OA 4-6-84 047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
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MAR 5 1984
CLERK, SUPREME COURT
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JEFFREY K. SMITH,

Petitioner,

vs.

GEORGE P. RUSSELL,

Respondent

CASE NO: 64,086

DISTRICT COURT OF APPEAL
SECOND DISTRICT
NO. 82-1478

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The Respondent/Defendant will, in this brief, refer to the Petitioner/Plaintiff, and to the record on appeal, in the same way as did the Plaintiff in his initial brief.

STATEMENT OF THE FACTS

The defendant has only the following areas of disagreement with the plaintiff's statement of the facts:

1. The plaintiff has exaggerated the facts with respect to the defendant's conduct on the night of his arrest.

(a) The "extremely high rate of speed" with which the defendant was driving his motor vehicle, when first observed by the plaintiff (Brief, p. vii) was actually given, by the plaintiff, as "between 55 and 60 miles an hour." (R 184)

(b) The plaintiff's statement (Brief p. vii) that "the defendant had great difficulty exiting his vehicle... (R-186)" is not borne out by the testimony referred to.[1]

2. The defendant disagrees with the plaintiff's description of the letters which were the subject of this action.

(a) "On March 12, 1979, the defendant wrote the first of three libelous letters..." (Brief p. x) The defendant does not agree that the letters were libelous.

(b) "...wherein he charged the plaintiff with the crime of brutality..." While the defendant did refer, in the March 12, 1979 letter, to "Smith's arrogance

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[1] R-186: "...he kind of rolled out of the car. He put his left hand down on the bottom door frame and put his right hand over on the door rest or the arm rest of the car. The door was open. He kind of pulled or helped himself out of the vehicle, and went over to the curb."

and brutality" (R-7), he did not charge the plaintiff with the commission of a crime.

(c) The plaintiff described the defendant's March 29, 1979 letter as "again accusing the plaintiff of brutality." The defendant's actual words were, "Ptl. Smith's abuse far transcended 'unnecessary force.'" (R-8)

3. The defendant disagrees with the plaintiff's characterization of the ex-Police Chief's[2] testimony concerning the effect of the defendant's letters upon his decision not to promote the plaintiff.

In his brief, the plaintiff says that, "testimony from Chief Miritello at trial established that the letter was a determining factor in his decision not to promote the plaintiff to a position for which he had taken a test and qualified. (R-117-123)." (Brief p. xi)

Upon cross examination, the former Chief had admitted that there were other factors in his decision as follows:

(a) "...Number one on the list was an officer who had a test score of 91%, and that Mr. Smith was number 2 and had a score of 79%." (R-128)

(b) Smith's absenteeism was a factor. (R-128)

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[2]Miritello was no longer Chief of Police, at the time of trial. He was an ROTC instructor in the United States Army, and appeared in court in uniform. Defendant's objection to his testifying while garbed in an Army uniform was overruled. (R-112-113)

(c) Smith had recently been injured, and that was a factor. (R-129)

(d) He had also had other complaints about Smith. (R-129)

(e) The evaluation of Smith by his superior officer, Sergeant Buckstein, was also a factor. (R-129)[3]

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[3]Buckstein's evaluation was obviously not particularly favorable. He and Smith had had what plaintiff's counsel had characterized as a "personality conflict" between themselves. (R-309)

ARGUMENT

POINT I

WHETHER THE TRIAL COURT CORRECTLY RULED THAT PETITIONER/POLICE OFFICER WAS NOT A "PUBLIC OFFICIAL" AND PROPERLY DECLINED TO GIVE DEFENDANT'S REQUESTED "PUBLIC OFFICIAL" JURY INSTRUCTION?

In the instant case, after the plaintiff had rested, the defendant moved for a directed verdict. (R-280) He argued that the plaintiff is a public officer, and that statements critical of him are, therefore, privileged, even if defamatory and false, that the plaintiff cannot recover except upon a showing of actual malice, and that the privilege creates a presumption that there was no malice. (R-282-283)

After hearing argument, the court denied the motion, saying, "a police officer in this state is not a public official subject to the qualified privileged rule which you suggest is applicable in this case." (R-297)

After the conclusion of the presentation of evidence, at the charge conference, the defendant requested the trial court to instruct the jury that, as a matter of law, the plaintiff was a public official, he could recover only upon a showing of actual malice, the defendant's communications were privileged, and a presumption exists that they were made without malice.[4]

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[4]Requested Jury Instruction No. 7: "As a police officer, the plaintiff is a 'public official' as a matter of law." (R-22)

No. 8: "Criticism of a public official relating to his official conduct is actionable only upon a showing of actual
(footnote continued)

The court denied the defendant's said requests.[5]

We have been unable to find a single case, other than this, in which a court, either at the trial level or at the appellate level, has ruled that a police officer is not a public official.

In White vs. Fletcher, 90 So. 2d 129 (Fla. 1956) this Honorable Court ruled directly on this very question. When defendant's counsel cited that case to the trial court, plaintiff's counsel responded that the facts of the case are distinguishable - "that White was the Chief of Police," while the plaintiff here "is (only) a policeman, the bottom of the totem pole." He argued that applying the rule of the White case to this case would be tantamount to ruling that the judge's secretary is a public official. (R-182-183)

Plaintiff's counsel may be in possession of facts unknown to us; the "careful reading of White" that he recommends[6] does not, we submit, support the distinction he claims to exist. A careful reading of the White case makes it clear that the plaintiff in that case was, like Smith, but a uniformed policeman, and not the Chief of Police, and

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malice." (R-23)

No. 9: "As the plaintiff is a public official, the defendant's communications about him were privileged and there is a presumption, therefore, that they were made without malice." (R-24)

[5]The trial court's notation, "Denied", appears on each of the defendant's said requested instructions. (R-22-24)

[6]Initial brief of respondent, p. 8

that this Honorable Court did hold a uniformed policeman to be a public official.

In both the headnotes and in the opinion itself the Court makes frequent references to "uniformed police officer", "police officer", and "uniformed policeman." The opinion begins,

> "The appellant, W. A. White, plaintiff below, was a police officer for the City of Orlando. In July, 1953, much public attention was focused on White, who was a witness in the prosecution of a prostitute in whose activities he was allegedly involved." White v Fletcher, supra. at 130.

The Mayor of the City of Orlando had demanded publicly that an investigation be made, and a newspaper article concerning the matter, entitled "City Police Chief Lax, Official Says," had reported the alleged libelous statement made by the defendant. Id. The Police Chief is mentioned nowhere else in the report of this case.

The newspaper article had reported that the Chairman of the Civil Service Board had said that his personal investigation convinced him "the man 'is not fit to be a police officer.'" Id.

The police officer had filed his complaint charging the Board Chairman with libel. The trial court had entered Final Summary Judgment for the defendant, "expressing the opinion, upon the pleadings and a deposition, that the publication was privileged and that no evidence of express malice existed." Id., p. 130-131.

This Honorable Court first quoted Mr. Justice Terrell, in Kennett v Barber, 31 So. 2d 44, 46 (Fla. 1947) as follows:

> "We think the rule is now generally accepted that any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval." White v Fletcher, supra., at p. 131.

The Court then went on to apply this rule to the case before it:

> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of the City of Orlando. The generally accepted rule is that "public officials" or "public men" are subject to such fair comment. Cason v. Baskin, 159 Fla. 31, 30 So. 2d 635. This court has said a person whose duty it is to perform agency for the State is a "public officer", and that a person in the service of the government who derives his position from duly authorized election or appointment is a public officer. State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721. There could be little doubt that a policeman, then, is a "public officer". Id, p. 131

There can be no doubt, then, that this Honorable Court has squarely ruled that a uniformed policeman, albeit he is nothing more than a "street level" patrolman for a "small beach community,"[7] is a public officer. A uniformed

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[7] Initial brief of petitioner, p. 5.

policeman does, after all, derive his position from appointment; his duty it is to perform agency for the State.

The White case was decided in 1956; subsequently, in 1964, the United States Supreme Court decided New York Times v Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). That case established that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. 376 U.S. 254, 279-80. In subsequent cases, the Supreme Court added that a plaintiff, to prove "actual malice", must provide clear and convincing proof[8] "that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968)

Sometime after the decision in New York Times v Sullivan, supra, the Supreme Court of Illinois had before it a case similar to the White case. The Illinois Court directed its attention to "the ambit of constitutional protection enunciated in New York Times Co. v Sullivan," and to the question whether the plaintiff (police patrolman) was within the "public official" classification. It reached the same conclusion that this Honorable Court had reached, twelve years earlier, in the White case. It gave the following explanation of its holding:

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[8] Gertz v Robert Welch, Inc., 418 U.S. 323, 342 (1974)

> "It is our opinion that the plaintiff is within the "public official" classification. Although as a patrolman he is "the lowest in rank of police officials" and would have slight voice in setting departmental policies, his duties are peculiarly "governmental" in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws." Coursey v Greater Niles Township Publishing Corp., 40 Ill. 2d 257, 239 N.E. 2d 837, 841 (1968) (emphasis added)

The last sentence above quoted, concerning the great potentiality for social harm that may result from the abuse of a patrolman's office, is self evident. The "street level" patrolman has the right to carry a gun, even during off duty hours. F.S. 790.052. He can arrest a person without a warrant if he but "reasonably believes " that a felony has been committed, and that that person has committed it. F.S. 901.15. He can "stop and frisk." F.S. 901.151. In case of an unlawful assembly, he has the power to command the persons so assembled to disburse, and if they do not thereupon immediately and peaceably disburse, to command the assistance of all such persons in seizing, arresting and securing such persons in custody. F.S. 870.04. Indeed, his primary res-

ponsibility is the prevention and detention of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. F.S. 943.10.

Like deputy sheriffs[9], police officers are "conservators of the peace."

While not every public employee is a public official, that designation applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v Baer, 383 U.S. 75, 85 (1966)

Every case that we have been able to find, dealing with this question, in this State or in any other, has either held a uniformed policeman to be a public official, or has acted on the assumption that it is so. See, e.g., Berkey v. Delia, 413 A. 2d 170 (Court of Appeals, MD 1980); Rawlins v. Hutchinson Publishing Co., 543 P. 2d 988, 992 (Kan. 1975); Moriarty v Lippe, 162 Conn 371, 294 A 2d 326 (1972); Hull v Curtis Publishing Co., 182 Pa. Super. 86, 125 A 2d 644 (1956); Wardlow v City of Miami, 372 So. 2d 976, 979 (footnote 4) (Fla. 3d DCA 1979); Harrison v Williams, 430 So. 2d 585 (Fla. 4th DCA 1983); and Hines v Florida Publishing, 4th Judicial Circuit, Duval County, Florida, No. 81-7923-CA and 81-8329-CA, January 6, 1982, 7 Med. L.Rptr. 2605.

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[9] F.S. 30.15. The plaintiff concedes, apparently, that deputy sheriffs are "public officials." (Initial brief of petitioner, p. 9)

On May 4, 1983, the day after the oral argument of this case in the Second District Court of Appeal, Harrison v Williams, supra, was decided by the Fourth District Court of Appeal of the State of Florida. That case, too, involved an action for slander and libel filed by a police officer. The court said,

> "Because appellee was a public official at the time he was defamed, malice or reckless disregard for the truth of a publication had to be established. St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968) (emphasis added)[10]

And now the Second District Court of Appeal, too, has ruled, in the instant case, that a police officer is a public official, "subject to fair comment and criticism from any member of the public," and that "to establish that he has been defamed, a police officer must show that the communication was made with malice or reckless disregard for the truth." Russell v Smith, 434 So. 2d 342 (Fla. 2d DCA 1983)

It does not seem likely that the effect of this decision by the Second District Court of Appeal will be to expand the privilege to include a trial judge's secretary.

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[10]The plaintiff attempts to explain Harrison v Williams by saying, "the District Court of Appeal erroneously relied upon St. Amant v Thompson for the proposition that the police officer therein was a 'public official' as a matter of law." (Initial brief of petitioner, p. 8) It seems clear, from the statement quoted above, that the Fourth District had made its own determination that appellee was a public official, and cited St. Amant v Thompson for the proposition that, therefore, malice or reckless disregard had to be established.

POINT II

WHETHER RESPONDENT/DEFENDANT PRESERVED FOR APPEAL, THE ISSUE OF WHETHER THE TRIAL COURT PROPERLY DECLINED TO GIVE RESPONDENT/ DEFENDANT'S REQUESTED "PUBLIC OFFICIAL" JURY INSTRUCTION?

Plaintiff here argues that the Second District Court of Appeal should not have reversed the trial court for failing to give the defendant's requested "public official" jury instruction, because the defendant had failed to include in the appellate record the transcript of the charge conference. He cites Seminole Shell Co., Inc., v Clearwater Flying Co., Inc., 156 So. 2d 543 (Fla. 2d DCA 1963), and Rule 1.470, F.R.C.P. (Initial brief of petitioner, p. 12-13)

Neither Seminole nor Rule 1.470 requires an appellant to include the transcript of the charge conference in the appellate record in order to challenge the trial court's rulings on requested jury instructions.

In Seminole, the court said,

> "There appears to be nothing in the record indicating this particular instruction was actually presented to the lower court and that the court refused to give it." (Seminole Shell Co., Inc., v Clearwater Flying Co., Inc., supra, at p. 454. (emphasis added)

Rule 1.470 requires counsel to appear before the court at charge conference and there to state all objections that they may have with respect to the charges which the court intends to give: "No party may assign as error... the failure to give any charge unless he requested the same."

The purpose of this rule is, of course, to ensure that issues on appeal be limited to those presented to and ruled on by the trial court. The orderly administration of the judicial system would not be possible if litigants were permitted to raise new issues on appeal, and to complain of a trial court's failure to do something it had not even been asked to do.

This is not such a case. Here, it is clear from the record that the defendant did request the trial court to give a "public official" instruction. His requested jury instructions appear in the record at p. 22-24. He did, then, comply with Rule 1.470(b).

The trial court's notation, "Denied", appears, handwritten, on the face of each said requested jury instruction. (R-22, 23, 24) The trial court did, then, not merely fail to give those jury instructions; it refused to do so.[11]

The plaintiff has, in his STATEMENT OF THE CASE in his initial brief to this court, admitted that the defendant had, at the charge conference, requested a "public official" instruction:

> "Instructions to the jury included one regarding "common interest privilege" but over Defendant's objection did not include a jury instruction on "public of-

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[11] As we have shown earlier in this brief (p. 4), the trial court had ruled, during the trial, that "a police officer in this state is not a public official subject to the qualified privilege rule..." The trial court's refusal to give the "public official" jury instruction was its second rejection of the defendant's claim in this regard.

ficial" privilege." (Initial brief of petitioner, p. v) (emphasis added)

No transcript of the charge conference is needed to confirm that the particular instructions were actually presented to the lower court and that the court refused to give them.

POINT III

WHETHER THE TRIAL COURT'S REFUSAL TO GIVE RESPONDENT/DEFENDANT'S REQUESTED "PUBLIC OFFICIAL" JURY INSTRUCTION WAS HARMLESS ERROR?

The plaintiff's claim that the trial court's refusal to give the "public official" instruction was harmless error fails to stand up under scrutiny.

If the trial court had agreed to instruct the jury that the plaintiff was a "public official", it would, perforce, have also instructed the jury that the defendant's criticism of the plaintiff is actionable only upon a showing of actual malice (Requested Jury Instruction No. 8; R-23) and that there is a presumption that such criticism was made without malice (Requested Jury Instruction No. 9; R-24).

The plaintiff pointed out that the trial court did give defendant's Requested Jury Instructions Nos. 10, 10(b) and 11.[12] The plaintiff then argued (initial brief of petitioner, p. 18) that,

> "Respondent/Defendant also received the benefit of the presumption of no malice

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[12] Requested Jury Instruction No. 10: "A communication made by one having an interest or duty in the subject matter thereof, to another person having an interest or duty thereof, is conditionally privileged, even though the statement may be false and otherwise actionable." (R-25)

No. 10(b): "In cases in which a qualified privilege exists, the essential element of malice may not be imputed. Rather, in order to recover, the plaintiff must prove express malice or malice in fact." (R-26)

No. 11: "A presumption is an assumption of fact which the law makes from the existence of another fact or a group of facts. The presumption that the defendant's communications were made without malice is rebuttable, but the plaintiff has the burden of overcoming that presumption." (R-27)

> and the burden having been placed on Petitioner/Police Officer to overcome said presumption."

And he argued that the jury's award of punitive damages shows that the jury must have concluded that the plaintiff overcame the presumption of no malice, ergo, the defendant had acted out of malice and the result would have been the same if the court had given the "public official" instruction.

But the giving of the defendant's Requested Instruction Nos. 10, 10(b) and 11 could not have had the effect which the plaintiff now attributes thereto.

There is a vast difference between Requested Jury Instruction No. 7, which the trial court refused to give, and Requested Jury Instruction No. 10, which it did give. In No. 7, the trial court would have instructed the jury that the plaintiff was a "public official" as a matter of law. The jury would not have been left to decide, as a question of fact, whether the plaintiff was a public official, and, therefore, whether "the defendant's communications about him were privileged" and whether "there is a presumption, therefore, that they were made without malice." (Requested Jury Instruction No. 9; R-24)

The jury would have been told, clearly and simply, that the defendant's communications were privileged, and that a presumption does exist that they were made without malice, and that the plaintiff has the burden of overcoming the presumption. (Requested Jury Instructions Nos. 9 and 10)

The "common interest" instruction that the court did give to the jury in this case was far different:

> "...You should consider the defendant's claim that the communication was made by one having an interest or duty in the subject matter thereof to another person having an interest or duty thereof and that the statements were, therefore, conditionally privileged, even though they may be false or otherwise actionable.
>
> A communication made by one having an interest or duty in the subject matter thereof to another person having an interest or duty thereof is conditionally privileged...
>
> If a communication is privileged the presumption is that it was made without malice and that plaintiff, Smith, has the burden of overcoming that presumption." (R 99-100) (emphasis added)

The trial court left for the jury the determination of whether the defendant's communication was made by one having an interest or duty in the subject matter to another person having an interest or duty thereof, and thus whether a qualified privilege existed, whether the defendant should be given the benefit of any presumption that the defendant's communications were made without malice. The defendant, in final argument to the jury had claimed that he was entitled to the benefit of the qualified privilege associated with communications to persons with an interest[13]. But he had sent copies of the letters in question to persons other than the chief of police; to his argument that all of the parties involved had an interest in the subject matter,

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[13] Leonard v Wilson, 8 So. 2d 12 (Fla. 1942).

plaintiff's counsel had responded, "Shingler was not interested. Shingler did not handle his case, but he sent that in there too so that Shingler could have the story, it wasn't me that was drunk driving. It was the cop that did wrong." (R-400)[14]

We do not know, then, whether the defendant "received the benefit of the presumption of no malice," and whether the jury considered that the plaintiff had the burden of overcoming the presumption. The jury might not have made an award of punitive damages, had they been properly instructed as to the presumption that the defendant should have been accorded. The instruction actually given, with regard to punitive damages, not only failed to accord the defendant the benefit of the presumption to which he was entitled, but also had the unfortunate effect of shifting the burden of proof as to malice from the plaintiff to the defendant:

> "If you find for Jeffrey K. Smith and find also that George P. Russell acted maliciously you may, in your discretion, assess punitive damages against George P. Russell as punishment and as a deterrent to others.
>
> It is malice to publish false material and false matter concerning another with knowledge of its falsity or with reckless disregard for its truth or falsity. Reckless disregard is not measured by whether a reasonably prudent man would have writ-

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[14]The defendant had admitted that his reason for writing to Judge Shingler was that he knew him, they had worked together on an Easter Seal Campaign, he had bumped into Judge Shingler on his way out of the courthouse on the day of his trial, and "I was embarrassed when Judge Shingler said to me, 'George, what have you been up to?'" (R-75)

> ten the letters in question. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of the statements." (R-101-102)

Standing by itself, without the benefit of the qualified privilege attending communications about a public official, and the presumption arising therefrom, that instruction could have been interpreted by the jury as placing the burden on the defendant to show that he in fact entertained no serious doubts as to the truth of his statements.

It was, of course, for the court to determine as a matter of law that the plaintiff was a public official. See Hoffman v. Washington Post Co., 433 F.Supp. 600, 604 (DC, 1977); Rosenblatt v. Baer, supra. The plaintiff, as a prerequisite to any recovery, would have had to show affirmatively that the privilege was abused, by showing that the defendant published the letters with actual malice. New York Times v. Sullivan, supra. Instead, the jury, here, was left to decide, as a question of fact, whether the defendant was entitled to the qualified privilege associated with communications to persons with an interest, etc.

The jury could, therefore, have rejected the defendant's claim to be entitled to a qualified privilege on account of his having published communications only to persons having an interest; it could have rejected that claim for the reason that the defendant had mailed copies of the letters to Judge Shingler, who was not directly involved; or the jury may have concluded that the defendant had lost the

benefit of the privilege, and the presumption, when he mailed copies of the letters to Judge Grube, who had testified, "I think I told him that I didn't have any authority to discipline a police officer. So it really couldn't go any further in front of me.." (R-171)

The plaintiff cited Nodar v. Galbreath, 429 So. 2d 715 (Fla. 4th DCA 1983), in support of his claim that the failure to give the "public official" instruction was harmless error. But in Nodar, while the trial court had failed to instruct on the "public official" privilege, the jury had been instructed on the "common interest" privilege and had found that privilege to exist; the Nodar court concluded that if the trial court's failure to instruct on the "public official" privilege was error, it was harmless error, because the "public official" privilege would have added nothing to the "common interest" privilege which the jury had found to exist.

Here, however, the jury might well have concluded that no "common interest" privilege existed, while it should have been instructed that a "public official" privilege did exist, as a matter of law.

The Second District Court of Appeal said, in the instant case, that to accept the plaintiff's argument that the trial court's error was harmless "would require (it to) disregard constitutional safeguards of freedom of speech contained in New York Times Co. v. Sullivan, 376 U.S. 254,

84 S.Ct. 710, 11 L.Ed. 2d 686 (1964)." Russell v Smith, supra, at p. 343.

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT?

The Second District Court of Appeal concluded its opinion, in this case, by saying,

> "We by no means would condone unjustified and scurrilous accusations against police officers. However, we do not reach the question of whether the letters in this case fall into that category and are outside the bounds of what the Florida Supreme Court in White referred to as 'fair comment and criticism' except to say that the trial court did not err in denying Russell's motion for a directed verdict on the ground of lack of evidence of malice. Our holding is simply that Russell was entitled to a jury instruction as to, and jury consideration of, the foregoing qualified privilege." Russell v Smith, supra, at p. 344. (emphasis added)

The defendant, here, respectfully asks this Honorable Court to review the question whether the trial court erred in denying the defendant's Motion for a Directed Verdict, as being necessary to the complete determination of the appeal. Bould v Touchette, 349 So. 2d 1181 (Fla. 1977)

Not only was the plaintiff subject to fair comment and criticism; he was subject, even, to false and unfair comment, unless such false and unfair comment had been published with actual malice. New York Times Company v Sullivan, supra.

In order to establish actual malice the plaintiff had to prove, affirmatively and expressly, that the allegedly libelous statements were made "with knowledge that

they were false or with reckless disregard of whether they were false or not." New York Times Company v Sullivan, supra.

"Knowing falsehood" means exactly that, and there is not one shred of evidence that the defendant subjectively knew that the published statements were false. Indeed, the whole purport of the plaintiff's case was that the defendant was under the influence of alcohol at the time of the incidents he complained of, and that his memory was therefore unreliable! Faulty recollection is not malice!

The plaintiff had to prove at least that the statements complained of were made "with reckless disregard of whether they were false or not." This is not a "reasonable man" or objective standard; a subjective standard must be applied. The plaintiff had to show that the defendant subjectively had a high degree of awareness of the probable falsity and that he subjectively entertained serious doubts as to the truth of the publication. St. Amant v Thompson, supra; Garrison v Louisiana, 379 U.S. 64 (1964); Curtis Publishing Co. v Butts, 388 U.S. 130, 153 (1967).

This Honorable Court has said,

> "However, the malice which vitiates a qualified privilege must be actual and not merely inferred from falsity, etc. See Coogler v Rhodes, supra..." Loeb v Geronemus, 66 So. 2d 241, 244 (Fla. 1953)

In order to justify a verdict against the defendant, the plaintiff had to establish facts which could lead

a jury to conclude that the defendant subjectively did not believe his publication was true.

The defendant, however, continued to insist, even at trial, on the truth of his complaints as expressed in the letters. He clearly had no doubts as to the truth of the publications. (R-343-348, 354)

A recent pronouncement by the Sixth Circuit in Schultz v Newsweek, 668 F. 2d at 919 (6th Cir., 1982), demonstrates that the courts are extremely wary of allowing a plaintiff to get to the jury on the issue of actual malice:

> "None of the plaintiff's "facts" or reasonable inferences arising therefrom, even if true, demonstrated any substantial doubt as to accuracy or any awareness of falsity on the part of either defendant. Thus, the plaintiff failed to demonstrate the existence of a genuine issue on the determinative question of actual malice. Under the circumstances the defendants were entitled to judgment as a matter of law..." (Emphasis added)

In the instant case, the plaintiff raised no facts to meet the subjective malice standard. None of the evidence produced by him was even directed to the clearly enunciated "reckless disregard" test: that the publication was made with a high degree of awareness of probable falsity in the mind of the defendant, and that the defendant entertained serious doubts as to the truth of the publication. Proof of a publication's inaccuracy is no proof that the defendant "in fact entertained serious doubts as to the truth of his publication."

The jury here was permitted to find liability on the basis of a combination of falsehood and anger. "This was error of constitutional magnitude, as our decisions made clear." Greenbelt Publishing Association v Bressler, 398 U.S. 6, 10 (1969).

It "goes against the grain" to permit a plaintiff/policeman to sue a citizen/defendant whom he has arrested and charged with a crime, on account of letters of protest written to the policeman's superior officer, proclaiming the citizen/defendant's innocence and complaining about the policeman/plaintiff's conduct.

The defendant did what he did "as a citizen -- it was my duty as a citizen to report what I considered very shabby treatment and handling." (R-358)

The public policy determination that such actions should not be permitted is reflected in what Prosser, in his work on Torts 4th Ed. (1971), at §115, p. 786, calls a "publisher's interest:"

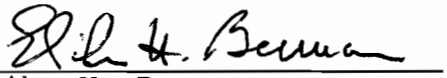
> "Roughly similar to the privileges of self-defense or the defense of property is the privilege which attaches to the publication of defamatory matter for the protection or the advancement of the defendant's own legitimate interest. Thus he may publish, in an appropriate manner anything which appears to be necessary to defend his own reputation against the defamation of another, including, of course, the allegation that his accuser is an unmitigated liar and the truth is not in him."

Certainly the plaintiff was defending his own reputation here, against what he believed to be the defa-

mation of another; he did, indeed, call his accuser a liar. This "interest of publisher", as described by Prosser, simply recognizes man's natural inclination to deny wrong doing, whether justified or not.

CONCLUSION

The holding of the Second District Court of Appeal that the trial court erred in failing to give the "public official" instruction, and reversing the judgment of the lower court, should confirmed; but the case should not be remanded for new trial. Rather, final judgment should be entered for the defendant, for failure of the plaintiff to offer any evidence of actual malice.



Elihu H. Berman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument has been furnished to Joseph M. Ciarciaglino, Jr., Esquire, 433 Fourth Street North, St. Petersburg, Florida 33701 this 1st day of March, 1984.

Elihu H. Berman
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