

**FILED**

IN THE SUPREME COURT OF THE STATE OF FLORIDA

AUG 15 1983

SID J. WHITE  
CLERK, SUPREME COURT  
Chief Deputy Clerk

JEFFREY K. SMITH,  
Appellant,

vs.

APPEAL NO.: 82-1478

GEORGE P. RUSSELL,  
Appellee. /

APPEAL FROM THE DISTRICT COURT OF APPEAL  
STATE OF FLORIDA, SECOND DISTRICT

BRIEF OF APPELLANT

Robert L. Paver and  
Joseph M. Ciarciaglino, Jr.  
OSBORNE & CIARCIAGLINO  
Attorney's for Appellant  
433 Fourth Street North  
St. Petersburg, FL 33701  
(813)823-1510

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEFFREY K. SMITH,  
Appellant,

vs.

APPEAL NO.: 82-1478

GEORGE P. RUSSELL,  
Appellee. /

PRELIMINARY STATEMENT

The Appellant is the Appellee below, and will be referred to herein as the Plaintiff or Appellant. The Appellee is the Appellant below and will be referred to as the Defendant or Appellee.

References to the record on appeal below will be made by the letter R followed by the page number in parenthesis.

STATEMENT OF THE CASE

This was an action for libel. The Plaintiff's First Amended Complaint was filed November 16, 1979 (R. 1); the defendant's Answer and Affirmative Defenses were filed December 28, 1979 (R. 10); and the case went to trial before a jury on February 15, 1982. (R. 299)

At the conclusion of the plaintiff's presentation of his case, the defendant moved for a directed verdict. His motion was denied. (R. 50, 171-187) After conclusion of presentation of evidence, and instructions from the court, the jury reached a verdict in favor of the plaintiff and against the defendant, and assessed general damages in the amount of \$4,500.00 and punitive damages in the amount of \$5,500.00. (R. 13)

Instructions to the jury included one regarding "common interest privilege" but over defendant's objection did not include a jury instruction on "public official privilege."

Defendant's Motions for New Trial, Remittitur, etc., were filed on February 25, 1982 (R. 42), and the court rendered judgment in favor of the plaintiff, and against the defendant, in the total sum of \$10,620.00 on May 24, 1982. (R. 52)

Notice of Appeal was timely filed on June 21, 1982. (R. 53)

On July 15, 1983, the Second District Court of Appeal reversed for new trial on grounds of failure to give "public official privilege" instruction.

Petition for Discretionary Review was timely filed on August 8, 1983.

### STATEMENT OF THE FACTS

At the time of the events giving rise to this action, the Plaintiff was a patrolman employed by the City of St. Petersburg Beach Police Department. (R. 1) On January 25, 1979, while on duty, the Plaintiff stopped the Defendant. (R. 185) At the conclusion of Field Sobriety Tests the Plaintiff arrested the Defendant for DWI.

On March 12, 1979, the Defendant wrote the first of the three libelous letters, to Police Chief Robert Miritello. (R. 1) Defendant sent copies of this first letter to Judge Karl Grube, who presided over the Defendant's DWI case, Judge Robert Shingler, Attorney John Robinson, who represented the Defendant in his DWI case, and the Plaintiff. Upon receipt of a copy of this letter, the Plaintiff became extremely upset. (R. 199) An internal investigation was conducted by the St. Petersburg Beach Police Department, and the Plaintiff was called upon to defend his actions and was placed under a great deal of stress as a result. (R. 116, 117, 199-214) 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) Police Chief Miritello wrote back to the Defendant, setting forth the procedures for receipt and investigation of complaints and suggested

that the Defendant avail himself of this system. (R. 115-117)

On March 29, 1979, the Defendant responded to the Police Chief's letter stating that he would pursue no action and again accusing the Plaintiff of brutality. (R. 116-118) Copies of this letter went to Judge Karl Grube and attorney John Robinson. The Defendant's third letter was dated April 19, 1979, and addressed to John Robinson. This letter accused the Plaintiff of lying under oath at deposition and expressed the Defendant's desire to transcribe the Plaintiff's "incredible" deposition. (R. 1-9) Copies of this third letter went to Judge Karl Grube, Chief of Police Robert Miritello, and the Plaintiff. This action followed an appeal to the Second District Court of Appeal.



ISSUE ON APPEAL

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN RUSSELL VS. SMITH, CASE NO.: 82-1478 EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN NODAR VS. GALBREATH, 429 So2d 715 (4DCA 1983), SO AS TO INVOKE THE DISCRETIONARY JURISDICTION OF THE SUPREME COURT OF THE STATE OF FLORIDA.

The Supreme Court, pursuant to the Art. V, § 3(b)(4), Fla. Const., and the Fla. R. App. P. 9.030(a)(2)(a)(iv) may discretionarily review decisions of District Courts of Appeal that expressly and directly conflict with a decision of another District Court of Appeal on the same question of law.

The question of law herein was whether the trial court's instruction to the jury as to a qualified privilege requiring an actual showing of malice affords to the defendant the same protection as is afforded specifically by the "public official" instruction thereby rendering the failure to find, declare, and instruct on the "public official" instruction, harmless error.

The Second District Court of Appeal herein held that the trial court erred in its failure to instruct the jury upon the "public official" qualified privilege, notwithstanding the fact that the trial court instructed the jury on the "common interest" qualified privilege, thereby requiring the same showing of actual malice.

In direct conflict, the Fourth District Court of Appeal in Nodar v. Galbreath, 429 So2d 715 (4DCA 1983), held that where a qualified privilege instruction was given, thereby requiring a finding of actual malice, there was no need to find, declare and give an instruction as to the public official privilege in that the defendant was still afforded the protections of a qualified privilege because the same showing of malice was required.

The court, in Nodar, specifically refrained from reaching the issue of plaintiff's status therein as a public official, finding it to be a matter not essential or relevant to reaching a decision on appeal. In Nodar, the court went on to point out that the case was decided on the basis of defendants having a qualified privilege to make the statements he did.

In Russell, the case also hinged upon defendants having qualified privilege to make the statements he did, however, the Second District Court of Appeal expressly found it necessary to reach a decision on plaintiff's status as a public official. The Court, in Russell, went on to find, that plaintiff was a public official and further held that the fact that the trial court failed to give a public official jury instruction was not harmless error even in light of the fact that the court did instruct the jury on the "common interest" qualified privilege.

The facts of Nodar and Russell are sufficiently similar so as not to render the conflicting decisions of the District Courts of Appeal as distinguishable on those grounds alone. In Nodar an issue was raised as to whether a public school teacher was a public official, and the Court having found that plaintiff did not reach that status, instructed the jury on the "common interest" privilege. In Russell, an issue was raised in the trial court as to whether a police officer was a public official, and the trial court finding the plaintiff did not reach that status, instructed the jury on the "common interest" qualified privilege.

It should be noted that the parties in Nodar have also petitioned this Court for discretionary review of the conflicting District Courts of Appeal decisions. Appellant would assert, as would the parties in Nodar, that if given the opportunity to present additional briefs on matters of law, it would become obvious that the decisions rendered in the District Courts of Appeal are wholly insufficient to clearly set forth what the current state of the law is regarding this type of action.

### CONCLUSION

The decision of the Second District Court of Appeal in Russell vs. Smith, Case No.: 82-1478, expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Nodar vs. Galbreath, 429 So2d 715 4DCA (1983), in that Russell holds that an instruction on "common interest" qualified privilege does not afford the same protection to the defendant as would an instruction on "public official" qualified privilege.

APPENDIX

Second District Court of Appeal Opinion

Russell v. Smith, Case No.: 82-1478

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to Elihu H. Berman, Esquire, 1525 South Belcher Road, P.O. Box 6801, Clearwater, Florida 33518, on this 12<sup>th</sup> day of August, 1983.

OSBORNE & CIARCIAGLINO

A handwritten signature in cursive script, appearing to read "Robert L. Paver", written over a horizontal line.

Robert L. Paver  
433 Fourth Street North  
St. Petersburg, FL 33701  
(813)823-1519  
Attorney for Appellant