OA 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

REPLY BRIEF OF PETITIONER

Joseph M. Ciarciaglino, Jr.
and Robert L. Paver of
OSBORNE & CIARCIAGLINO
Attorneys for Petitioner
433 Fourth Street North
St. Petersburg, FL 33701
813/823-1519

TABLE OF CITATIONS

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?

Respondent, in support of his position that Petitioner/Police Officer is a "public official" under New York Times v.Sullivan[1], places great weight upon the decision of White v. Fletcher, 90 So.2d 129 (Fla. 1956).

As Respondent correctly points out this Court, in White, quoted and relied upon the comments expressed by Mr. Justice Terrell, in Kennett v. Barber, 31 So.2d 44, 46 (Fla. 1947):

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

Unfortunately, Mr. Justice Terrell's comments,

[1]New York Times Company v. Sullivan, 376 U.S. 254, 84 S.CT. 710, 11 L.Ed. 2d 686 (1964).

although a correct statement of the law when made, are no longer an accurate statement of the law as it exists today after New York Times' narrowing of the definition of "public official".

At the time that White held that a police officer was a "public official", this Court had ruled in Kennett v. Barber, supra, that basically anyone connected with public employment or public office was a public official. Clearly this is in direct conflict with New York Times and its progeny.

Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed. 2d 597 (1966), strictly limits what government positions are within the New York Times rule and limits those positions to those,

> " . . . of 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 and the qualifications and the performance of all government employees. . ." 383 U.S. at 86, 86 S.Ct. at 676.

The thrust of the above is that although this Court did, in White, hold that a uniformed police officer was a "public official", it did so at a time when the standard for "public officials" was much less stringent. It is

appropriate at this time to reconsider and reevaluate in light of New York Times.

Respondent goes on to cite a number of decisions to support the proposition that a uniformed policeman is a "public official". Examination of those decisions, however, reveals that they are distinguishable.

For example, Respondent cites Berkley v. Delia, 413 A.2d 170 (Md. 1980). In fact, in that case the question of whether or not the Plaintiff police officer was a "public official" was never briefed or argued to the Court.[2]

Respondent further cites Rawlins v. Hutchinson Publishing Co., 543 P.2d 988, (Kan. 1975). The Plaintiff in Rawlins, however, sued for invasion of privacy, not for liable, as in the instant case. Rawlins, if authority for anything, is authority for the fact that a police officer may be a "public official" for the purposes of an invasion of privacy action but certainly does not stand for the proposition that a police officer is a "public official" for actions in defamation.

Respondent also cites Moriarity v. Lippe, 294 A.2d 326 (Conn. 1972). Again, the Court in Moriarity was concerned with an issue other than whether the Plaintiff

[2]Berkley v. Delia, 413 A.2d at 180 (Md. 1980).

was a "public official". Specifically, the Court in Moriarity had before it the issue of whether the lower court erred in denying Defendant's Motions to Set Aside the Verdict and Render Judgment Notwithstanding Verdict because the verdict was not supported by the evidence. Furthermore, the Plaintiff in Moriarity, did not except to the trial court's charge to the jury that Plaintiff police officer was a "public official" with a burden to show actual malice.[3]

Respondent in citing Hull v. Curtis Publishing Co., 125 A.2d 644 (Pa. Super Ct. 1956), seeks to rely on a pre-New York Times decision for support of their position. Again, the case involved a Plaintiff's action for invasion of privacy not defamation. In fact, the case revolved around the issue of a public figures' right to privacy as opposed to any issue of conditional or qualified privilege.

Respondent also relies upon Wardlow v. City of Miami, 372 So.2d 976 (Fla. 3d DCA 1979). Here again, the issue involved is totally distinguishable from the issue in the instant case. The facts in Wardlow reveal that Plaintiff police officer, who had been refused employment, allegedly as a result of a slanderous statement, brought an action

[3]294 A.2d at 331 (Conn. 1972)

against the city, which had formerly employed him, and its deputy police commander for defamation of character. The issue was whether the deputy commander of internal security for the municipal police department, who had among his duties the responsibility to oversee and conduct investigations of police officers based upon citizen complaints and intra departmental complaints, had the right and duty to communicate an evaluation of Plaintiff to an inquiring official from another department. Also before the Court was the issue of whether such communications were qualifiedly or absolutely privileged. In fact, Wardlow was later reversed by this Court.[4]

Respondent also seeks to rely upon 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. Hines is also factually distinguishable as involving law enforcement officers employed by a sheriff's department as opposed to a police department, a point which is addressed in greater detail in Petitioner's Initial Brief. (Petitioner's Initial Breif at p. 9).

Respondent would assert that the Court in Harrison v. Williams, 430 So.2d 585 (Fla. 4th DCA 1983), cites St. Amant v.Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20

[4]Wardlow v. City of Miami, 403 So.2d 414 (Fla. 1979)

L.ED. 2d 262 (1978), for the proposition that malice or reckless disregard had to be established. If this is the case, then again Respondent is seeking to rely upon authority in which the issue was not whether the Plaintiff as a police officer was a "public official", but rather some other issue.

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?

Respondent argues that Petitioner/Police Officer cites Seminole Shell Co., Inc., v. Clearwater Flying Co., Inc., 156 So.2d 543 (2nd DCA 1963), for the proposition that because Defendant failed to include in the Appellant Record the transcript of the charge conference, he has not properly preserved the issue of whether the trial court properly declined to give his requested "public official" jury instructions. Although Seminole Shell was cited for a related proposition, Petitioner/Police Officer in fact cited Upchurch v. Barnes, 197 So.2d 26 (4th DCA 1967), for the above proposition and stands by it as good authority for same.

Respondent fails to address the other issues presented by Petitioner/Police Officer in Issue II.

POINT III

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

Here Respondent seeks to attack the very instructions requested by him, and which were subsequently given by the trial court. In fact Respondents requested instructions constitute a large portion of the pertinent instructions given and Respondent, therefore, cannot now be heard to complain. Roe v. Henderson, 190 So. 618 (Fla. 1939).

Again, Respondent has failed to establish any prejudice as a result of the trial court's failure to instruct on the "public official" privilege. What still remains is the fact that the jury awarded Petitioner/Police Officer punitive damages and did so pursuant to a malice definition which is consistent with the New York Times[5] and Rosenblatt[6] cases. (R-101). Since the jury did find that Respondent acted maliciously,

[5]New York Times Company v. Sullivan, 376 U.S. 254, 84 S.CT. 710, 11 L.Ed. 2d 686 (1964).

[6]Rosenblatt v. Baer, 383 U.S. at 86, 86 S.Ct. 669, 15 L.Ed. 2d 597 (1966).

Respondent could not have benefited by a New York Times "public official" privilege in any event. 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 possible privilege. Furthermore, the jury was instructed that "common interest" communications are given the presumption of being made without malice and that Petitioner/ Police Officer had the burden of overcoming that presumption. (R-99).

POINT IV.

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

Respondent raises an issue that he has previously failed to urge as error which is the subject of Petitioner's Motion to Strike. If said motion should be denied then Petitioner's response would be as follows.

In reviewing an order denying a motion for directed verdict, the question before the Court is simply whether the evidence, when interpreted in a light most favorable to the Plaintiff, was sufficient to require submission of the issue to the jury. Atlantic Coast Line R. Co. v. Savary, 64 So.2d 562 (Fla. 1953).

In the instant case, to establish malice, Plaintiff was required to meet the following standard concerning Respondent/Defendant's letters,

> 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, entertains serious doubts as to the truth of the statements. (R-101)

Respondent argues that the jury herein was permitted to find liability on the basis of a combination of falsehood and anger, and that such was error of "constitutional magnitude" citing as authority Greenbelt Publishing Association v. Bressler, 398 U.S. 6, (1969). In Greenbelt, however, the trial judge erroneously defined malice to include "spite, hostility, or deliberate intent to harm".[7] The trial court, in the instant case, correctly defined malice and instructed the jury with strict adherence to the definition of malice as set forth in New York Times.[8]

Excerpts from Respondent/Defendant's letters clearly establish that Respondent/Defendant not only published false material, but also entertained serious doubts as to the truth of that material:

> "You deserve to know, however, of the sadism and juvenile behavior of Patrolman Smith whose actions that night caused me to loose respect for policeman, and whose behavior at my trial and at his own deposition

[7]398 U.S. at 10

[8]New York Times Company v. Sullivan, 376 U.S. 254, 84 S.CT. 710, 11 L.Ed. 2d 686 (1964).

confirm my evaluation of him as a petty, insecure egomaniac with a permanent prejudice against anyone who appears to be either educated or affluent.

He referred to an expensive Indian jewelry watch band as 'hippie' jewelry. Handcuffs were slapped on my wrists in a manner which bruised one. I was pushed into the police car on my side facing backwards.

A member of your department told me, "He demoralized everyone, he is a first class p---k".

The young man, with his obvious inferiority complex and corresponding 'Dick Tracy' attitude, plus brutality, is no credit to your department.

As a result of Smith's arrogance and brutality, I have apologized to my teenage son, whom I once whipped for calling a police officer a 'pig'.

Smith could not resist displaying his smug glee by sneering at me at the courthouse after the trial. So long as he takes out his awareness of his own incompetence on the public, using a badge which should deserve respect, the St. Petersburg Beach Police Department will be viewed as a callous and cruel 'speed trap'. He is a disgrace to his uniform.

Patrolman Smith's abuse far transcended 'unnecessary force'.

Only the lies of Officer Smith as demonstrated in your deposition, and concern about clients being summoned to court resulted in my conviction, Nolo Contendere." (R-1-9)

Not only were the letters which gave rise to Petitioner's cause of action filled with patently derogatory language, but every other witness with direct knowledge of Respondent/Defendant's arrest testified in direct contravention to the allegations contained in those libelous letters. Indeed the facts of the case establish that Respondent/Defendant had been arrested by Petitioner for driving while under the influence of an alcoholic beverage, that Respondent/Defendant registered a 1.3 Breathalyzer reading, and that Respondent/Defendant subsequently pleaded Nolo Contendere and was convicted of said offense. Notwithstanding the same, Respondent/Defendant refused to admit the falsity of his publications.

Assuming arguendo, that Petitioner/Police Officer is required to prove malice as a public official, the record clearly establishes that Petitioner/Police Officer met that burden. Had Respondent/Defendant merely wanted to do his civic duty and truthfully convey complaints about Petitioner/Police Officer, as he testified at trial, as opposed to maliciously venting his spleen against Petitioner/Police Officer, both the content and style of the libelous letters would have been quite different. In fact, Defendant testified at trial that he refused to go

to the St. Petersburg Police Station and sign a sworn Complaint. (R-356).

Clearly then when the evidence is considered in the light most favorable to Petitioner/Police Officer, it was sufficient to require submission of the case to the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Elihu H. Berman, Esq., 1525 South Belcher Road, P.O. Box 6801, Clearwater, FL 33518, on this 26th day of March, 1984.

ROBERT L. PAVER, ESQ.
OSBORNE & CIARCIAGLINO
433 Fourth Street North
St. Petersburg, FL 33701
813/823-1519

Attorney for Appellant