SUPREME COURT OF KENTUCKY
No. 2013-SC-000002-D
(2009-CA-001686)

JOSEPH TOLER — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
versus HON. JUDITH McDONALD-BURKMAN
No. 05-CI-8765

SUD-CHEMIE, INC., et. al. — APPELLEES

REPLY BRIEF FOR APPELLANT

PHILIP C. KIMBALL
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

CERTIFICATE

I hereby certify that I have served a true copy of this Brief upon Oliver B. Rutherford, Esq., 300 South, First Trust Centre, 200 South 5th Street, Louisville, KY 40202; and Rob Colone, Esq., PO Box 272, Sellersburg, IN 47172-0172; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Judith McDonald-Burkman, Judge, Jefferson Circuit Court, Division 9, Jefferson County Judicial Center, by mailing or hand-delivering the same to them upon this 14th day of March, 2014. I also certify that I have not removed the record on appeal to the Jefferson Circuit Clerk upon the date above-written.

PHILIP C. KIMBALL
Attorney for Appellant
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT IN REPLY

Appellees' Misrepresentations

Appellees' Acknowledgement

No authorities cited.

Appellees' Argument for a Modification of Existing Law

This is the Reply Brief of the Plaintiff/Appellant, Joseph Toler.

An analysis of Appellees' arguments reveals the following:

1. They are based upon three important misrepresentations about the content of the Circuit Court's instructions to the jury, Toler's objections to those instructions, and Toler's characterizations of the instructions; and

2. They contain an important acknowledgement about the permissible content of jury instructions in cases such as this one; and

3. They include a plea in favor of the Circuit Court's instructions to the jury that would represent a severe modification of the existing law regarding the qualified privilege in employment-related defamation cases.

Appellees' arguments should not prevail. An analysis of them will reveal that they merely serve to increase the force of Appellant Toler's contrary arguments, which are that the Circuit Court's instructions to the jury in this case were clearly erroneous and that the judgment for the individual Appellees based upon those instructions should be reversed.

The Misrepresentations

First, Appellees assert that there is no common law actual malice component to Appellant Toler's proposed instructions to the jury (Appellee's Brief, P. 22, note 21).

This is not true.

In the second section of Toler's proposed instruction number two, he listed four alternative definitions for "malice," i.e., the proof whereby he could overcome the Appellees' qualified privilege. The fourth alternative permitted a finding of malice if the jury believed that the individual Appellees, "... uttered or wrote them [the words of which Appellant Toler complained]... with an improper motive," (TR, P. 743; Appellant's original Brief, Appendix, Tab 5, P. 39).

In Kentucky, common law "actual malice" in defamation cases arises from, "... motives of ill will, hatred, or wrongful motive," *Ideal Motor Co. v. Warfield*, 211 Ky. 576, 277 S.W. 862, 864 (1925), *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d. 646, 649, note 1 [referring to Instruction #3] 650 (1970) [Appellant's original Brief, Pp. 31-32].

Appellant Toler believes that his use of the term "improper motive" in his proposed instructions to the jury served to incorporate at least the "wrongful motive" component of common law actual malice.

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Second, Appellees assert that Appellant Toler has mischaracterized the Circuit Court's actual instructions to the jury as containing a requirement of a finding of Constitutional actual malice for him to recover in this case.

The sole basis for this argument is that the Circuit Court's instructions to the jury did not require the jury to find for the plaintiff by clear and convincing

evidence (Appellees' Brief, P. 16).

The answer to this argument is that the United States Supreme Court, which created the clear and convincing requirement in defamation cases involving Constitutional concerns, does not require it in jury instructions. Indeed, its opinions appear to require judges, and not juries, to apply this particular requirement. As the Court said in *Bose Corp v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 511, 104 S.Ct. 1949, 1965, 80 L.Ed.2d. 502 (1985), and again in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 659, 686, 109 S.Ct. 2678, 2695 (1989):

> . . . judges as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the Constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice.

Appellees have cited "pattern" jury instructions from New Jersey, Connecticut, California, Vermont, Mississippi, Alaska, and Delaware in support of their position on this issue.

However, only the instructions used in New Jersey, Vermont, and Mississippi require a jury instruction including the use of the terms "clear and convincing."

There appears to be no such requirement in the pattern instructions from Connecticut, California, Alaska, or Delaware.

Appellees have cited no Kentucky or federal Court opinions in which juries

are required to find clear and convincing evidence in *any* sort of defamation cases including even those involving Constitutional protections. Obviously, there are no cases including any such requirement in a case such as the one at bar, which involves no Constitutional concerns of any sort.

Without any doubt, the lack of any "clear and convincing" language in the Circuit Court's jury instructions does not mean that the instructions were something other than an articulation of the Constitutional actual malice standard for overcoming the Appellees' qualified privilege.

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Appellees' third misrepresentation is that, "Toler does not appear to argue that the 'knowledge of falsity' or 'reckless disregard' language used by the trial court in its jury instructions was erroneous," (Appellees' Brief, P. 17).

This is a half-truth. Appellant Toler has not objected to the words "knowledge of falsity," or "reckless disregard for truth or falsity," in the Circuit Court's jury instructions. His argument is that:

> 1. The knowledge of falsity/reckless disregard for truth or falsity standard is but one of several alternative standards for proof of abuse of the qualified privilege in this case. The others were set forth in Appellant Toler's proposed instructions to the jury in this case (TR, P. 743; APX to Appellant's Brief, Tab 5, P. 39) (Appellant's Brief, Pp. 33-41).

2. The Circuit Court's instructions to the jury included the highly subjective definition of reckless disregard for the truth that has no place in a defamation case such as this one (TR, P. 765; APX to Appellant's Brief, Tab 4, P. 29) (Appellant's original Brief, P. 28-37).

Appellant Toler advanced these arguments in the portions of his original Brief cited above. Appellees appear to have foregone any response to either of the arguments.

As we shall see, the Appellees have acknowledged that there are, indeed, alternative grounds to the knowledge/reckless disregard standard whereby a defamation plaintiff in a case such as this may prove abuse of the qualified privilege.

As to the Circuit Court's subjective definition of reckless disregard as requiring a "high degree of awareness of falsity" or the entertaining of "serious doubts" as to the truth of the defamatory matter, the Appellees really have no good arguments in support of their defense of the definition. Their appended materials and cited authorities certainly provide none. Appellees cite *Black's Law Dictionary*, 6th Edition. However, this authority indicates merely that recklessness is a stronger term than mere or ordinary negligence but still that it is a mental state in which , ". . .no harm was intended," by the actor (Appellees' Brief, Pp. 19-20). In the Vermont "pattern instructions" submitted by Appellees, Jurors are asked to

find recklessness, in part by looking, ". . . to whether [defendant] did or did not act as a reasonable person would have acted in the situation," (Appellees' Brief, attached Vermont Civil Jury Instructions, Pp. 3-4). This is an objective, and not a subjective, definition of recklessness.

Furthermore, none of the pattern jury instructions from the six jurisdictions provided by the Appellees include the "serious doubts/high degree of awareness" definition of reckless disregard, or even the use of this standard as the exclusive one appropriate for cases such as the one at bar.

The highly subjective definition of reckless disregard that the Circuit Court used in its instructions to the jury in this case is, and should remain, exclusively used for cases involving Constitutional concerns. This is not such a case.

The Acknowledgement

Appellees have acknowledged that Kentucky law and the common law generally does recognize alternative grounds for proving abuse of the qualified privilege; that the knowledge/reckless disregard burden is not the only one available to a defamation plaintiff seeking to overcome the qualified privilege (Appellees' Brief, P. 21). But, Appellees imply, none of Toler's evidence supported any of these alternative grounds for showing abuse of the qualified privilege.

This is not so. The evidence outlined at pages 5-11 of Toler's original brief support the alternative grounds set forth in his proposed instructions: that the

Appellees' reports were made in bad faith, or without probable cause to believe that they were true, or were made from an improper motive; all in addition to the knowledge of or reckless disregard for falsity.

The Argument for a Modification of Existing Common Law

Finally, Appellees argue that the qualified privilege in cases arising from an employment context should afford to employers the same protections that the law accords to speech involving public figures or matters of public concern. In other words, the Circuit Court's instructions to the jury were correct in this regard precisely because they required the Appellant Toler to prove Constitutional actual malice instead of merely common-law actual malice or any one of the alternative standards whereby a plaintiff in Kentucky may show abuse of the qualified privilege in a private figure/private concern case.

This argument represents a severe narrowing of Appellees' previous argument that the qualified privilege generally can be overcome in all cases only by proof of Constitutional actual malice.

That is the teaching of *Harstad v. Whiteman*, 338 S.W.3d. 804 (Ky. App., 2011), which requires the "high degree of awareness/serious doubts" definition of reckless disregard in an ordinary defamation case.

As Toler argued in his original Brief in this case at pages 34-40, the common law of Kentucky, up to and clearly including this Court's last published opinion on the subject, *Stringer v. WalMart Stores, Inc.*, 151 S.W.3d. 782 (Ky., 2004), does

not support this argument.

Nor have the Appellees advanced any compelling arguments against long-established Kentucky law concerning the qualified privilege in employment-related cases. Their proposed standard would unfairly subordinate the reputational interests of individuals to the convenience of employers. Employers already have the right to discharge employees for any reason at all that is not illegal, and for no reason at all. They do not need the right to defame them in the process with the same protection afforded to individuals and entities that speak out concerning public figures or matters of public concern.

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Appellees also argue that the speech at issue in this case involved a matter of public concern: namely racial discrimination in the workplace.

Appellees have made this argument for the first time in this litigation in their Brief for this Court. Appellant believes that Appellees have waited too long to make their argument, *Commonwealth, Department of Highways v. Thomas*, 427 S.W.2d. 213 (Ky., 1967).

This is especially so considering the enormous implications of the Appellees' argument.

The argument would require affording Constitutional protection to any workplace speech of "public concern," presumably both in favor of and against both employees and employers. This would represent a sea change in existing

Constitutional law, which currently protects the Constitutional rights of citizens *only* against their governments, *Gryzb v. Evans*, 700 S.W.2d. 399 (Ky., 1985), and *not* against their employers or other private individuals or entities. *Id.*

Appellee does not believe that this case, as practiced, presents a fit forum for a discussion of Appellees' proposed expansion of the public sphere of American life into every workplace within the Commonwealth. We must not forget that current statutory law protects individuals with claims of invidious discrimination or retaliation against their employers, 42 United States Code, §2000-e, et. seq., KRS chapter 344 (especially KRS 344.450, KRS 344.040, and KRS 344.280). The remedies provided by these statutes are exceedingly broad; there is no reason to revolutionize the law of defamation in order to achieve the goals of these statutes!

Finally, Appellees' argument would convert almost all workplace defamation cases into Constitutional battles. This is because there is a sense in which almost any defamatory utterance involves some matter of public concern. The most common defamatory accusations, within and outside of the workplace, involve crime (especially theft). The public has a great interest in the apprehension and prosecution of criminals. The law recognizes this, ironically for our case, by permitting individuals who report crimes to have either an absolute or a qualified privilege to do so, depending upon the circumstances of the report. This latter fact leads to another conclusion fatal to Appellees' argument: the law has already afforded protections for speech such as that at issue in this case. It is called, in our

case, the qualified privilege. It is what both parties have been arguing about for the last several years and has been a part of the law of defamation for at least as long as Kentucky has been a part of the United States. Now is not the time to take a meat cleaver to it.

CONCLUSION

For the reasons stated in this and the Appellant's original Brief, the Appellant, Joseph Toler, requests that this Court reverse the Circuit Court's judgment upon a jury verdict for the individual Appellees, and remand this case to that Court for a new trial with proper instructions to the jury; the relief to be tailored to match what the Appellant in this case prays will be the affirmance of the Opinion of the Court of Appeals in case no. 2013-SC-000007-D.

Respectfully Submitted,

PHILIP C. KIMBALL
Attorney for Appellant
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479