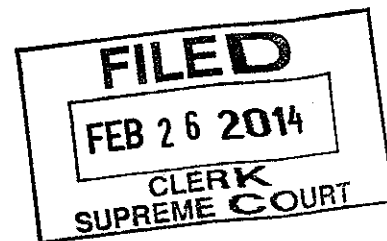


SUPREME COURT OF KENTUCKY  
2013-SC-000007-D  
(2009-CA-001686)



SÜD-CHEMIE INC.

APPELLANT

v. 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

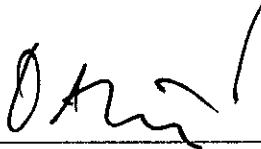
JOSEPH E. TOLER

APPELLEE

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REPLY BRIEF OF  
APPELLANT SÜD-CHEMIE INC.

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**CERTIFICATE**

It is hereby certified that a copy of the Reply Brief of Appellant Süd-Chemie Inc. has been mailed this 25<sup>th</sup> day of February, 2014, 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.

  
Oliver B. Rutherford

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**APPENDIX**

## ARGUMENT

### **I. Toler Concedes that a Mere Denial of the Making of an Alleged Defamatory Statement is Insufficient to Create a Jury Issue Regarding Abuse of the Qualified Privilege and Thereby Tacitly Acknowledges the Holding of the Court of Appeals in this Case is in Error.**

Since Appellant Süd-Chemie Inc. (“Süd-Chemie” or “the Company”) made its motion for a directed verdict at the conclusion of Appellee Joseph E. Toler’s (“Toler”) case-in-chief over four years ago, the central issue in this case has been whether Toler’s mere denial of making the alleged defamatory statements creates sufficient evidence of malice to have his case presented to a jury. Toler refers to this proof as “implied malice.” (Toler Brief, p. 30). To this point in the litigation, Toler has been steadfast in his insistence that such a denial is all that is required of a plaintiff in a defamation case to create a jury issue regarding abuse of the qualified privilege by a defendant. (VR No. 1, 7-21-09: 4:13:00).<sup>1</sup>

Toler now concedes in his brief, however, that “implied malice,” standing alone, is insufficient to overcome the qualified privilege. (Toler Brief, p. 30). Toler writes, “Also, the ‘implied malice’ standard set forth in Stringer, supra, and earlier cases, does not preclude summary judgment or a directed verdict in every case. . . . While the ‘implied malice’ standard set forth in Stringer does permit summary judgment or a directed verdict, it certainly requires a jury trial in more cases than any alternative standard. . . . Appellee Toler certainly cannot deny that some of our cases explicitly require a plaintiff seeking to show that a defamation defendant has abused his common-law qualified privilege to show more than ‘implied malice’ in order to get his case to a jury.” (Toler Brief, p. 30, 32-33). This concession is not insignificant. The Court of Appeals agreed with Toler’s long-held position

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<sup>1</sup> All references to the video record herein are for “VR No. 1, 7-21-09:” unless otherwise noted.

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. This was the express holding of the Court:

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.

(Opinion of Court of Appeals, p. 18 and footnote 17) (italics added). Süd-Chemie's principal reason for pursuing discretionary review by this Court was its concern that the Court of Appeals had effectively eviscerated dispositive motion practice in defamation cases involving the qualified privilege by erroneously announcing this bright-line rule.

Toler now tacitly acknowledges that this holding of the Court of Appeals is erroneous because a mere denial, without evidence of malice, does not satisfy a plaintiff's burden of proof regarding a defendant's abuse of the qualified privilege. This recognition is consistent with established case law in Kentucky. See, e.g., Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793 (Ky. 2004) ("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.*") (italics added); 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.”) (italics added); Stewart v. Hall, 7 Ky. L. Rptr. 323 (Ky. 1885) (“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.”) (italics added).<sup>2</sup> The holding of the Court of Appeals should be reversed because it is inconsistent with Kentucky law.

**II. Toler’s Attack on the Trial Court’s Recitation of the Legal Standard Used in its Directed Verdict Ruling is Unavailing.**

Toler first claims that the trial court erroneously required him to prove that the Company acted with a “complete disregard” for the truth or falsity of the statements at issue in order to overcome the qualified privilege. (Toler Brief, p. 24). Toler asserts that such a “standard” required him to present a quantum of proof far greater than the standard required even in Constitutional defamation cases. (Toler Brief, p. 26). Toler is plainly overreaching with this assertion. Toler fails to provide the Court with the full content of the trial court’s

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<sup>2</sup> See also Sherman v. Rinchem Co., 687 F.3d 996, 1007-1010 (8<sup>th</sup> Cir. 2012) (applying Minnesota law) for a comprehensive discussion of the application of qualified privilege in the employment context. (Opinion attached as Appendix A). While certainly not binding on the Court, Sherman is persuasive in confirming that proof of falsity alone is insufficient to create a jury issue regarding abuse of a qualified privilege.

recitation of the legal standard it used.

A review of the trial record in full context establishes that the trial judge applied the correct legal standard in its directed verdict analysis. The trial judge first observed that all parties agreed the qualified privilege applied in this case. (4:17:45). The trial court then stated that in a case in which the qualified privilege applies in the employment arena, there must be a finding of malice and malice, in turn, in this type of case exists if the Company either knew the statements at issue were false, did nothing to determine the veracity or falsity of them, or acted with some other disregard in accepting the statements without some form of investigation. (4:17:45 - 4:21:00).

The trial court's recitation of this standard falls squarely within the category of proof identified by established authority as sufficient to overcome the privilege. See Restatement (Second) of Torts § 596 cmt. a (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); Tucker v. Kilgore, 388 S.W.2d 112, 115 (Ky. 1965); see also cases cited in Argument Section III, pp. 7-8. Toler's attempt to morph two words taken out of context into legal error should be dismissed out-of-hand.

### **III. The Trial Court Did Not Apply the Actual Malice Standard Found in Constitutional Defamation Claims.**

Toler next argues that the trial court erroneously applied the "Constitutional actual malice" standard to the Company's directed verdict motion. (Toler Brief, p. 24). The

Company asserted in its principal brief that the trial court did not apply such a standard because it did not utilize the clear and convincing evidentiary requirement which attaches to the “Constitutional malice” analysis. (Company Brief, p. 24). Toler attempts to diffuse this argument by stating that courts in such cases do not instruct juries that they must find “Constitutional malice” by clear and convincing evidence because this evidentiary standard “is completely a legal issue for the Courts” (e.g., trial courts only use this standard at the directed verdict stage). (Toler Brief, pp. 25-26, italics omitted). This argument lacks merit.

Courts throughout this country require juries to find that the quantum of proof meets the clear and convincing evidentiary requirement in Constitutional defamation claims. This is so because states recite this clear and convincing evidence standard in their jury instructions. Nothing in the cases cited by Toler, e.g., Warford v. Lexington Herald-Leader or Anderson v. Liberty Lobby, Inc., state that the “clear and convincing” evidentiary standard is a “legal standard” to be utilized only by a court. On the contrary, inclusion of this standard in jury instructions necessarily places the determination of whether the standard has been satisfied squarely within the province of the jury. After all, it is the jury that must weigh the evidence of record and make credibility determinations in assessing whether this burden of proof has been satisfied. A trial court cannot.

For example, Florida’s model jury instructions addressing Constitutional defamation claims include a recitation of the “clear and convincing” evidentiary standard. (See Appendix B, Florida Model Jury Instruction 405.7(c)).<sup>3</sup> The instruction specifically states,

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<sup>3</sup> Florida’s Model Jury Instructions may be viewed through the Florida Supreme Court’s website at [www.floridasupremecourt.org/civ\\_jury\\_instructions/instructions.shtml#model](http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#model)



“You must decide whether clear and convincing evidence shows that at the time the statement was made (defendant) knew the statement was false or had serious doubts as to its truth.” (*Id.*). Florida Model Jury Instruction 405.4 provides a definition of “clear and convincing evidence” to be used in the model Constitutional defamation instruction: “‘Clear and convincing evidence’ is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.” (Appendix B).<sup>4</sup> Contrary to Toler’s assertion, the fact that the trial court *did not* apply the clear and convincing evidence standard to the Company’s directed verdict motion underscores that Toler was not required to prove a heightened “Constitutional malice” standard to overcome the qualified privilege.

Toler also misstates the Company’s position, and ignores established case law, with respect to the standard under which a plaintiff may overcome the qualified privilege. According to Toler, the Company’s position is that “there is only one standard” by which a plaintiff can defeat the privilege: knowledge of falsity or a reckless disregard for the truth or falsity. (Toler Brief, p. 37). Toler’s assertion disregards the fact that the Company expressly recognized that this standard was one of several avenues the trial court could have traveled in assessing whether Toler raised sufficient proof of malice to get his case to a jury. (Company Brief, p. 25). The Company wrote as follows:

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

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<sup>4</sup> Similarly, Vermont (10.4 - Draft), Michigan (M Civ JI 118.06), and New Jersey (3.11A) pattern jury instructions in Constitutional defamation cases incorporate the clear and convincing evidentiary standard therein. (Appendix B).

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.

(Company Brief, p. 25) (italics added). The Company's Brief recognizes that there is more than one means by which a plaintiff may overcome the qualified privilege and, further, includes a discussion of authority establishing that the standard used by the trial court in this case (e.g., knowledge of falsity or reckless disregard for the truth or falsity) is legally sound.

Toler attacks the Company's position by stating that the "only arguably valid authority for the exclusive use of the knowledge/reckless disregard standard for showing abuse of the qualified privilege in a common law defamation case is the case of Harstad v. Whiteman [citation omitted]." (Toler Brief, p. 37). But Toler continues to ignore that our Courts have applied this standard in defamation cases involving *private figures* (e.g., in non-Constitutional cases) for over one hundred years. 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); see also 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) (all applying the standard in defamation cases involving private figures). There being no error in the trial court's application of this standard at the directed verdict stage, the trial court's grant of the Company's motion should be affirmed.

**IV. Toler Acknowledged, through the Position He Advanced During His Closing Argument at Trial, that the Jury Determined that the Alleged Defamatory Statements at Issue were in Fact True.**

During his closing argument, Toler acknowledged that given the way the jury instructions were drafted and the fact that the individual defendants were the ones who actually uttered the alleged defamatory statements, if the jury determined that those statements were false, a finding of malice would necessarily be required because no defense of privilege could possibly apply. (VR No. 2, 7-22-09: 1:25:25). In short, the distinction between falsity and malice would effectively be eliminated under those circumstances. The jury, however, returned a verdict in favor of the individual defendants. Having found in favor of the individual defendants, the jury necessarily determined that the statements they made were true.<sup>5</sup> By extension, then, the Company could have no liability for repeating these true statements to Toler.<sup>6</sup>

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<sup>5</sup> It should be reiterated here that Toler does not allege 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 the individual defendants during his disciplinary meeting with two Company representatives.

<sup>6</sup> Toler chides the Company for discussing the effect of the jury's verdict in its Petition for Rehearing. (Toler Brief, p. 46). As a practical matter, however, the effect of the

Further, Toler protests that the exclusion of the Company from the case after the directed verdict was entered was a “seal of approval” by the trial court that the Company correctly believed the reports of the individual defendants to be true. (Toler Brief, p. 46). Toler’s theory ignores the fact that the trial court properly instructed the jury to draw no inferences from the Company’s absence to the prejudice of any remaining party. (VR No. 2, 7-22-09: 9:49:45 - 9:53:40). Moreover, Toler approved of the trial court’s approach to so admonishing the jury. (Id.).

Finally, Toler’s point lacks merit because the individuals who actually made the alleged defamatory statements remained as defendants in the case after the Company was granted the directed verdict. As such, Toler was not prejudiced in that he had a full opportunity to cross-examine these individuals and present whatever rebuttal proof he deemed appropriate in an effort to prove the “falsity” of the statements. If, as Toler asserts, the trial court’s ruling was tantamount to a finding that the statements at issue were true, then the individual defendants, who actually uttered the statements, would necessarily have been dismissed as well.

**V. Toler’s Alternative Grounds for Establishing Abuse of the Qualified Privilege Offer Him No Relief.**

Toler also claims that he adduced sufficient proof of malice to get his claim to a jury using alternative grounds such as “publication with a reckless disregard of Toler’s rights,” “publication without reasonable grounds, or probable cause, for a belief in the truth of the

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jury’s verdict on the Company’s potential liability did not ripen as a salient point in this case until the Court of Appeals reversed the grant of directed verdict in favor of the Company while affirming the jury’s verdict in favor of the individual defendants in its Opinion.

defamatory matter,” “publication with a reckless disregard for the truth or falsity of the defamatory matter,” and “publication from a wrongful motive.” (Toler Brief, pp. 44-45). Even if the jury had determined the statements of the individual defendants were false, Toler’s “proof” of malice along these lines was insufficient to create a jury issue as it relates to the action of the Company.

A review of the evidence upon which Toler relies in supporting this position reflects that the Company appropriately limited its investigation to interviews between the accusers and the accused and did not engage in excessive publication. One can only imagine Toler’s reaction if the Company had canvassed all of Toler’s subordinates and inquired of them whether he had made such racially discriminatory remarks. The Company conducted its investigation in a reasonable manner and with respect to the rights of Toler to understand the accusations leveled against him. The Company provided him with an opportunity to respond to the allegations. That Toler believes he was entitled to more does not establish malice by the Company. Importantly, Toler does not allege that the Company acted towards him with spite, ill-will, hatred, or some other wrongful motive; the evidence of record establishes the opposite is true.

When faced with divergent stories from its employees, the Company was called upon to make a decision regarding who to believe and what discipline to impose. The Company credited the statements of the individual defendants. The qualified privilege exists in this circumstance to protect the reasonable belief of the Company and insulate it from claims such as Toler’s even if it is wrong in its belief. The directed verdict of the trial court in favor of the Company should stand.

Respectfully submitted,



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\* \* \* \* \*

Tab A      Sherman v. Rinchem Co., 687 F.3d 996 (8<sup>th</sup> Cir. 2012)

Tab B      Florida Model Jury Instruction 405.7(c)  
             Florida Model Jury Instruction 405.4  
             Vermont Draft Model Jury Instruction 10.4  
             Michigan Civil Jury Instruction 118.06  
             New Jersey Model Jury Instruction 2.16(C)