 63, 68 (Ky. App. 2006) ("Although the jury normally determines whether a privilege was abused, a motion for summary judgment is appropriate when the record shows no facts which would lead to the conclusion that the Appellees acted with malice."). . . . Citing Frentz v. SHPS, Inc., 2006 WL 3457210 (Ky. App. 2006) (2005-CA-001744),[footnote omitted], the circuit court next correctly concluded that Harstad had a burden to carry to avoid summary judgment – presenting evidence sufficient to create a genuine issue that the privilege had been abused or waived by actual malice. Cargill, 215 S.W.3d at 68. . . . Because Harstad failed to adduce evidence sufficient to create a genuine issue that the qualified privilege was abused or waived, i.e., not 'exercised in a reasonable manner and for a proper purpose[,] Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 797 (Ky. 2004), summary judgment was properly entered.

Id. at 811-12, 814. Consistent with established case law, Harstad plainly requires a plaintiff to introduce sufficient evidence of malice to create a jury issue and stands in direct

opposition to the Court of Appeals's holding.

Further, the Harstad opinion rejects the theory, used by the Court of Appeals, that a plaintiff creates an issue of fact for a jury simply by denying the making of an allegedly defamatory statement. The plaintiff in Harstad asserted that summary judgment was inappropriate because the statements made about him were "lies" and one can infer that such "lies" were uttered with malice. Id. at 812-13. The court rejected that argument, stating:

> However, their falsity alone will not demonstrate abuse of the privilege that attached when those statements were elicited from [defendant] by Asbury personnel. It was Harstad's burden to present some evidence that would incline a reasonable person to believe that [defendant's] perception was not simply the product of mistaken observation, but the result of malice, i.e., some evidence that [defendant] knew she was lying or making wholly unfounded statements without regard to their truth or falsity. . . . In other words, not every erroneous statement is expressed with malice. As our highest court plainly stated, once a qualified privilege attaches, even 'false and defamatory statements will not give rise to a cause of action *unless maliciously uttered.*' Stewart v. Williams, 218 S.W.2d 948, 950 (Ky. 1949) (emphasis supplied). Harstad was required to do more than assert that these statements were false; people are sometimes wrong without even suspecting it. It was therefore incumbent upon Harstad to present some evidence that the respective defendants uttered one or more of the statements Harstad found objectionable with[:]
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> > 'knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not . . . . [R]eckless disregard is . . . a high degree of awareness of . . . probable falsity, and . . . [w]here the publisher must have entertained serious doubts as to the truth of his publication.'
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> Ball v. E.W. Scripps Co., 801 S.W.2d 684, 689 (Ky. 1990) (citations and quotations omitted). He failed to do that.

Id. at 813. Harstad does not support the holding of the Court of Appeals in this case.

Significantly, the Court of Appeals in this case did not conclude that Toler had introduced sufficient proof of malice by Süd-Chemie to create a jury issue. Instead, the

Court concluded that Toler was entitled to have his claim presented to a jury because his mere denial of making the statements at issue is all that is needed to raise a jury question. (Appendix B, pp. 18-20, footnote 17; "Certainly, reasonable minds could differ as to the truth or falsity of the statements attributed to Toler, as the evidence on this issue is conflicting. Accordingly, we believe the matter to have been one appropriate for the jury and not the court to decide."). Of course, this conclusion ignores the fact that Süd-Chemie did not raise an issue of truth for purposes of its motion for directed verdict, nor did the trial court base its directed verdict on truth or falsity. The Court of Appeals then necessarily concludes that Süd-Chemie's defense of qualified privilege never can warrant judgment as a matter of law because the issue of whether the privilege has been abused always is a question for the jury, even where, as here, a plaintiff introduces no evidence of malice.

The proof introduced by Süd-Chemie at trial through Hinrichs, and unrebutted by Toler, was that when Süd-Chemie was presented with written statements from its employees that Toler, a supervisor of Süd-Chemie, was making heinous racist comments *in the workplace*, it acted appropriately to address the issue. Süd-Chemie conducted a reasonable and prompt investigation. Toler never challenged this testimony with *any* evidence that Süd-Chemie acted towards him with malice. The unrebutted testimony of Hinrichs, Süd-Chemie's Director of Human Resources, was that he had no basis for discrediting the written statements provided by the employees, particularly where the employees, to a man, affirmed his statement during his interview with Hinrichs.

In Baskett v. Crossfield, 228 S.W. 673 (Ky. 1920), the Kentucky Supreme Court concluded that falsity alone was not enough to withstand a directed verdict when the

defendant had entered proof of good faith and reasonable investigation. In Baskett, a university president, a private defendant, expelled a student, a private plaintiff, and wrote two explanatory letters to the student's father, which included the fact that the student had been exposing himself in front of a window and was seen by female pedestrians. Id. at 673-75. Despite the fact that the statements could have been false, the Court still found them to be privileged and upheld the directed verdict for the defendant.

In so doing, the Court noted that the president had "done only what his duty required of him," that his words were "gentl[e] and rather apologetic[]," and that the "letters were written in the utmost good faith and for the good of the father." Id. at 676. The court further stated that **"there [was] a total absence of evidence tending to show malice on the part of [the president] towards young Baskett or his father."** Id. (emphasis added). While the communication may have stated a false fact, it was not communicated out of malice or without reasonable investigation, and therefore held privileged as a matter of law. Id.[15]

As in Baskett, Süd-Chemie entered proof of good faith and reasonable investigation. Like the president in Baskett, it was the Company's duty and responsibility to investigate the allegations it received from the individual defendants regarding Toler's racist comments. Indeed, Toler admitted that the Company had an obligation to investigate any reports of racial discrimination made by employees of the Company. Moreover, in conducting its investigation, the Company was both thorough and discrete. There is no claim by Toler that

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[15] See also Stewart v. Williams, 218 S.W.2d 948 (Ky. 1949) (court held that there was no evidence of malice, despite the fact that plaintiff alleged falsity, because the plaintiff had caused the inquiry to be put to the defendant which led to the utterance, and because the persons present during the utterance "were proper persons to be called into consultation concerning the subject matter").

Süd-Chemie knowingly or even negligently failed to investigate obvious sources of refutation for the allegedly defamatory statements or that Süd-Chemie was unwilling to interview any employee who might be able to exculpate Toler. And, as in Baskett, there is a complete absence of evidence tending to show malice on the part of the Company toward Toler. Stated simply, Toler provided the Company with no reason not to credit the statements of the individual defendants.

Even assuming the racist statements attributed to Toler were false, however, the analysis does not end there.[16] The record is satiated with evidence of a reasonable and good faith investigation conducted by the Company and the record is silent with respect to proof of malicious intent. Having proven that the communications were made in good faith, and without malice, and with reasonable or probable grounds for believing them to be true, Stringer, 131 S.W.3d at 706, the Company was entitled to the qualified privilege.

This Court has held that testimony regarding the falsity of the underlying facts is irrelevant where the defendant is not alleging a defense of truth but, rather, claims privilege and enters evidence that it spoke based upon evidence a reasonably prudent person would believe and that it spoke in good faith. In that regard, the Court in Edwards v. Kevil, 118

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[16] As discussed in Section IV below, the jury necessarily determined that the statements of the individual defendants were true. The sole basis for Toler's defamation claim against the Company is that it repeated purportedly false statements to Toler in the meeting between him, Hinrichs and Furlong. Consequently, because the jury has determined that these statements were true, no liability can attach to the Company, even if the Court decides that a directed verdict was improvidently granted. It bears repeating that the Company did not "publish" the statements of Shull to Toler, or anyone else, because his identity was not known until discovery in this litigation. Thus, even though the Court of Appeals reversed the grant of directed verdict with respect to Shull, Toler cannot maintain a defamation claim against the Company on the basis of what Shull wrote because there was no publication. Columbia Sussex, 627 S.W.2d at 273.

S.W. 273, 275 (Ky. 1909), held that even though the appellant could prove the statements false, such proof was irrelevant to contradict the defendant's proof that he had a reasonable belief and spoke in good faith. Id.

Here, it was incumbent upon Toler to present evidence that the Company abused the qualified privilege. This is a burden Toler failed to satisfy. Süd-Chemie, on the other hand, has provided ample evidence of the absence of malice in relying on the statements offered to it, *not solicited by it*, by the individual defendants. Toler has offered no reason to disbelieve those statements other than his self-serving denial. *Ipsi dixit* has a place in the law, but it has no place in this case. By demonstrating an absence of malice in relying on the statements of the individual defendants, Toler's claim of falsity was insufficient to withstand directed verdict.

III. The Trial Court Applied the Correct Legal Standard Required for Toler to Establish Malice.

Toler asserted before the trial court and again on appeal that the trial court erroneously applied the "constitutional" actual malice standard to this employment-related defamation claim in granting the Company's motion for directed verdict. The "constitutional" actual malice standard applies to public figure plaintiffs and requires clear and convincing evidence that a defamatory statement was made with knowledge that it was "false or with reckless disregard for whether it was false or not."[17] New York Times Co. v.

[17] "Reckless disregard" in the context of malice is described as a "high degree of awareness of . . . probable falsity." Ball v. E.W. Scripts Co., 801 S.W.2d 684, 689 (Ky. 1990), quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Stated another way, reckless disregard "may be shown to exist where there exists sufficient evidence to permit conclusion that defendant in fact entertained serious doubts as to truth of his publication or where there are obvious reasons to doubt veracity of informant or accuracy of his

Sullivan, 376 U.S. 254, 279-80 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Toler's argument fails out of the gate because the trial court did not require him to prove malice by "clear and convincing evidence" in response to the Company's motion for directed verdict. Nor did the trial court's jury instructions require clear and convincing evidence of malice. As such, Toler's claim that the trial court erroneously applied the "constitutional" actual malice standard rings hollow.

Further in support of his argument that the trial court erroneously required him to prove a "constitutional 'actual malice' standard" to defeat the Company's qualified privilege, Toler hangs his hat almost entirely on this Court's Opinion in Stringer. According to Toler, Stringer stands for the proposition that a plaintiff is not required to prove "knowledge of falsity or reckless disregard" to defeat the privilege, notwithstanding the use of those words in the Stringer Opinion. Rather, Toler asserts some unidentified lesser standard applies.

Stringer does not attempt to define the appropriate verbiage to be used by trial courts in articulating abuse of the qualified privilege in jury instructions.[18] The parties went to some length in this case quibbling about the use of "malice" versus "actual malice" in the jury

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reports." Black's Law Dictionary, 6th Ed., p. 1270.

[18] Stringer does not appear to break new ground in the law of defamation as Toler suggests. Stringer does provide a comprehensive summary of the law of defamation in Kentucky. Importantly for purposes of this case, however, the application of qualified privilege was not part of the Court's holding in Stringer. The Court did briefly discuss possible application of the privilege to the case: "Although the context of the statement suggests the possibility of a qualified privilege . . . ." The Court even touched on a definition of "actual malice:" "While actual malice 'requires a showing of knowledge of falsity of the defamatory statement or reckless disregard of its truth or falsity . . . ." But the Court's holding did not turn on application of the privilege, because the Court of Appeals reversed the judgment of the trial court upon the defense of truth, not qualified privilege. Id. at 798.

instructions and perhaps this is a distinction without a difference as those terms are used interchangeably in Kentucky case law. In any event, case law prior and subsequent to Stringer confirms that the jury instructions used by the trial court in this case accurately summarized Toler's burden of overcoming the privilege. Toler was required by the trial court to show either that the Company knew the statements were false or acted with reckless disregard as to their truth or falsity. This Court approved that very language in Calor and this standard has appeared in our case law going back decades.

In Calor, the Court stated that "[a]buse of the privilege can occur in a number of situations:"

> The privilege may be abused and its protections lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; by the publication of the defamatory matter for some improper purpose; by excessive publication; or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Id. at *8. Notably, the Court cited this language from the Restatement (Second) of Torts § 596 cmt. a, a source to which our courts often turn in analyzing tort claims. See e.g. Stringer, 151 S.W.3d at 794. To be sure, the trial court in this case could have assessed whether one or more of the other three variations of the standard identified above were appropriate for the circumstances of this case. But the language relied on by the trial court falls squarely within the confines of language deemed acceptable by this Court. As such, there is no error in the instructions.

Apparently Toler would have the Court limit the standard for proving abuse used in the case (e.g., knowledge of falsity or reckless disregard for the truth) strictly to cases

involving public figures. But Toler's argument ignores the reality that this standard is embedded in the "private" context as well in cases going back as far as the late 19th Century. See e.g. Calor, 2011 WL 4431143 at *8-9, National Collegiate Athletic Ass'n v. Hornung, 754 S.W.2d 855, 860 (Ky. 1988) (defining "in good faith" to mean whether statements were made for a proper purpose, with knowledge of their falsity, or with reckless disregard for their truth or falsity); Carghill, 215 S.W.2d at 68; Baker v. Clark, 218 S.W. 280, 285-86 (Ky. 1920); McClintock v. McClure, 188 S.W. 867, 871 (Ky. 1916); Tanner v. Stevenson, 128 S.W. 878, 883 (Ky. 1910); Browning v. Commonwealth, 76 S.W. 19, 20 (Ky. 1903); and Stewart v. Hall, 7 Ky. L. Rptr. 323 (Ky. 1885).

This standard is embodied in our statutory framework as well. For example, the legislature, in KRS 411.225, provides a qualified privilege to employers who give inaccurate information regarding the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer. In announcing the privilege, the legislature stated that such privilege can only be overcome by demonstrating knowledge of falsity, a reckless disregard of the truth or falsity of the information, or an intent to mislead the prospective employer on the part of the employer. KRS 411.225. Certainly if we utilize this standard to protect employers when giving job references, the same standard should apply to employers when investigating claims of race discrimination in the workplace.

Our courts have developed and applied the qualified privilege in cases where there is a common interest among the parties implicated by the context in which the statements arise, which context warrants imposing a higher standard of proof to defeat the privilege. The employment arena is one such context. Stringer, 151 S.W.3d at 796. Presumably Toler

would have some form of a lesser "negligence" standard applied for him to defeat the privilege. But this argument has been rejected. See Hoke v. Sullivan, 914 S.W.2d 339 (Ky. 1995) (considering "the qualitative differences between negligence and recklessness, the former consisting of a failure to exercise ordinary care, and the latter consisting of a conscious indifference, we doubt that an allegation of simple negligence gives notice that recklessness is charged.").

Kentucky courts impose a higher burden on plaintiffs in the employment context to overcome the privilege so that employers are afforded the opportunity to be wrong without fear of liability, so long as they do not act maliciously. Again, language from the Calor Opinion confirms the point:

> This difference is significant as slander in private matters ordinarily requires no proof of recklessness, only mere negligence in the dissemination of the statement, whereas the existence of a relationship supporting the privilege requires recklessness, or some other form of abuse to lose it. Thus, one could say the existence of the privilege implicitly raises the bar on the 'knowledge of falsity' level to that recognized under other circumstances by New York Times Co. [v. Sullivan], 376 U.S. 254[,] [] 280 [(1964)] ("That is, with knowledge that it was false or with reckless disregard of whether it was false or not."), albeit for other reasons and in other ways. . . . This is because the privilege, if applicable, protects one's erroneous beliefs. See [Weinstein v. Rhorer, 42 S.W.2d [892,] [] 895 [(Ky. 1931)].

Calor, 2011 WL 4431143 at *11. Because the trial court applied a legal standard to its jury instructions which is embodied in our case law, old and new, there was no error in the trial court's instructions.[19]

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[19] It is worthy of note that Toler's tendered jury instructions submitted at trial recite this identical standard for proving malice, the same standard of which he now complains in this appeal. (Appendix F, Toler's Revised Proposed Instructions Tendered at Trial). Toler's proposed instructions defined malice as "reckless or knowing disregard for [the] falsity" of the statement. (Id.). Incredibly, Toler advocated for the very standard which

To overcome the defense of qualified privilege, then, Toler was required to introduce proof that Süd-Chemie acted toward him with malice. Stringer, 151 S.W.3d at 797. For malice to be found, Toler was required to show: 1) that Süd-Chemie either knew that the statements of the individual defendants were false when it decided to credit those statements; or 2) that Süd-Chemie acted in reckless disregard of the truth or falsity of those statements. Id. at 799. Toler introduced no such proof.[20]

Toler offered no evidence that the Company knew the statements he was accused of making were false. Süd-Chemie cannot be said to have acted with malice in the absence of actual knowledge of the falsity of the statements against Toler. Stringer, 151 S.W.3d at 799. Further, Toler offered no evidence that the Company acted in reckless disregard as to whether the statements were true or not. Toler, instead, simply intimated that he was given "short-shrift" by the Company when it came to allowing him to explain the accusations. Toler's argument was wholly undermined, however, by his own testimony.

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he now attacks in this appeal.

[20] Toler decries the malice standard used by the trial court in this case, yet does not offer any substantive alternative. Instead, Toler merely states that in all qualified privilege cases where a plaintiff denies making the statement at issue, the issue of privilege must be submitted to a jury. (Toler's Brief to the Court of Appeals at 19). According to Toler, an employer's sole entitlement in this kind of case is a jury instruction regarding the qualified privilege. Again, this argument is not supported by Kentucky law and ignores the fact that an employer may not be liable *even for defamatory statements* unless it acted with malice with regard to the truth or falsity of the statement. It is Toler's burden of proof to introduce evidence of malice sufficient to overcome the privilege. Stringer, 151 S.W.3d at 797. Further, even if one assumes that some undefined lesser standard of malice should have been utilized by the trial court, a directed verdict in favor of the Company would nevertheless be appropriate because of the complete absence of evidence in Toler's case regarding malice on the part of Süd-Chemie.

Toler testified that he had a meeting with Hinrichs and Furlong in which he was given an opportunity to explain why he thought the individual defendants would make such accusations against him. Toler acknowledged that Süd-Chemie, being faced with a situation wherein several employees had made allegations that he, a supervisor, had made heinous racist comments in the workplace, had a duty to investigate claims of inappropriate racial language in the workplace. That is precisely the function of a human resources department and what human resources employees are trained to do.

When confronted with this situation, the Company had a duty to investigate the allegations and, ultimately, form a conclusion as to the ultimate disposition of the situation using its business judgment. Hinrichs testified that after speaking with all parties involved, after considering that each individual defendant fully affirmed their statements in conversation with him, after considering the speculative and tenuous nature of the defense offered by Toler, and considering that there was no other information provided to Hinrichs from any party that warranted a different conclusion, he believed termination of Toler's employment was appropriate.

That Toler disagrees with the decision of the Company or believes that the investigation of the statements was something less than *he* desired does not establish malice under any circumstance. Toler's argument might be resonant if the Company had only spoken with the accusers, and not Toler, or had declined to interview anyone at all. Kentucky Kingdom Amusement Co. v. Belo Ky., Inc., 179 S.W.3d 785 (Ky. 2005). Toler admits, however, that did not happen here.

Toler offered not one shred of evidence to establish that the Company and the individual defendants somehow conspired to terminate his employment, or that the Company otherwise had sufficient information to disbelieve the statements. Indeed, Hinrichs unrebutted testimony established exactly the opposite: he had absolutely no basis to disbelieve the statements at issue. (3:47:05). In essence, Toler's entire defamation case boils down to his assertion that Süd-Chemie should have known the statements were false because he said they were. This is insufficient proof of malice to get his claim to a jury. It was Toler's burden to introduce such proof and his failure to do so warranted a directed verdict.

IV. The Jury Determined that the Alleged Defamatory Statements at Issue were in Fact True.

The jury decided by a vote of 10-2 that the statements of the individual defendant employees of Süd-Chemie were true statements. The jury instructions given by the trial court confirm this conclusion. (Appendix G). To find for Toler, the jury must have believed that the statements made by the employees were false, in which case the statements also would have been made with malice. Malice was defined in the instruction as constituting either 1) knowledge that the statement was false, or 2) acting with reckless disregard as to the truth or falsity of the statement.

The jury could not have determined that the second element of the malice definition was implicated because of the context of the statements. The testimony offered regarding Toler's use of racist language came from employees each stating that he directly heard Toler

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However, such conclusions and conjecture are not sufficient to sustain his burden created by the motions for summary judgment. His argument fails because '[c]onclusory allegations based on suspicion and conjecture' are not sufficient to create an issue of fact as to abuse of the privilege. Cargill, 215 S.W.3d at 69.

make the racist comments. In other words, based upon the evidence actually submitted, the jury was asked to make a credibility determination as to whether the employees were telling the truth about hearing Toler make racist comments or whether Toler was telling the truth by denying making any racist comments. If a juror were to determine that Toler was telling the truth, then the necessary implication is that the employees were all making up the stories entirely. No other possible conclusion was offered to the jury for their consideration.

Thus, if the jury believed Toler, they would have concluded that the employees' statements were made with "knowledge that the statement was false" and "with reckless disregard as to the truth or falsity of the statement." Based upon the evidence actually submitted to the jury, the distinction between falsity and malice was eliminated. Having found in favor of the employees, the jury necessarily determined that the statements they made were true. It is undisputed in this case that Süd-Chemie cannot be liable for statements made by its employees that were determined by the jury to be true. To reiterate, Toler made no claim that the Company defamed him other than through the "republication" of the defamatory statements to Toler in the meeting with Hinrichs and Furlong. Thus, the fact that the jury determined to the statements at issue to be true is dispositive of the Company's liability in this case. Even if one assumes, then, that the trial court erred in granting directed verdict in favor of Süd-Chemie, which it did not, the error was harmless in light of the jury's verdict.

V. If Left Undisturbed, the Court of Appeals's Opinion Eviscerates CR 50.01 and CR 56 Practice in All Defamation Cases Involving a Qualified Privilege.

The consequences of the decision of the Court of Appeals are significant. By holding that Toler is entitled to present his case to a jury simply because he denied making the statement at issue, and thereby not requiring Toler to introduce any evidence of malice to create a jury issue, the Court precludes any grant of judgment as a matter of law in a defamation case involving the qualified privilege, whether through summary judgment or a motion for directed verdict. Every plaintiff in a defamation case necessarily denies making the statement at issue in bringing the claim. If the Opinion of the Court of Appeals stands, Süd-Chemie will be forced to undergo another jury trial in a case where no evidence was introduced in the first trial that it abused the qualified privilege it held. This result is not supported by Stringer and a host of other established precedent in the Commonwealth.

Further, the Opinion of the Court of Appeals fails to apprehend the purpose of the qualified privilege in the employment context: to permit employers the latitude to be wrong in their assessment of statements made in the workplace, so long as the employer does not know the statements to be false or act with reckless disregard with respect to their veracity. The ultimate issue regarding application of the qualified privilege is not whether the statement made is in fact false, rather whether the statement is based upon one's reasonable belief. In the employment context, the privilege protects one's erroneous belief.

CONCLUSION

Because Toler introduced no evidence upon which a reasonable jury could conclude that Süd-Chemie Inc. acted toward Toler with malice, the grant of a motion for directed

verdict in favor of the Company was appropriate. Süd-Chemie Inc. respectfully requests that the Judgment of the trial court be affirmed in all respects.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY
2013-SC-000007-D
(2009-CA-001686)

SÜD-CHEMIE INC.

APPELLANT

v. APPENDIX TO APPELLANT SÜD-CHEMIE INC.'S BRIEF

JOSEPH E. TOLER

APPELLEE

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Tab A	Judgment of Jefferson Circuit Court Entered September 1, 2009 (T.R. Vol. VI, pp. 783-84)
Tab B	Opinion of Kentucky Court of Appeals in Joseph E. Toler v. Süd-Chemie Inc., et al., No. 2009-CA-001686-MR (March 4, 2011)
Tab C	Calor v. Ashland Hospital Corp., No. 2007-SC-000573-DG (Ky., August 26, 2010)
Tab D	Calor v. Ashland Hospital Corp., 2011 WL 4431143 (Ky., September 22, 2011)
Tab E	Calor v. Ashland Hospital Corp., No. 2006-CA-000395-MR (Ky. App., June 1, 2007)
Tab F	Toler's Revised Proposed Instructions Tendered at Trial (T.R. Vol. V, pp. 741-746)
Tab G	Jury Instructions Given by Jefferson Circuit Court (T.R. Vol. VI, pp. 764-772)