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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001686-MR

JOSEPH E. TOLER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CI-008765

SUD-CHEMIE, INC.; JUDE WARE;
DON VOTAW, GLEN SHULL; AND
MIKE WATSON — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Joseph Toler, appeals the September 1, 2009, order of the Jefferson Circuit Court granting a directed verdict to Appellees Sud-Chemie, Inc. and Glen Shull, and from a jury verdict in favor of Appellees

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Jude Ware, Mike Watson, and Don Votow, on the defamation claim filed by Toler against the Appellees below. On appeal, Toler argues that the trial court erroneously applied the constitutional "actual malice" standard for overcoming the qualified privilege in this case, instead of the more plaintiff-friendly common-law standard set forth in *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 782 (Ky. 2004). Toler also argues that the court gave prejudicially erroneous liability instructions to the jury as to the individual defendants against whom claims remained. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm in part, reverse in part, and remand.

The Appellee, Sud-Chemie Inc., manufactures catalysts for various chemical operations. It operates two plants in Louisville, and several more in various locations in the United States. Toler was employed in a management position as a Shift Coordinator at the company's South Plant, located on Crittenden Drive at the time the events pertinent to this matter occurred. He has been employed by Sud-Chemie since 1976.[2] As a Shift Coordinator, Toler was responsible for scheduling employees and overseeing production, which included supervising maintenance, operator, and laborer/helper workers.[3] Toler also had the authority to recommend to his supervisors that an employee be disciplined. Toler

[2] Toler was initially employed by the Girdler Chemical Company, which became United Catalysts Company, and eventually, Sud-Chemie, Inc.

[3] The terms and conditions of employment for maintenance, operator, and laborer/helper employees of Sud-Chemie are governed by a Collective Bargaining Agreement with their respective union. As a supervisory employee, Toler was not affiliated with any union, although he was a union member when he worked for Sud-Chemie in non-supervisory positions.

became a Shift Coordinator in 1999. He initially worked on the day shift, but was thereafter transferred to the night shift, which he worked from 6:30 p.m. to 6:00 a.m. Toler remained on the night shift until his employment was terminated in April 2005. Toler states that he had a spotless work record while in management, that his last formal evaluation in February of 2005 was very positive, and that he received the highest mark in the evaluation area of trustworthiness.

The events giving rise to the termination of Toler's employment began in February 2005. On February 21, an operator named Allen Trice was sent home for refusing to perform a job that Toler instructed him to do. Toler states that when Trice refused to perform the assigned job, Toler called his boss, Troy Wise. Toler states that Wise told him to tell Trice to get his union steward, and then to explain to Trice and the steward that Trice had to do his assigned work. Toler states that he did this, but Trice still refused to perform the job. Toler states that he then told Trice, in accordance with Wise's instructions, that Trice was suspended, and he sent Trice home. None of the individuals who ultimately made statements against Toler were present when Toler sent Trice home. Toler said that Trice stated as he was leaving that Toler would be sorry because Sud-Chemie would not fire a black man.

Toler stated that his last involvement with Trice was approximately a week later, when he attended one of Trice's grievance meetings. Toler states that at that meeting Trice apologized for his earlier threat to Toler. Scott Hinrichs, Director of Human Resources, testified that Toler had handled the Trice situation

correctly, and Trice was subsequently terminated. Trice then filed a charge of discrimination against Sud-Chemie with the EEOC on March 7, 2005, asserting that he was terminated because of his race[4]. The company received Trice's EEOC complaint on March 17, 2005.

On March 16, 2005, Hinrichs received information that because of employee Mike Watson's concern about Toler's involvement in Trice's termination, the company would be provided with several written statements from company employees regarding racial comments made by Toler. On March 23, 2005, four employees, Mike Watson,[5] Bob Deweese,[6] Glen Shull,[7] and Don Votaw,[8] provided such statements which were given to Sud-Chemie management by Appellee Jude Ware.[9] Sud-Chemie asserts that these employees had no involvement in the

[4] Trice is African-American. Toler is Caucasian.

[5] Watson reported that Toler had commented, in reference to the African-American employees that, "all I work around is a bunch of dumb n----rs." *See* Appellant's Trial Exhibit No. 1.

[6] Deweese was initially named as a party to this suit. However, as he has since passed away, he was dismissed from the suit without objection by any party. Deweese had provided a written statement indicating that Toler had talked about "the lazy n---r's [sic] on his shift and how he would fire their black a—if they didn't jump when he said so." *See* Appellant's Trial Exhibit No. 1.

[7] Shull's written statement was unsigned, and was actually transcribed by another employee, Jude Ware, who is also a party to this lawsuit. Therein, Shull stated that Toler had referred to Sud-Chemie's African-American employees as "Little Africa", and referred to one African-American employee as "The Gorilla". *See* Appellant's Trial Exhibit No. 1. Sud-Chemie asserts that it did not learn of his identity until discovery commenced in this litigation. Accordingly, Sud-Chemie states that it did not interview Shull along with the other employees as part of its investigation of the allegations against Toler, nor did it rely on his statement in making the decision to terminate Toler.

[8] Votow reported to the company that Toler had referred to African-American employees as "stupid f----ng n----rs," "Jungle Bunnies," "dumb-a-- n----rs," "dumb n----r b—ch," and "gorilla-looking n----r." *See* Appellant's Trial Exhibit No. 1.

[9] All of these employees are Caucasian.

disciplinary issue between Toler and Trice when they provided these written statements to management.

Thereafter, Sud-Chemie, through Hinrichs, scheduled meetings with Votow, Watson, and Deweese to discuss the allegations contained in their written statements. Hinrichs interviewed these employees between March 29, 2005, and April 5, 2005. During the course of those interviews, each employee acknowledged and affirmed their statements.

Subsequently, on April 14, 2005, Hinrichs and Bill Furlong, Sud-Chemie's Plant Manager, met with Toler to discuss the allegations raised by the employees, and to inform Toler of the EEOC charge filed by Trice. During the course of that meeting, Toler acknowledged that using racist language in the workplace at Sud-Chemie was a "firing offense", and that the company had a zero tolerance policy with respect to the use of racist language in the workplace. Toler further agreed that it would be reasonable for an employee to report to management any incidents of racial discrimination or harassment, and that the company, Hinrichs and Furlong, had an obligation to investigate any such reports. Toler nevertheless takes issue with the timeliness of the reports, asserting that the employees should have reported the statements at the time they were allegedly made, as opposed to providing them in concert following Trice's termination.

Toler testified that during the meeting, Hinrichs and Furlong told him the names of the employees who had provided written statements, and gave him the opportunity to explain why he thought those individuals would make such

accusations. Toler states that he was provided with the information contained in the statements but that Hinrichs refused to match any of the individuals with their particular statements. Toler stated that he first gained access to the actual statements through the discovery process at trial and had not seen them before that time. Regardless, Toler denied the accusations[10] and testified that he advised Hinrichs and Furlong that he believed the statements made by the employees were part of a "union gang-up" against him.

In support thereof, Toler stated that he believed Watson was "out to get him" because he was a union steward. With respect to Don Votaw, he stated he had trouble getting Votaw to do his work, and that on one occasion in March of 2003, he had reported Votaw for not doing his job. That report apparently resulted in a written proposal for discipline of Votow. Sud-Chemie asserts that Votaw was ultimately never disciplined by Toler, and that they were unaware of any prior disciplinary issues between Votaw and Toler when they decided to terminate Toler[11]. Nevertheless, Toler testified at trial that he had to "get on" Votaw and Shull every day to do their work. With respect to Deweese, Toler stated that while he was supervising Deweese in 2000, he and Deweese had "words" over Deweese's performance of his job. Hinrichs also testified that Toler had stated that Deweese was a friend of Lonny Hampton, a shift coordinator that Sud-Chemie had

[10] Sud-Chemie asserts that while denying the use of racist language in the workplace, Toler acknowledged using racist language outside of the workplace in reference to African-American individuals.

[11] Toler nevertheless testified that Votaw's direct boss, Tony Risinger, stripped the maintenance break room of its television and ordered Votaw not to work on crossword puzzles as a result of Toler's March 2003 discipline of Votaw.

recently fired, an event which Hampton blamed on Toler. Concerning Shull, Toler testified at trial that on one occasion he had to instruct Shull to do his job, although he did not impose any discipline on Shull at that time.

During the course of the trial, 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 that individual's employment. Hinrichs nevertheless stated that he had no reason to believe that any of the statements submitted to him by the employees were falsified in any manner, and that he had no reason to disbelieve the statements at issue.

Following the investigation, Hinrichs and Furlong decided to terminate Toler's employment on April 15, 2005. This lawsuit followed, in which Toler alleged defamation against the aforementioned defendants and against Sud-Chemie for republishing the statements. He also alleged that Sud-Chemie wrongfully terminated him both because of the false statements and because of his Caucasian race.[12] Trial was held on July 21 and 22, 2009.

At the conclusion of Toler's case-in-chief, Sud-Chemie moved for a directed verdict, arguing that Toler had failed to establish his burden of proof. Specifically, Sud-Chemie asserted, in accordance with *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004), that Toler had failed to prove that the statements had been issued with actual malice, that is, a knowledge of falsity or a

[12] On January 23, 2008, the trial court dismissed Toler's racial discrimination claim upon Sud-Chemie's motion for summary judgment. Accordingly, we do not address that matter further herein.

reckless disregard of the truth or falsity of the statements and, further, that he had failed to prove the falsity of the statements. In addition, Sud-Chemie relied upon *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63 (Ky. App. 2006), in arguing that Toler had to prove actual malice in order to overcome the qualified privilege to which Sub-Chemie is entitled. They asserted that Toler had presented no proof that Sud-Chemie knew the statements were false, nor that they uttered or wrote the statements with a reckless disregard for the truth thereof.

In response, Toler asserted that *Cargill* was not applicable to this case, and that he merely needed proof of falsity and defamatory language in order to get his case to a jury. Sud-Chemie attempted to rebut that argument by asserting that *Stringer* also requires more than falsity, and indeed requires that a plaintiff prove actual malice, that is, a knowing or reckless disregard or the falsity of the statements.

The trial court agreed with Sud-Chemie, ruling that Toler had to prove a knowing or reckless disregard for the truth in order to overcome Sud-Chemie's qualified privilege. Accordingly, the trial court granted Sud Chemie's motion, along with a directed verdict motion filed by Shull, on the ground that Toler had failed to prove any damage as a result of Shull's statements. Toler argued that he was not required to prove that Shull's statement had gotten him fired or caused him to have lost wages, because general compensatory damages and injury to reputation are presumed upon the publication of defamatory statements. The trial

court disagreed, and dismissed Toler's claims against Shull. The following day, the trial convened with only Watson, Ware, and Votaw remaining as defendants.

During the course of the trial, Watson, Ware, and Votaw each testified. Watson stated that at the time that he made his statement, he was a union steward at Sud Chemie. He stated that he frequently participated in grievance processing, and that he had also participated in the discharge grievance processing of Allen Trice. Watson testified that as an employee at Sud Chemie, he had in fact heard Toler make racially derogatory remarks about African-American employees. Watson further testified that although he had heard Toler make the remarks a few months prior to the time he submitted his statement, he kept this information to himself until it appeared to him that Toler may have discharged Trice on the basis of his race. Watson testified that he wanted to make sure the company was aware of Toler's racial remarks because he wanted to ensure that Trice was not being mistreated by Toler.

Ware testified that at the time the events in the matter *sub judice* occurred, he was the Chief Union Steward. Ware stated that his responsibilities included working with management in an effort to process grievances and employee concerns. Ware stated that he participated in the processing of Allen Trice's grievance, and that he collected the statements from Watson, Shull, Votaw, and Deweese, and submitted them to the company via the appropriate union chain of command. Ware testified that he had never heard Toler make any racial remarks.

Votaw testified that he had recently heard Toler make racial remarks in the workplace. According to Votaw, Toler's remarks were constant and consistent, despite the fact that Toler and Votaw rarely worked together. That testimony was apparently echoed by the testimony of Mike Long, a former neighbor of Toler's and a fellow Sud-Chemie manager. Long testified that he had frequently heard Toler make racist remarks both in and outside of the workplace. Long stated that he had known Toler for nearly 33 years, and had been his neighbor for approximately 7 years. Long stated that he first heard Toler make racist remarks more than 22 years ago.

At the conclusion of all the evidence, the matter was submitted to the jury for deliberation. The jury returned a verdict for the defendants by a vote of 10-2. The court entered judgment on the jury verdict on September 1, 2009. This appeal followed.

On appeal, Toler asserts that there is no question that the statements at issue were defamatory per se. In support thereof, Toler relies upon *Louisville Taxicab and Transfer Co. v. Ingle*, 229 Ky. 578, 17 S.W.2d 709, 710 (Ky. App. 1929)[13] to argue that the statements prejudiced him in the performance of his profession, because it was unanimously acknowledged that racist statements were a "firing" offense at Sud-Chemie. Having asserted that the statements were defamatory per se, Toler further argues, in reliance upon *Stringer, supra*, that the

[13] Case involving false publication that chauffeur was discharged for drinking, wherein Court held that false words imputing unfitness for trade or profession are libelous per se.

law presumes damage to Toler by mere publication of the defamatory remarks. Toler therefore argues that the only true issue in this matter was the burden Toler had to meet to overcome the qualified privilege of the Appellees. Toler now argues that the trail court erroneously interpreted the law on this issue, and that it gave prejudicially erroneous liability instructions to the jury.

At the outset, we note that, as set forth in *Gibbs v. Wickersham*, 133 S.W.3d 494, 495 (Ky. App. 2004), the appropriate standard of review for appeal of a directed verdict is as follows:

> The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue, or there are no disputed issues of fact upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of the evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied.
>
> It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. While it is the jury's province to weigh evidence, the court will

> direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture.

Gibbs v. Wickersham, 133 S.W.3d 494, 495 (Ky. App. 2004)(Internal citations omitted).

As noted, Toler argues that the circuit court should not have directed a verdict for Sud-Chemie on the basis of its qualified privilege defense. In making this argument, Toler acknowledges the seminal case of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d. 686 (1964) articulated a constitutional privilege under the First and Fourteenth Amendments for those who write or speak about a public official.[14] Therein, the Court held that in order to recover for defamation, a public official suing a media defendant must prove actual malice, which the Court defined as knowledge that the statements at issue were false or with reckless disregard of whether they were false or not. In *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63 (Ky. App. 2006), our courts extended the same First Amendment protections of the media to churches when writing or speaking about public officials or figures.

[14] The Court later extended this privilege to "otherwise private individuals" if caught up in a matter of general or public interest. *See Rosenbloom v. Metromedia*, 403 U.S. 29, 31-32 (1971). This ruling was later abrogated by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), wherein it held that the actual malice standard should not apply to individuals who were not public figures of some sort, nor could the media invoke the constitutional protections outlined in *NY Times v. Sullivan* when writing about a private individual. It opined instead that the states were free to permit such individuals and entities to avail themselves of the full protection of the common law of libel and slander against the media, so long as some reasonable "fault" standard applied in such cases. In *McCall v. Courier-Journal and Louisville Times Co., Inc.*, 623 S.W.2d 882 (Ky. 1981), our Kentucky Supreme Court chose simple negligence as the appropriate standard to be applied in cases involving the media and "private figure" defendants.

Toler argues that in the matter *sub judice*, no churches, media organizations, or public officials or figures are involved, thus the First Amendment protections addressed in the aforementioned cases are inapplicable. Instead, Toler asserts that *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 782 (Ky. 2004) is applicable to the facts of the matter *sub judice*, and that the protections set forth therein must be measured in terms of the common law of libel and slander as opposed to the actual malice standard set forth in *Cargill*.

Toler asserts that under the common law of libel and slander a defendant entitled to the defense of qualified privilege is entitled to an instruction requiring a finding of malice as a condition to recover, but is not entitled to a directed verdict if the plaintiff proves the falsity of the defamatory publication. Toler argues that in the matter *sub judice,* he proved that the defamatory publications were false, that they were published, and that this was sufficient for the case to go to a jury, who should have then determined whether or not qualified privilege was a good defense. In essence, Toler argues that it was the task of the jury and not the Court, to determine if Toler had proven the malice necessary to overcome Sud-Chemie's qualified privilege in this case.

In response, the Appellees assert that the directed verdict concerning Sud-Chemie was appropriate based upon its defense of qualified privilege. The Appellees argue that they met their burden to establish the defense of truth by a preponderance of the evidence, and that Toler did not provide sufficient evidence to rebut that assertion. Further, the Appellees assert that a qualified privilege exists

in the matter *sub judice*, and that *Stringer* and *Cargill* have established that one must show "actual malice" in order to overcome a qualified privilege.

In reviewing the arguments of the parties, we note that Kentucky law is clear that 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[15]. *Stringer* at 793. Further, it is clear that truth is a complete defense which is deeply rooted in Kentucky law. *Id.* at 796. Since the law will not presume misconduct of a person, the falsity of defamatory words is presumed. *Id.* Consequently, the defendant has the burden of proving truth as an affirmative defense or "justification" by a preponderance of the evidence. *Id.* Accordingly, "if the evidence supports, without contradiction or room for reasonable difference of opinion, the defense that these [statements] were substantially true, it would necessarily follow that the jury should have been directed to find a verdict for the defendant, because the truth is always a complete defense." *Stringer* at 796, citing *Herald Pub. Co. v. Feltner*, 158 Ky. 35, 164 S.W.370, 372 (Ky. App. 1914).

Further, our courts have recognized a series of qualified or conditional privileges, including situations where the communication at issue is one in which the party who has an interest makes the statements to another having a corresponding interest. *See Tucker v. Kilgore*, 388 S.W.2d 112, 114-5 (Ky. 1965); and *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d 646, 649-50 (Ky. 1979). In such

[15] As noted previously, injury to reputation is presumed in cases where the remarks at issue are defamatory per se.

situations, the statements are communications within the employing company which are necessary to its functioning. *Caslin v. General Electric Co.*, 608 S.W.2d 69, 70 (Ky. App. 1980).

In such instances, the communication is privileged if made in good faith and without actual malice. *Id.* *Stringer* also affirmed the existence of a qualified privilege relating to the conduct of employees because of the common interests implicated in the employment context. *Stringer*, 151 S.W.3d at 796. Further, if a qualified privilege exists, and is not abused, there may be no recovery for defamation. *Stringer*, 151 S.W.3d at 797. Certainly, we have held that the existence of a qualified privilege is a question to be resolved by the trial court as a matter of law. *Landrum v. Braun*, 978 S.W.2d 756, 757-58 (Ky. App. 1998). In so stating, however, we note that *Landrum* was recently overruled by our Kentucky Supreme Court in *Calor v. Ashland Hospital Corp.*, 2010 WL 3374251 (Ky. 2010)(*To be published*), wherein the Court held that the issue of whether a qualified privilege is waived or abused is a question properly submitted to a jury and cannot be decided by a court as a matter of law. Further, we note that in *Stringer*, the Court held that:

> The significance of the defense of qualified privilege or conditional privilege is that it removes the presumption of malice otherwise attaching to words that are actionable per se and thereby casts on the plaintiff a technical burden of proof in that respect. *This does not require any greater degree of proof by the plaintiff because the offensive character of the words still is sufficient by itself to support an inference of malice.* The practical difference, therefore, is that in the one case the

> instructions do not require a finding of malice as a condition to recover and in the other they do.

Stringer, 151 S.W.3d at 797, citing *Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. 1965)(Emphasis added). Further, in addressing the connection between the falsity of the words and the presumption of malice, the *Stringer* court stated:

> It is clear that "when ... there is any evidence of actual malice or malice in fact, the case should go to the jury." While actual malice "requires a showing of knowledge of falsity of the defamatory statement or reckless disregard of its truth or falsity," "[m]alice can be inferred from the fact of ... falsity."

Stringer, 151 S.W.3d at 799 (internal citations omitted)[16].

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 Sud-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. Certainly, if the statements at issue were in fact falsely attributable to Toler, they are of such a nature as to be found

[16] *See also*, *Tucker v. Kilgore*, 388 S.W.2d at 114. *See also* *McClintock v. McClure*, 171 Ky. 714, 188 S.W. 867 (Ky. App. 1916): "The fact that the publication was made in a qualifiedly privileged communication simply relieves the publication from the presumption of malice otherwise attendant, and puts upon the [plaintiff] the burden of proving malice; but it does not change the actionable quality of the words published, nor is there any difference in the malice in the one case presumed but in the other to be proven ... which is merely an evidential distinction and nothing more."

defamatory per se in accordance with *Louisville Taxicab*, *supra*. The parties unanimously agree that the making of such statements was an offense mandating termination at Sud-Chemie. Thus, it can clearly be said, in accordance with *Louisville Taxicab*, that the statements at issue in the matter *sub judice*, if in fact they were falsely alleged, prejudiced Toler in the performance of his profession.

Having so found, we agree with Sud-Chemie that the qualified privilege applies in this instance, as the statements made were internal communications between company employees, and as the company had an interest in addressing comments in the work place which were allegedly racist in nature. Thus, if Sud-Chemie can establish that the qualified privilege in this instance was not abused, in accordance with our law as referenced above, it would be entitled to a verdict in its favor. However, ultimate entitlement to a jury verdict and whether a directed verdict was appropriate are two different issues. We address the latter herein.

In the matter *sub judice*, the statements at issue are of a purely private concern about a private individual. Accordingly, although constitutional protections for free speech and freedom of the press require heightened proof requirements and other modifications to the common law of defamation, such concerns are not implicated herein. Thus, we measure the sufficiency of Toler's defamation claims in light of the elements established in prima facie cases of common law libel and slander and the defenses offered by Sud-Chemie et al. *See Stringer*, *supra*, at 793.

Having reviewed *Stringer* and its progeny, and contemporary and preceding opinions in depth, we believe it is clear that a qualified privilege exists in the matter *sub judice*[17]. Accordingly, there is no question that in keeping with *Stringer* and other similar holdings, Toler will ultimately have the burden of establishing actual malice, or malice in fact to recover. However, we believe *Stringer* to be equally clear that it is a task for the jury, and not the court, to determine whether Toler had proven the malice necessary to overcome Sud-Chemie's qualified privilege.

Thus, in the matter *sub judice*, in order to establish a prima facie case of defamation sufficient to bring his case before a jury, Toler must prove that there existed defamatory language about himself, which was published and which caused injury to his reputation. Having reviewed the record, we believe Toler has met that burden in this instance. While this Court will not opine on the truth or falsity of the statements at issue, we reaffirm the well-established principle in the courts of this Commonwealth that the falsity of such statements is presumed. *See Stringer* at 796. While truth is certainly a complete defense, in order to establish

[17] To that end, we note that Sud-Chemie cites this Court to a number of cases, including *Baskett v. Crossfield*, 190 Ky. 751, 228 S.W.673 (Ky. App. 1920), *Stewart v. Williams*, 218 S.W.2d 948 (Ky. 1949), and *Edwards v. Kevil*, 133 Ky. 392, 118 S.W.273, 275 (Ky. App. 1909). Sud-Chemie argues, and this Court agrees, that these cases hold that some communications, even if proved false, were privileged as a matter of law because they were made with good faith and in the course of a reasonable investigation. Sud-Chemie argues, on the basis of these holdings, that it entered proof of good faith and reasonable investigation, and that accordingly, the truth or falsity of the statements at issue is not dispositive, and that Sud-Chemie should be insulated from liability via qualified privilege unless Toler establishes malice. In reviewing Sud-Chemie's arguments in this regard, we note that each of these cases were decided before *Stringer*. For the reasons stated herein, we 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.

entitlement to a directed verdict, a defendant must support that defense with evidence that leaves no room for contradiction or reasonable difference of opinion. *Id.* Such is not the case in the matter *sub judice*. 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. Thus, this Court finds that the directed verdict to have been in error in this instance, and we reverse.

As his second basis for appeal, Toler argues that the circuit court's jury instructions were prejudicially erroneous because they misstated the standard of proof necessary to show abuse of the qualified privilege. Toler argues that instead of applying *Stringer*, the court applied the actual malice standard of *NY Times v. Sullivan*. Toler said he did not have to prove this constitutional actual malice standard and that his proof was complete when he testified as to the falsity of the defendants' statements which were defamatory per se. Toler states that this error was preserved both by specific objections to the court's instructions and by tendering instructions with the correct standard.

In response, the Appellees assert that the court did apply the *Stringer* standard of proof within the jury instructions. While Toler asserts that the use of the term "actual malice" was in keeping with the holding in *New York Times*, the Appellees argue that the term "actual malice" was in fact referenced by the *Stringer* court. *See Stringer* at 796.[18] Regardless, the Appellees argue that

[18] "The communication is privileged if made in good faith and without actual malice."

Stringer clearly sets forth its malice standard by stating that either (1) The employees knew that their statements were false when they made them; or (2) The employees acted in reckless disregard of the truth or falsity of the statements. *Stringer* at 799.

In addressing this issue, we note that alleged errors regarding jury instructions are considered questions of law which we examine under a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006)(citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). Further, when examining jury instructions for error, they must be read as a whole. *Bills v. Commonwealth*, 851 S.W.2d 466, 471 (Ky. 1993).

The jury instruction at issue in the matter *sub judice* provided that "actual malice" may be said to exist upon proof that:

> …the speaker either (1) knew the statement was false at the time it was made or (2) acted with "reckless disregard" as to whether the statement was true or false. "Reckless disregard" means the speaker either (1) entertained serious doubts as to the truth or falsity of the statement or (2) had a high degree of awareness as to whether the statement was probably false. (TR p. 765).

A review of *Stringer* reveals that the Court does make a distinction between "actual malice" and "malice in fact." The former requires, as the court outlined in its instruction, either that the speaker knew the statement was false or that the speaker acted in reckless disregard of the truth or falsity of the statement. The latter type of malice, malice in fact, can be inferred from the establishment of

the falsity of the statements alone. A review of *Stringer* is clear that in cases where a qualified privilege exists, which Toler does not dispute to be the case here, the "burden of showing *actual malice* is put upon the plaintiff …" *Stringer* at 797 (Emphasis added). As the *Stringer* court noted, "In other words, the circumstances under which the publication was made, if it is privileged, rebut the inference of malice that under ordinary conditions would arise from such a publication." *Id.*

Having reviewed *Stringer* and the standards set forth therein, we believe the jury instructions issued by the court below to have been in keeping with that holding. Accordingly, we decline to find error in the instruction as issued, or to reverse on this basis, and affirm the jury verdict in favor of Appellees Ware, Votaw, and Watson.

As his third and final basis for appeal, Toler argues that the circuit court should not have directed a verdict for defendant Glenn Shull on the basis that his statement did not cause any special damages to Toler. As noted, the trial court directed a verdict for Shull upon a finding that Sud-Chemie did not rely upon his unsigned statement in making its decision to fire Toler. Toler argues that even if this is true, it was an improper reason to dismiss Shull from the action. Toler states that Shull's statement was defamatory per se, and that it was published to Ware and Hinrichs. While Toler concedes that damages have not been proven, he argues that special damages are not required as an element of a libel or slander claim in that the law presumes that the publication of words which are defamatory per se cause damage.

In response, Shull argues that the directed verdict entered by the court was appropriate. He directs this Court's attention to the fact that his "statements" were not signed, or even written in his own hand. He asserts that these statements were made to Ware, who transcribed them and provided them to management. Shull argues that as management did not even know that Shull was the author of the statement, it was therefore not considered at the time of Toler's discharge, as the management met with the authors of the other three statements. Shull thus argues that in the absence of any evidence from Toler that Shull's statement was utilized as part of the company's decision to terminate him, Toler is not able to establish the injury necessary under *Stringer*, and that Shull was entitled to a directed verdict.

Having reviewed the record, we are compelled to agree with Toler on this issue. Again, turning to the elements required to establish a prima facie case for defamation, we note that if the statements were false as Toler alleges then they were defamatory. They were undoubtedly published, first by Shull to Ware, and then by Ware to Sud-Chemie management, which Shull does not dispute. And, for the reasons stated previously herein, the nature of such statements, if false, makes them defamatory per se. Accordingly, damages are presumed. This Court is not convinced that Sud-Chemie was not influenced and did not rely upon these statements simply because Shull was not interviewed. The statements and allegations were submitted to management, and were no doubt considered

cumulatively with the other statements. Accordingly, we believe the directed verdict as to Shull in this instance was in error, and we reverse.

Wherefore, for the foregoing reasons, we hereby reverse the September 1, 2009, order of the Jefferson Circuit Court granting a directed verdict to Appellees Sud-Chemie, Inc. and Glen Shull, affirm the jury verdict in favor of Appellees Jude Ware, Mike Watson, and Don Votow, and remand this matter for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Philip C. Kimball
Louisville, Kentucky

BRIEF FOR APPELLEE, SUD CHEMIE, INC.:

James U. Smith, III
Oliver B. Rutherford
Louisville, Kentucky

BRIEF FOR APPELLEES, JUDE WARE, MIKE VOTAW, GLEN SHULL AND MIKE WATSON:

Robert M. Colone
Sellersburg, Indiana