4-6-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEFFREY K. SMITH,

Petitioner,

vs.

GEORGE P. RUSSELL,

Respondent.

Case No: 64,086

DISTRICT COURT OF APPEAL
SECOND DISTRICT
No. 82-1478

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner is the Appellee below, and will be referred to herein as Plaintiff or Petitioner/Police Officer. The Respondent is the Appellant below, and will be referred to as Defendant or Respondent/ Defendant herein.

Paragraph references to the record on appeal will be made by the letter "R" followed by the page number in parenthensis.

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 a "public official privilege" instruction.

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

The Order accepting jurisdiction and setting oral argument was entered Monday, January 9, 1984.

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). The Defendant was the senior partner in a public relations firm, earning Twenty Five Thousand Dollars ($25,000.00) per year. (R-61, 81, 82)

On January 25, 1979, while on duty, the Plaintiff observed the Defendant driving his motor vehicle at an extremely high rate of speed and weaving between the lanes of traffic. (R-184, 185). Based upon these observations, the Plaintiff stopped the Defendant. (R-185). Upon approaching the Defendant's vehicle and requesting his driver's license and registration, the Plaintiff smelled a strong odor of alcohol. (R-186). The Defendant had great difficulty exiting his vehicle and twice fell against the car as he walked to the sidewalk. (R-186). At this time Sergeant Randy Buckstein arrived at the scene to assist the Plaintiff. (R-187). Plaintiff advised the Defendant of his rights under the Miranda decision, then questioned the Defendant concerning his recent alcohol consumption. (R-187). Defendant admitted having had "a few drinks" but denied intoxication. (R-187). The Plaintiff administered the standard Field Sobriety

Test, demonstrating and explaining each portion to the Defendant, who continued to insist he was not drunk. (R-187-189). The Defendant staggered throughout the test, his speech was slurred, and he failed each test given. (R-187-189). He was unable to place his finger on his nose, he could not recite the alphabet, and he stumbled during the heel to toe test. (R-188-189). At the conclusion of the Field Sobriety Test the Plaintiff informed the Defendant that he was under arrest for DWI, placed the handcuffs on him, and performed a pat-down search for weapons. (R-189). The Defendant continued to protest his arrest and had to be talked into entering the rear seat of Sergeant Buckstein's cruiser for transportation to the Police Station. (R-189, 190). The Plaintiff remained at the scene to inventory the Defendant's vehicle prior to impoundment, whereupon he found a pillbox containing three (3) Librium capsules. (R-191). When he returned to the station, the Plaintiff asked the Defendant if he had a prescription for the Librium, and the Defendant replied that he did. (R-192, 193). The Plaintiff suggested that the Defendant call his wife and have her bring the prescription to the station when she came to pick up her husband. (R-193). At trial, the Plaintiff testified that he extended this courtesy to the Defendant so that he could avoid an additional charge of felony

possession of a controlled substance. (R-193). When the Defendant's wife appeared with the prescription bottle, it was for a different strength of the drug than the Defendant possessed; nevertheless, the Plaintiff did not charge the Defendant for possession of the Librium. (R-197).

Sergeant Buckstein administered the Breathalyzer Test; twice the Defendant registered .13 indicating legal intoxication. (R-196). The Defendant telephoned his wife, and was then placed in the holding cell pending her arrival. (R-196,197).

Throughout the custodial period, the Defendant was agitated and upset. (R-185-197). Although both the Plaintiff and Sergeant Buckstein explained that the procedures were standardized by law and policy, the Defendant continued to strenuously object to having been stopped, the Field Sobriety Test, the arrest, the handcuffs, the Breathalyzer, the holding cell, and so on. (R-185-197). The Plaintiff's efforts to calm the Defendant by engaging in casual conversation were to no avail. (R-195).

The Defendant pleaded nolo contendre, and was adjudicated guilty of DWI, fined, and ordered to attend driving school. (R-78, 362). At the time of his change of plea, the Defendant made a statement to Judge Grube concerning his treatment at the time of his arrest. (R-170-171).

The Judge suggested that the Defendant address any grievance he may have to the St. Petersburg Beach Chief of Police, Robert Miritello. (R-63, 359). The Plaintiff had also suggested to the Defendant on the night of arrest, that if he felt he should not have been subject to the standard procedures followed by the Plaintiff and Sergeant Buckstein, he should contact Chief Miritello. (R-359). When he appeared before the Department of Motor Vehicles Hearing Officer, the Defendant again complained of his treatment during arrest and was advised likewise, to address his complaint to Chief Miritello.

On March 12, 1979, the Defendant wrote the first of three libelous letters, to Police Chief Robert Miritello, wherein he charged the Plaintiff with the crime of brutality, accused him of arrogance, sadism and juvenile behavior, labeled him a petty insecure egomaniac with a permanent prejudice against everyone who appears to be either educated or affluent, and declared the Plaintiff to be a disgrace to his uniform. (R-1-9). Defendant sent copies of this first letter to Judge Karl Grube, who presided over the Defendant's DWI case, Judge Robert Shingler, who had no involvement in the matter, but whom the Defendant knew personally, Attorney Jim 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.

ISSUE 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, the trial court correctly ruled that Petitioner/Police Officer was not a "public official" within the meaning of the landmark case of New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). For the trial court to have ruled otherwise would have virtually authorized an open season on all lower echelon government employees, thereby ignoring society's paramount interest in preventing and redressing such vicious and baseless attacks as was suffered herein by the Petitioner/Police Officer at the hands of Respondent/Defendant.

Florida Courts have defined defamation, including both libel and slander, as the unprivileged publication of false statements which naturally and proximately result in injury to another. Wolfson v. Kirk, 273 So. 2d 774 (Fla. 4DCA 1973). The law of defamation has evolved, in Florida, with the primary purpose of compensating those whose reputation has been attacked by

false and malicious publications. See Eaton, The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349 (1975). While the right of the individual to protect his reputation from malicious publication is sacrosanct, there is an equally important opposing interest in the freedom of speech which is central to the viability of our democratic society. The United States Supreme Court has endeavored in recent years to balance these two strong and competing values.

In New York Times, the United States Supreme Court held that consistent with the First and Fourteenth Amendments, a state can not award the damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice, i.e., that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false. As for defining "public official," the United States Supreme Court remarked that it had no occasion

> "to determine how far down in to the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U.S. at 283 note 23, 84 S.Ct., at 727.

Without precise lines having been drawn by the Court in New York Times, how are we then to ascertain whether Petitioner/Police Officer may accurately be designated as a "public official?" The answer to such quandaries appeared two years later in the decision of Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). In Rosenblatt, the United States Supreme Court held that no precise lines need be drawn, for the true test of whether one is a "public official" is revealed by scrutinizing the motivating force for the New York Times decision. 383 U.S., at 85, 86 S.Ct., at 85, 86 S.Ct., at 675. The motivation for New York Times was two fold. First, the Court expressed,

> "A profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and second, that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S., at 270, 84 S.Ct., at 721.

As restated in Rosenblatt,

> "There is, first, a strong interest in debate on public issues and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." 383 U.S., at 85, 86 S.Ct. at 675.

In light of these ideals, the United States Supreme Court in Rosenblatt makes it clear that the "public official" designation applies at the least to those among

the hierarchy of government employees who have, or appear to have, substantial responsibility or control over the conduct of governmental affairs.

What then of the lower echelon government employees such as Petitioner/Police Officer in the instant case? Under this banner of constitutionally protected criticism of government, are we to ignore the important social values which underlie the law of defamation, i.e., society's interest in preventing and redressing vicious attacks upon reputation such as was evidenced in the facts herein. Rosenblatt clearly answered the above inquiries in the negative.

The United States Supreme Court, in Rosenblatt, went on to say,

> "The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protection afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply. 383 U.S., at 86, 86 S.Ct., at 676 (Emphasis supplied).

In order for the trial court to have correctly ruled that Petitioner/Police Officer was a "public official," Respondent/Defendant would have had to prove that

Petitioner/Police Officer's position in governnment, as a patrolman for a small beach community, had such apparent importance that the public had an independent interest in the qualifications and performance of Petitioner/Police Officer, beyond the general public interest in qualifications and performance of all government employees. 383 U.S. 75, 86, 86 S.Ct. 669, 676. (R-1). Respondent/Defendant was unable to present any evidence to establish that Petitioner/Police Officer was anything other than the lowest ranking of police officials, and, in fact, was nothing more than a "street level" patrolman. Further, Respondent/ Defendant presented no evidence that the interests in public discussion in the instant case were particularly strong as they were in New York Times.

Certainly, Respondent/Defendant did not establish that Petitioner/Police Officer's position in government rose to the level of a "public official."

In reversing the trial court, the Second District Court of Appeal ruled that Petitioner/Police Officer was a "public official" as a matter of law, citing as its authority White v. Fletcher, 90 So.2d 129 (Fla. 1956) and Harrison v. Williams, No. 81-842 (Fla. 4DCA May 4, 1983). Accordingly, the District Court went on to hold that to establish he has been defamed, a police

officer, as a "public official," must show that the communication was made with malice or with reckless disregard for the truth, citing as its authority, St.Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The District Court of Appeal, in so ruling, erred for two reasons.

First, Petitioner/Police Officer's position in government does not place him in the category of a "public official" as a matter of law, and in fact, it is well established that it is for the trial court to determine whether the plaintiff in a defamation action is a "public official." Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966). See also McCusker v. Valley News, 428 A.2d 493 (N.H. 1981). It is fundamental that the ruling of a trial court is presumed to be correct; thus, if on the pleadings and evidence before the trial court, there was any theory or principle of law that would support the trial court's judgment, the District Court is obliged to affirm that judgment. Cohen v. Mohaw, Inc., 137 So.2d 222 (Fla 1962). Clearly there existed before the trial court substantial evidence, as well as theory and principle of law, upon which the trial court could base its ruling that Petitioner/Police Officer, as a "street level" patrolman could not be designated a "public official."

Second, the District Court of Appeal erred in its reliance upon the authorities previously mentioned. In White v. Fletcher, 90 So.2d 129 (Fla. 1956), this court did not have the benefit of the 1964 decision in New York Times, nor the 1966 decision in Rosenblatt. In holding that a policeman was a public officer, this Court in White stated,

> "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." 90 So.2d, at 131.

The standard for designation as a "public official" is considerably higher as later pronounced by New York Times and Rosenblatt. Further, White is factually similar to New York Times and, for that very reason, not applicable to the instant case. In White, Plaintiff/Appellant was the Chief of Police, elected by the public and certainly a "public official" under the New York Times Rule. Defendant/Appellee was the Chairman of the Civil Service Board, which was conducting an investigation of the Chief pursuant to the Mayor's demand. The Civil Service Board was empowered to recommend or effect the firing of the Plaintiff Chief of Police, if their investigation warranted such action. The matter was of great public interest, and a newspaper's publication of a statement by Defendant

in reference to the Chief's unfitness to continue in his position resulted in the Plaintiff's libel action. The trial court entered summary judgment for the Defendant/Appellant, finding that the Chief of Police was a "public official," thus the publication was privileged and that no evidence of express malice, to overcome the privilege, existed. This Court agreed.

A careful reading of White and the authorities cited therein establishes that it was not the intention of this Court to expand the "public official" rule, as stated in New York Times, to include each and every governmental employee and civil servant of this State. In the instant case, Petitioner/Police Officer was not the Chief nor was he elected. In addition, the facts herein were not of great public interest.

In Harrison v. Willaims, 81-842 (Fla. 4DCA May 4, 1983), the District Court of Appeal erroneously relied upon St.Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) for the proposition that the police officer therein was a "public official" as a matter of law. St. Amant neither states nor stands for this proposition. Careful reading of St.Amant discloses that the question presented was whether the Louisiana Supreme Court, in sustaining a judgment for damages, correctly applied the New York Times rule, not whether Thompson, a deputy sheriff, was a "public official." Whether the Plaintiff/Deputy Sheriff in

St.Amant was a "public official" within the meaning of New York Times was never presented as an issue for the Court. In fact, the United States Supreme Court in St.Amant points out that the Louisiana Supreme Court, in determining whether the Plaintiff/Deputy Sheriff was a "public official," first considered state law and then applied the test as established by Rosenblatt. St.Amant never held that a police officer or deputy sheriff, was, as a matter of law, a "public official," but specifically stated that it was for the purposes of that case only that the court accepted Plaintiff/ Deputy Sheriff as a "public official." St.Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

In light of the decision in St.Amant, it is interesting to note that Florida law specifically defines the duties and powers of deputy sheriffs. In Florida, deputy sheriffs have the same powers and duties as the sheriff appointing them, which powers and duties are considerably broader than that of a mere patrolman. §30.07, Fla. Stat. (1981).

Particular attention must be given to the language in Rosenblatt referring to cases in which the interest in public discussion are particularly strong. The relevance of that language becomes evident when one considers when the United States Supreme Court decided

New York Times. In 1964, when the decision in New York Times was rendered, the Civil Rights movement had reached its peak in in this country. The plaintiff in New York Times, an elected commissioner of the City of Montgomery, Alabama, alleged that he had been libeled by statements in a full page advertisement that was carried in the New York Times on March 29, 1960. This advertisement communicated information, expressed opinions, recited grievances, and protested claimed abuses on behalf of the Black right to vote movement and the Black student movement. New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). It is manifestly clear that what was factually presented in the New York Times decision was truly a situation in which the "interests in public discussion" were particularly strong. Surely then, we must conclude that a routine arrest for driving while under the influence was not envisioned by the United States Supreme Court in New York Times as being of great public interest. (R. 184-189).

The few cases to come before the United States Supreme Court in which it is alleged that a police officer's position rose to the level of "public official" involved police officers with superior rank and supervisory duties such as a deputy chief of detectives or chief of police. See Time, Inc. v. Pape, 401 U.S. 279,

91 S.Ct. 633, 28 L.Ed.2d 45 (1971) and Henry v. Collins, 380 U.S. 356 85 S.Ct. 992, 13 L.Ed.2d 892 (1965). Respondent/Defendant was unable to produce for the trial court any evidence to establish that Petitioner/Police Officer held superior rank or was charged with supervisory duties in the instant case because no such evidence existed.

Petitioner/Police Officer is at the bottom rung of the governmental ladder and certainly not a "public official" within the meaning of New York Times Company v. Sullivan. Petitioner/Police Officer, as the lowest ranking police official in his department, cannot be accurately described as having substantial responsibility for control over the conduct of governmental affairs.

> "The repute in which one is held among his fellow men has been proved by the experience of the human race to be a most potent factor in determining his moral, social, and even material well being... Accordingly, no system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation. T. Street, The Foundations of Legal Liability, 274 (1976).

ISSUE 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?

The Second District Court of Appeal below assigned as error the trial court's refusal to give Respondent/Defendant's requested "public official" jury instruction, yet Respondent/Defendant failed to include in the Appellate record the transcript of the charge conference. When the complaining party fails to include such transcript, the reviewing court cannot presume the trial court passed upon an instruction, the refusal of which is alleged to be error. Upchurch v. Barnes, 197 So.2d 26 (4th DCA 1967). This is true even where the requested instruction is included as a part of the record on appeal, but no reference is made to the requested instruction in the transcript of the trial. Seminole Shell Co., Inc. v. Clearwater Flying Co., Inc., 156 So.2d 543 (2d DCA 1963).

Respondent/Defendant, in order to properly preserve the matter for appeal, had to timely object to the trial court's refusal to instruction on the "public official"

privilege at the charge conference. The only objection by Respondent/Defendant appearing in the appellate record is Respondent/Defendant's objection made after the jury was instructed and had retired to consider a verdict. (R-103). Respondent/Defendant's objection was not, therefore, timely because Respondent/Defendant was required to object at the charge conference. Fla. R. Civ. P. 1.470.

Absent a record showing a timely objection to the jury instructions, the court's giving of them cannot be assigned as error and the merits cannot be considered. Wright v. Coca Cola Bottling Co., 256 So.2d 56 (4th DCA 1971).

Not only must Respondent/Defendant's objection have been timely, but Respondent/Defendant's requested instructions must have contained an accurate statement of the law. Davis v. Charter Mortgage Co., 385 So.2d 1173 (4th DCA 1980).

Respondent/Defendant's requested instructions stating that Petitioner/Police Officer was a "public official" as a matter of law were not correct statements of the law.

Respondent/Defendant further assigned as error in his brief below, the trial court's giving of a portion of Defendant's requested jury instructions, to wit: numbers 10 and 13, in conjunction with Petitioner/Police Officer's requested instructions. (R-25-38).

Since Respondent/Defendant's requested instructions constitute a large portion of the pertinent instructions given and, what is complained of as error, Respondent/Defendant cannot now be heard to complain. Roe v. Henderson, 190 So. 618 (Fla. 1939).

ISSUE III.

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

In order for the trial court's refusal to give Respondent/Defendant's requested "public official" jury instruction to constitute reversible error, it must appear from the record, after examination of the entire case, that said refusal resulted in a miscarriage of justice. §59.041 Fla. Stat. (1981).

Respondent/Defendant assigned as error, the trial court's refusal to give the following instructions to the jury:

1. Requested Jury Instruction No. 7: "As a police officer, the plaintiff is a 'public official' as a matter of law."

2. Requested Jury Instruction No. 8: "Criticism of a public official relating to his official conduct is actionable only upon a showing of actual malice."

3. Requested Jury Instruction 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-18, 22, 23, and 24).

In addition to requesting the above instructions, Defendant also requested the following instructions, including an instruction on "common interest" privilege:

4. 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."

5. Requested Jury Instruction 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."

6. Requested Jury Instruction 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."

7. Requested Jury Instruction No. 12: "'Actual malice' means that the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"

8. Requested Jury Instruction No. 13: "'Reckless disregard'... is not measured by whether a reasonably prudent man would have written 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 his statements." (R-25, 26, 27, 28, 38).

Although the trial court denied Respondent/Defendant's requested jury instructions Nos. 7, 8, and 9, it did instruct the jury in the same or in substantially the same language as contained in Respondent/Defendant's jury instructions Nos. 10, 10(b), 11, 12, and 13:

"...If the greater weight of the evidence does not support the claim of Smith, then your verdict should be for Russell. However, if the greater

> weight of the evidence does support the claim of Smith, then you should consider the defendant's claim that the communication was made by one having an interest or duty in the subject matter thereof through 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, even though the statement may be false or otherwise actionable. (R-98).
>
> This privilege does not extend to statements made with malice. I will define malice for you later.
>
> 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).
>
> 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 written 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).

Careful comparison of the above instructions as requested by Respondent/Defendant and as given by the trial court, reveals that Respondent/Defendant's requested instructions made up a large part of the instructions actually given. Also, it must be noted that the trial court gave the very same definition of malice as is set forth and required by New York Times and Rosenblatt, i.e., that the statement was made with knowledge of its falsehood or with reckless

disregard for its truth or falsity. While not only receiving the same definition of malice as would have been required under a "public official" privilege, Respondent/Defendant also received the benefit of the presumption of no malice and the burden having been placed on Petitioner/Police Officer to overcome said presumption.

Respondent/Defendant is only left to argue that the jury returned a favorable verdict for Petitioner/Police Officer because they, in fact, found no "common interest" privilege to exist. Respondent/Defendant might assert that if its requested "public official" instructions had been given, the jury would have been instructed that a privilege existed as a matter of law. Such an argument to establish prejudice to Respondent/Defendant is clearly illogical and without merit. Such a contention fails because the verdict, in fact, reflects a jury award of punitive damages. The award of punitive damages specifically required a finding of malice as defined by New York Times and Rosenblatt. Since the jury did find that Respondent/Defendant acted maliciously, Defendant could not have benefited by a New York Times "public official" privilege instruction in any event. Obviously, even if the jury had been instructed that a privilege existed as a matter of law, they would have been inclined to find that Defendant acted maliciously, thereby destroying any existing privilege.

It is also clear after comparison of the above delineated instructions, that Respondent/Defendant's requested instructions make up a large part of the instructions actually given and now complained of as error. As stated in Issue II, Respondent/Defendant cannot now be heard to complain. Roe v. Henderson, 190 So. 618 (Fla. 1939).

Further, technical errors in the refusal of requested instructions are not sufficient to support a refusal of judgment if it appears that such errors could not have prejudiced the Defendant nor deprived the Defendant of any fundamental rights. Atlantic Coastline & R. Co. v. Holliday, 73 Fla.269, 74 So. 479 (Fla. 1917).

A similar situation was presented in Nodar v. Galbreath, 429 So.2d 715 (4DCA 1983), the case jurisdictionally alleged to be in conflict with the district court opinion. In Nodar, the jury awarded damages to Plaintiff, a public school teacher, in her defamation action against the parent of one of her students. The parent appealed, claiming as error, the trial court's failure to instruct on the "public official" privilege. The Fourth District found no harmful error, noting that the jury had been instructed on the "common interest" privilege and had found that privilege to exist, but had concluded that the statements were made with actual malice.

Both the facts as they existed in the instant case and the instructions as given by the trial court clearly indicate that no miscarriage of justice was suffered by the trial court's refusal to give Respondent/Defendant's requested "public official" jury instructions.

Failure of the trial court to instruct on the "public official" privilege, assuming it would have been proper to give same, was harmless error in light of all the instructions given taken as a whole. See Maule Industries, Inc. v. Watson, 201 So.2d 631 (3rd DCA 1967); Laca v. Stalker, 205 So.2d 11 (2d DCA 1967).

CONCLUSION

The trial court correctly found Petitioner/Police Officer not to be a "public official" as a matter of law and properly refused to give Respondent/Defendant's requested "public official" jury instructions. Respondent/Defendant failed to preserve the issue of the trial court's refusal to give his requested instructions. The failure of the trial court to give Respondent/Defendant's requested jury instructions was harmless error in light of the jury's finding of malice and subsequent award of punitive damages. The verdict should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Elihu H. Berman, Esquire, 1525 South Belcher Road, P. O. Box 6801, Clearwater, FL 33518, on this 3rd day of February, 1984.

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