

SUPREME COURT OF KENTUCKY

No. 2013-SC-000602-D
(2009-CA-001686)

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SUPREME COURT

JOSEPH TOLER

APPELLANT

versus

APPEAL FROM JEFFERSON CIRCUIT COURT

HON. JUDITH McDONALD BURKMAN

No. 05-CI-8765

SUD-CHEMIE, INC., et al.

APPELLEES

BRIEF FOR APPELLANT

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CERTIFICATE

I hereby certify that I have served a true copy of this Brief upon Oliver B. Rutherford, Esq., 300 South First Trust Centre, 200 South 5th Street, Louisville, KY 40202, and Rob Colone, Esq., PO Box 272, Sellersburg, IN 47172-0172, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and Hon. Judith McDonald-Burkman, Judge, Jefferson Circuit Court, Division 9, Jefferson County Judicial Center, by mailing or hand-delivering the same to them upon this 16th day of December, 2013. I also certify that I have not removed the record on appeal to the Jefferson Circuit Clerk upon the date above-written.



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INTRODUCTION

Joseph Toler appeals from the Jefferson Circuit Court's use of "Constitutional" actual malice instructions in his private parties/private issue defamation case. The Court of Appeals affirmed the Circuit Court's use of these instructions, which resulted in a jury verdict and judgment adverse to Toler.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Joseph Toler requests oral argument in this case because of the importance and complexity of the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

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<i>Stringer v. Wal-Mart Stores, Inc.</i> , 151 S.W.2d. 782 (Ky., 2004)	2, 12-13, 20-26
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ARGUMENT

I

NOTHING IN THIS COURT'S STRINGER OPINION REQUIRES THE APPELLANT TO PROVE CONSTITUTIONAL ACTUAL MALICE IN ORDER TO SHOW ABUSE OR WAIVER OF THE QUALIFIED PRIVILEGE IN THIS PRIVATE PERSON/PRIVATE INTEREST DEFAMATION CASE

- Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.2d. 782 (Ky., 2004) 26, 27
- Baker v. Clark*, 186 Ky. 816, 218 S.W. 280 (1920) 26, 27

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THE CIRCUIT'S JURY INSTRUCTIONS IN THIS CASE WERE CLEARLY ERRONEOUS BECAUSE THEY REQUIRED THE APPELLANT TO PROVE CONSTITUTIONAL ACTUAL MALICE IN ORDER TO RECOVER

- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) 28, 31
- Ball v. E. W. Scripps Co.*, 801 S.W.2d. 684 (Ky., 1990) 28
- Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.2d. 782 (Ky., 2004) 29
- Warford v. Lexington Herald Leader*, 789 S.W.2d. 789 (Ky., 1990) 29, 30
- Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d. 270 (Ky., 1981) 30
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Prosser, <i>Law of Torts</i> , §115, P. 97 (4th Ed., 1971)	31
<i>Holdaway Drugs, Inc. v. Braden</i> , 582 S.W.2d. 646 (1979)	31, 32
<i>Allen v. Wortham</i> , 18 S.W.73 (Ky., 1890)	31
<i>Tanner v. Stevenson</i> , 138 Ky. 578, 128 S.W. 878 (1910)	31
<i>Ideal Motor Co. v. Warfield</i> , 211 Ky. 576, 277 S.W. 878 (1925)	32
<i>Weinstein v. Rhorer</i> , 240 Ky. 679, 42 S.W.2d. 892 (1931)	32
<i>Harte-Hanks Communication, Inc. v. Connaughton</i> , 491 U.S. 657, 109 S.Ct. 2678, 2685, note 7, 105 L.Ed.2d. 562 (1989)	32

III

THE CIRCUIT COURT SHOULD HAVE USED THE
LIABILITY INSTRUCTIONS PROPOSED BY THE
APPELLANT, JOSEPH TOLER.

<i>Stringer v. Wal-Mart Stores, Inc.</i> , 151 S.W.2d. 782 (Ky., 2004)	34, 35, 37
<i>Thompson v. Bridges</i> , 209 Ky. 710, 273 S.W., 529 (1929)	34
<i>Evening Post Co. v. Richardson</i> , 68 S.W. 665 (1902)	34
<i>McClintock v. McClure</i> , 171 Ky. 714, 188 S.W. 867 (1918)	34
<i>Democrat Publishing Co. v. Harvey</i> , 181 Ky. 730, 205 S.W. 908 (1918)	34, 39
<i>Commercial Tribune Publishing Co. v. Raines</i> , 228 Ky. 483, 15 S.W.2d. 306 (1929)	34

<i>Johnson v. Langley</i> , 247 Ky. 387, 57 S.W.2d. 21, 25 (1933)	34, 35
<i>Tucker v. Kilgore</i> , 388 S.W.2d. 112, 114 (Ky., 1965)	34
Elder, <i>Kentucky Tort Law; Defamation and the Right of Privacy</i> (Michie, 1983), §1.11(G), Pp. 214-217]	34, 35
<i>Baker v. Clark</i> , 186 Ky. 816, 218 S.W. 280 (1920)	34, 35, 38
<i>Holdaway Drugs, Inc. v. Braden</i> , 582 S.W.2d. 646 (1979)	37, 38
<i>Ideal Motor Co. v. Warfield</i> , 211 Ky. 576, 277 S.W. 878 (1925)	37
<i>Browning v. Commonwealth</i> , 116 Ky. 282, 76 S.W. 19, 20 (1903)	38
<i>Miller v. Howe</i> , 245 Ky. 568, 53 S.W.2d. 938, 939 (1932)	40

IV

EVEN IF THE APPELLANT TOLER'S PROPOSED INSTRUCTIONS TO THE JURY WERE NOT CORRECT IN EVERY RESPECT, THEY WERE SUFFICIENT TO ENTITLE HIM TO A NEW TRIAL, GIVEN THE FACT THAT THE CIRCUIT COURT'S INSTRUCTIONS WERE CLEARLY ERRONEOUS.

Palmore, <i>Kentucky Instructions to Juries</i> , Vol. II (Anderson, 1989), §13.15, Pp. 23-24	41
<i>Edwards v. Johnson</i> , 306 S.W.2d. 845 (1957)	41
<i>Rainbo Baking Co. v. S & S Trucking Co.</i> , 459 S.W.2d. 155 (Ky., 1970)	41

STATEMENT OF THE CASE

Pre-Trial Procedural and Legal History

The Plaintiff/Appellant, Joe Toler, filed the lawsuit that is the subject of this appeal in the Jefferson Circuit Court on October 11, 2005. In it he alleged that the individual Defendants had falsely accused him of uttering racist statements in the mutual workplace of the parties, Defendant/Appellee, Sud-Chemie, Inc. He alleged that Sud-Chemie was also liable for the defamatory remarks because of a republication by company management. Toler also alleged that Sud-Chemie fired him on April 15, 2005, not only because of the false accusations against him, but also because of his Caucasian race (Transcript of Record, hereinafter TR, Pp. 1-5).

On January 23, 2008, the Circuit Court dismissed Toler's race discrimination claim upon Sud-Chemie's motion for summary judgment, but refused to dismiss Toler's defamation claim (TR, Pp. 445-448).

On September 18, 2008, the Court permitted Toler to file an Amended Complaint. It alleged that the individual Defendants/Appellees Jude Ware, Mike Watson, Bob DeWeese, Glen Shull, and Don Votaw had published false written reports to Sud-Chemie management alleging that Toler had made racist remarks in the workplace. It also alleged that Scott Hinrichs, a Sud-Chemie executive, then published these defamatory reports to his boss, Bill Furlong, the Sud-Chemie plant manager, who fired Toler (TR, Pp. 507-514).

The case was set for trial on August 19, 2008, but was continued because of the press of Court business. Defendants then moved for summary judgment again on Toler's defamation claim. On April 15, 2009, the Court denied this motion (TR, P. 732-737; APX, Tab 6 P. 43-48).

In its Opinion and Order, the Court:

1. Rejected the defense of truth as a matter of law;
2. Held that "malice" is presumed in the case, "because of the offensive character of the words," of which Toler complained, which, along with proof of falsity creates, "a factual issue for the jury," citing *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W:2d. 781, 799 (Ky., 2004) and *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d. 270, 276 (Ky., 1981);
3. Held that Sud-Chemie was liable for the defamatory statements of its employees under the doctrine of respondeat superior;
4. Held that Defendant Glenn Shull was potentially liable to Toler for his written statement to management, even though it was unsigned and management did not rely upon it in making its decision to fire Toler, because the statement (like those of

the other Defendants) was presumptively injurious to Toler's reputation;

5. Held that Ware was potentially liable for republishing Shull's statement because he wrote it down and passed it along to Sud-Chemie management; and

6. Held that the Defendant Bob DeWeese should be dismissed from the lawsuit because he had died, his estate had not been substituted as a Defendant, and the Plaintiff did not oppose dismissing him (TR, Pp. 732-737; APX, Tab 6 Pp. 43-48).

The case was tried to a jury on July 21, and 22, 2009.

Substantive Facts

Joe Toler and Sud-Chemie

The Appellant, Joe Toler, is a high school graduate. He began working for the Girdler Chemical Company, which later became United Catalysts Company and finally Appellee Sud-Chemie, Inc. in 1976 (DVD 7-21-09, 1:31-1:31:50).

Sud-Chemie has plants nationwide, including two in Louisville: the West Plant on West Hill Street and the South Plant on Crittenden Drive (1:32:20). Until Sud-Chemie fired Toler on April 15, 2005, he always worked at the South Plant, which had about 70 other employees. The company manufactures industrial catalysts by means of various ovens, mixers, furnaces, mills, and grinders (1:33-

1:33:50). The work is dangerous and requires the frequent use of goggles, respirators, and protective suits (1:37:10-1:37:40). It operates around the clock.

According to Toler, Teamsters Local Union 89 has long represented hourly workers at the plant (including Toler until he went into management in 1999). Since before he began working at what was then Girdler Chemical Company, Toler characterized the union as very powerful and effective; indeed he testified that it "basically runs the plant," (1:38-1:38:20).

Given the age of the South Plant and the dangerous nature of the work there, maintenance of the equipment was an obvious priority.

Toler did about every hourly production job at the plant during his career (1:34:45-1:36) before he became a supervisor in 1999. His job title was later changed to shift coordinator (1:39:20), although his job remained the same. From 1999 until Sud-Chemie fired Toler, he worked three days one week and four days the next, mostly on the night shift, 6:30 p.m. until 3:30 a.m. (1:39:50). On night shift, because the specialized supervisors all worked during the day, Toler was in charge of the entire operation of the plant. (1:40:10-1:40:50). Toler's bosses were Dave Massey and Troy Wise (1:41-1:41:15). Bill Furlong was their boss and was responsible for both Sud-Chemie Louisville plants (1:42:15-1:43).

Toler had a spotless work record while in management. He was good at his work and enjoyed it. He worked overtime without quarrel and was often called at

home to come to the plant for troubleshooting problems that nobody else seemed able to fix (1:43:15-1:44:22). Bill Furlong told Toler two months before Sud-Chemie fired Toler that he was the best coordinator at the plant (there were approximately six coordinators at any one time) (1:44:30-1:45). Toler's last formal evaluation, dated February 17, 2005, was very positive and gave Toler the highest mark in trustworthiness (2:18:20-2:19:20; 3:20:10-3:21; Plaintiff's Trial Exhibit 3).

Scott Hinrichs, Sud-Chemie's Director of Human Resources, testified that Toler was a hard and conscientious worker who would find a way to get a job done if there was a way to do it; he also characterized Toler's job as very difficult (3:17:20-3:18). This was because of the inherent challenges in keeping the plant running and in being the first line of management to deal with the hourly union workers (3:18:30-3:19:30).

The only complaint against Toler came from union workers upset that he performed what they considered to be their work (3:21-3:21:40).

The Discharge

On April 14, 2005, Toler came to work as usual.

When he was notified that he was to meet with Hinrichs and Furlong, Toler had no idea what they wanted (1:45:30-1:46).

The three met in the plant conference room.

Hinrichs told Toler that plant employees had accused Toler of making racist remarks in the workplace. Hinrichs read some of the alleged statements to Toler. Toler emphatically denied ever making such remarks at work (1:47:40-1:48). Furlong listened (1:48).

Toler testified that the accusations were that he had uttered such words as "niggers," gorilla," and "monkey" in the workplace. When Toler pressed him, Hinrichs identified those who had reported Toler's saying such things as the individual Defendants, Mike Watson, Jude Ware, Don Votaw, and Bob DeWeese (1:49:15-1:50). Hinrichs refused to match any of these individuals with any particular alleged racist statements by Toler (1:47:40). Hinrichs gave no other details surrounding the alleged statements to Toler (1:48:30).

Toler testified that Hinrichs gave him about one minute to give "his side of the story" (2:36:10).

Toler offered that the statements were part of a union "ganging" against him to save the job of a Union member, Allan Trice. Toler had earlier suspended Trice for insubordination. Toler also stated that Votaw disliked him because Toler had had trouble getting Votaw, a maintenance man, to do his work (1:50-1:51). Hinrichs testified that Toler stated that Bob DeWeese was a friend of Lonny Hampton, a shift coordinator that Sud-Chemie had recently fired, an event that Hampton blamed on Toler (3:27:30-3:28:30).

Otherwise, Hinrichs' account of the meeting was similar to Toler's (3:22-3:26:10). He agreed that he had recited the alleged racist remarks by Toler, within the hearing of Furlong (3:28:50). He verified that Toler denied making the "specific racist statements with which Hinrichs confronted him as well as any racist remarks," (3:25-3:26:10). At the conclusion of the meeting Hinrichs took Toler's company property and sent him home (3:30:10).

The next day, April 15 2005, Furlong called Toler at his home and told him that Sud-Chemie was firing him (3:39:40; 1:49:15).

Hinrichs testified that the company's decision to fire Toler was based upon the allegations from Sud-Chemie hourly workers (the individual Appellees) that Toler had made racist statements in the workplace (3:40). Sud-Chemie had a "zero tolerance" policy for racist behavior, including using racist language, in the workplace (2:21:10).

At trial, the actual written statements of the individual Defendants attributing racist language to Toler in the workplace were introduced into evidence as Plaintiff's Exhibit 1 (2:00). Toler testified that he only gained access to them through the discovery process; that he had not seen them before filing this lawsuit (1:53:45). They are attached hereto (APX, Tab 7 Pp. 49-52).

Also at trial, Toler expanded on the ill will of some of the individual Defendants toward him. He testified that he had "had words" with DeWeese

(2:24). Toler swore that he had to “get on” Votaw and Glen Shull every day (2:24-2:24:30). His only written discipline of Votaw took place in March 2, 2003 (2:29-2:29:40), But Toler testified that he had Votaw “up front” (in the office) several times after that (2:31-2:32). Also, according to Toler, Votaw’s direct boss, Tony Risinger, stripped the maintenance break room of its television and ordered Votaw not to work on crossword puzzles as a result of Toler’s March, 2003, discipline of Votaw (2:33-2:33:50).

The Trice Incident

Several months before Sud-Chemie fired Toler, Toler had sent Allen Trice home from work on suspension. Toler had assigned Trice, an hourly worker, to do a job that Trice did not want to do; the assignment was based upon Trice’s seniority. Trice refused to do the job. Toler called his boss, Troy Wise. Wise told Toler to tell Trice to get his union steward and then explain to Trice and the steward that Trice had to do his assigned work. Toler did this. Trice still refused to do his assigned job.

As Wise had instructed him, Toler then told Trice that he was suspended and sent him home (2:01:50-2:03:30).

On his way out, Trice told Toler that Toler would be sorry because Sud-Chemie would not fire a Black man (2:06:45).

Toler's last involvement with Trice's situation was about a week later, when he attended one of Trice's grievance meetings. Trice apologized for his earlier threat to Toler (2:06:45-2:07:18). Trice's discipline was not resolved at this meeting.

Scott Hinrichs testified that Toler handled this situation correctly (3:15:45).

Unbeknownst to Toler, Trice filed a complaint of race discrimination with the United States EEOC (Plaintiff's Trial EX. 2; APX, TAB 8 P. 53).

At trial, Toler refuted the allegations in this complaint.

One was that Toler had earlier failed to discipline three insubordinate white employees (2:00:40-2:01:50). Hinrichs corroborated Toler's testimony that this was false (3:14:30-3:15). Toler and Hinrichs also denied Trice's allegations that Toler had fired him and that Trice was not insubordinate (2:03:50, 3:13:10-3:13:15).

A Plot Develops

During March, 2005, several weeks after Toler had send Trice home from work, Rob Colone, then the Local 39 Business Agent, contacted Hinrichs with a report that some hourly workers had heard Toler make racist statements in the workplace (3:31-3:32). On March 23, 2005, Colone showed alleged written reports of these alleged racist statements to Hinrichs (3:32-3:32:30). There were

four statements: one signed by Votaw; one signed by DeWeese; one signed by Mike Watson, and an unsigned statement made by Shull (3:32:30-3:33).

These statements were Plaintiff's Trial Exhibit #1 (2:00; APX, Tab 7 Pp. 49-52).

Hinrichs discussed Watson's statement with Watson in person. He discussed the statements of Votaw and DeWeese with them by phone

Watson told Hinrichs that his written statement reflected the only time that he had heard Toler make a racist statement, and that Toler had made the remark at Christmastime with no witnesses (3:34-3:34:15). Watson, who was a union steward and who had initially mentioned his alleged hearing of Toler making a racist statement to the Union Business Agent, Rob Colone, told Hinrichs that he had brought the situation to the attention of the union in order to insure that Allen Trice got a "fair shake" from Sud-Chemie (3:37:50-3:38:30; 3:34:20).

DeWeese told Hinrichs that Toler made the alleged racist statement to him when Toler had last changed shifts and that Lonnie Hampton had overheard Toler making the statement (3:35:30). Toler testified that this transfer was "some time" before he was fired (1:57:30).

Votaw told Hinrichs that he heard Toler utter racist remarks within the last two weeks of his reporting the same, and that there were no witnesses to the

statement. Votaw told Hinrichs that Toler was a liar (3:37:20). Hinrichs testified that he had never heard any such accusation against Toler before (3:37:38).

Hinrichs testified that none of the three men he interviewed had been present when Toler sent Trice home (3:39). He was not acquainted with any of the men (3:39-3:40:30), and Sud-Chemie did not evaluate the work of union workers, only management employees such as Toler (3:45). Hinrichs testified that he had never had any reason to distrust Toler (3:34:30). He did not ask Watson, DeWeese, or Votaw to swear to their statements against Joe Toler (3:29:39).

Hinrichs testified that employees were required to immediately report racist remarks that they overheard in the workplace under the company's anti-harassment policy (3:41:30-3:42:30).

* * * * *

The obvious purpose of Watson's, Votaw's, Shull's and DeWeese's allegations against Toler, as facilitated by Jude Ware and union attorney Rob Colone, was to save Alan Trice's job. Toler was a (perhaps unintended) casualty of this scheme.

It worked. As a result of the allegations that Toler used racist language in the workplace, Trice came back to work for Sud-Chemie (2:07:45; see also Sud-Chemie's admission of this fact at TR, P. 533).

Directed Verdict for Sud-Chemie

After the Plaintiff's proof, the Defendant Sud-Chemie moved for a directed verdict. Its attorneys argued that the Plaintiff had not shown malice against it, such as bad faith. They also argued that Toler had not proven the falsity of the charge that he had made racist remarks in the workplace (3:55:45). The Circuit Judge disagreed with this argument (3:56).

Sud-Chemie's lawyers continued with their "actual malice" argument, averring that the *Stringer* opinion (*Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d. 781 [Ky. 2004]) required that a defamation plaintiff prove actual malice, i.e. a knowledge of falsity or a reckless disregard of truth or falsity (3:57-3:58).

The lawyers also cited the case of *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d. 63 (Ky. App., 2007) for the proposition that a defamation plaintiff must prove "actual malice" as described above, in order to overcome the qualified privilege that all parties agreed applied to the defamatory statements at issue in this case (4:06:45-4:08:30). They argued that the Plaintiff had presented no proof that Sud-Chemie, acting through Hinrichs or any other individual, knew the defamatory statements about Toler were false or uttered or wrote them with a reckless disregard for whether or not they were true or false. They cited the case of *Baskett v. Crossfield*, 190 Ky. 751, 228 S.W. 673 (1921) for the proposition that proof of

falsity alone was, not enough to overcome the qualified privilege and get Toler's case to the jury (4:08:30-4:10).

Toler's lawyer responded that the *Cargill* case was a "church case," and that cases involving defamation within the context of a church dispute involve First Amendment and "free speech" type defenses; the same are also available in public figure/media defendant defamation cases (4:13-4:15). He argued that under the *Stringer* opinion, which the Court of Appeals did not even mention in *Cargill* and certainly did not overrule in that case, all a defamation plaintiff such as Toler needs to get his case to a jury is proof of falsity (and defamatory language) (4:13-4:15).

Sud-Chemie's lawyers responded that *Stringer* requires more than falsity; indeed, they argued that it requires that a plaintiff prove a knowing or reckless disregard of falsity (actual malice) in order to overcome the qualified privilege, as does *Cargill* (4:15-4:17:30).

The Circuit Court agreed with Sud-Chemie, ruling that Toler had to show a knowing or reckless disregard for the truth in order to overcome Sud-Chemie's qualified privilege, and that Toler had not shown this "actual malice" (4:17:30-4:19:20). The Court opined that the standards for summary judgment and a directed verdict were different and that at trial Toler was obligated to prove Sud-Chemie's (i.e. Hinrichs') "complete disregard" of the truth or falsity of the

defamatory statements about Toler in order to recover (4:19:20-4:20:30) and that he had not done so (4:20:30-4:21).

The court did acknowledge that *Cargill* was a "church case," but stated that the privilege analysis in *Cargill* nevertheless applied to Toler's case (4:21:30). It directed a verdict for Sud-Chemie on this basis.

Glen Shull's lawyer moved for a directed verdict on the basis that his unsigned statement had not motivated Sud-Chemie to fire Toler, according to Hinrichs (4:21:30-4:23). Toler's lawyer responded that Toler was not required to prove that Shull's statement had gotten him fired or caused him to have lost wages, because general compensatory damages and injury to reputation are presumed upon the publication of defamatory statements such as that of Glen Shull (4:23-4:23:50).

The Court agreed with Shull's attorney and dismissed Toler's claims against Shull (4:25:50-4:26:30). It denied Jude Ware's motion for a directed verdict based upon his role in publishing the statements of Watson, Votaw, and DeWeese to Hinrichs (4:26:50-4:27:47).

The Trial Continues

The individual Defendants/Appellees explained in more detail than Hinrichs had the genesis of their reports to Sud-Chemie management of their witnessing of Toler's alleged racist remarks.

Mike Watson, a maintenance worker who claimed that he was the Chief Union Steward at the time, learned of the Trice situation while attending Trice's "Step C" grievance procedure (July 22, 2009, 10:45), during March, 2005. This triggered, according to him, a memory of Toler's "saying something" on one of the rare occurrences when he and Toler were at work together, around Christmas, 2004 (10:04-10:05).

Watson testified that he remembered hearing Toler say, "All I work around is a bunch of dumb niggers," at this time in the break room where Toler had appeared to deliver a work order (10:06:30-10:07:20). Watson, ever the faithful steward, called Rob Colone, the Union Business Agent, "to see what he thought" of his sudden memory about Toler's alleged peccadillo (10:07:50-10:08:20).

Colone then apparently delegated the real Chief Steward, Jude Ware, to determine if anybody else had heard Toler make racist statements. Watson agreed at Ware's request to hunt for some auditors of racist statements and came up with Don Votaw and Glen Shull (10:08:20-10:09:30).

Watson testified that he brought his memory of Toler's alleged racist statement to the Business Agent's attention because of the "Trice situation," (10:11:15-10:11:45). He indicated that he waited over two months to do this because he had seen no reason to immediately report Toler's statement until management sought to discipline Trice (10:14:15-10:15:30).

According to Watson, Jude Ware carried his written statement to Colone, at Colone's request (10:19:15; 10:20:15-10:22:30).

Watson admitted that he had never reported racist remarks by his union coworkers to anybody in management, while he did discuss Toler's remarks with Scott Hinrichs (10:27:40-10:28:40; 10:13: 15-50).

Jude Ware testified that he was the Chief Steward in March, 2005, and that the Business agent, Rob Colone, called him to tell him that he, Colone, had received a report from an hourly worker (Watson) of Toler's making racist remarks (10:31:15-10:31:45). Colone asked Ware to look into the situation (10:31:50-10:32:10). Ware then asked Watson if Watson knew of other employees who had heard Toler make racist comments; Watson agreed to "look into it," (10:32:10-10:33).

Ware testified that in his frequent contacts with Toler both in and out of the workplace he had never heard Toler make racist remarks (10:33:20-10:34:30).

Watson polled some of his co-workers. Votaw and Shull volunteered that Toler had made racist remarks. Colone asked Watson and Ware to get written statements from them (10:35:30-10:36:05). Ware also got a written statement from Bob DeWeese (10:36-10:36:50).

Shull refused to give Ware a written statement. He told Ware that he did not want to get involved and that he feared retaliation from company management due

to his low seniority. Ware persuaded Shull to dictate a statement to him, and wrote it down, but Shull refused to sign the statement (10:38:30-10:40).

Ware took the three signed statements and the one that was unsigned and delivered them to Colone (10:43:40).

Votaw testified that he had no animus toward Toler and that his only conflicts with Toler were "normal workplace disagreements," (10:58:15). Votaw did admit that Toler had complained about Votaw's working crossword puzzles at work and that Toler had "taken [him] to the office" on one occasion (10:37:30-10:58).

Votaw claimed that Toler's racist remarks were "an everyday thing," (10:54:55-10:55:15). He admitted, however that he and Toler had little interaction at work and on many nights no interaction at all (10:51:50, 11:02:50) and that there were no witnesses to Toler's alleged racist statements (11:06). He also testified that he was a friend of Allen Trice (10:52).

The only other witness was Mike Long, Toler's former neighbor and a Sud-Chemie day shift maintenance coordinator. Long testified to hearing Toler make racist remarks both in and outside of the workplace. Of course, like Votaw and the individual Defendants, he never reported any of them to management until asked to do so (11:40:15), despite the company's anti-harassment policy, which required immediate reporting.

Toler rebutted Long's testimony (11:42:50-11:43:30).

Instructions to the Jury

At the conclusion of all of the evidence, the Plaintiff submitted revised proposed jury instructions to the Court, reflecting the Court's dismissal of the defendants Sud-Chemie and Glenn Shull (TR, Pp. 741-746; APX, Tab 5 Pp. 37-42). They required that the Plaintiff prove "malice" in order to overcome the remaining Defendants' qualified privilege, and provided the following guidance on this issue:

As used in this Instruction, the Defendants may be said to have uttered or written the statements of which the Plaintiff complains with malice if the Defendants uttered or wrote them under the following circumstances:

- A. In bad faith; OR
- B. Without probable cause to believe that they were true; OR
- C. With a reckless or knowing disregard for their falsity; OR
- D. With an improper motive.

You may infer that the Defendants uttered or wrote the statements of which the Plaintiff complains with malice from the falsity alone of the statement, (TR, P. 743; APX, Tab 5 P. 39).

Plaintiff's attorney repeated the legal principle that the malice necessary to overcome the qualified privilege may be inferred from the falsity alone of the defamatory words at issue as an objection to the Court's actual Instructions to the Jury (12:41:15-12:42).

The Court's actual instructions required that the jury find "actual malice" in order to find for the Plaintiff. The Court told the jury that "actual malice" may be said to exist upon proof:

. . . that the speaker either (1) knew the statement was false at the time it was made or (2) acted with "reckless disregard" as to whether the statement was true or false. "Reckless disregard" means the speaker either (1) entertained serious doubts as to the truth or falsity of the statement or (2) had a high degree of awareness as to whether the statement was probably false (TR, P. 765; APX, Tab 4 P. 29).

The Court's Instructions also required proof of an absence of "ordinary care" upon the part of the Defendants in publishing their defamatory statements about the Plaintiff in order for him to recover (Id.).

After deliberating for just under two hours, the jury returned a verdict for the Defendants by a vote of 10-2 (TR, Pp. 765-766; 770; APX, Tab 4 Pp. 29-30, 34).

The Court entered judgment on the jury verdict on September 1, 2009 (TR, Pp. 783-784; APX, Tab 3 Pp. 26-27).

The Plaintiff, Joe Toler, filed his Notice of Appeal on September 15, 2009 (TR, P. 786).

The Opinion of the Court of Appeals

The Court of Appeals rendered its opinion on March 4, 2011.

The Court of Appeals thoroughly analyzed the issues underlying the Circuit Court's directed verdict in favor of Sud-Chemie. It concluded that the Circuit

Court should not have entered the directed verdict; that it was up to the jury to determine if Sud-Chemie had abused its qualified privilege in republishing the individual Appellees' accusations that Toler had uttered racist remarks in the workplace (Opinion of the Court of Appeals, APX, Tab 1 Pp. 20-21).

Of course, Appellant agrees with this conclusion.

The Court of Appeals relied upon, and even emphasized, some of the following language from *Stringer, Id.*, at 797, citing *Tucker v. Kilgore*, 388 S.W.2d. 112, 114 (Ky., 1964):

The significance of the defense of qualified privilege or conditional privilege is that it removes the presumption of malice otherwise attaching to words that are actionable per se and thereby casts on the plaintiff a technical burden of proof in that respect. *This does not require any greater degree of proof by the plaintiff because the offensive character of the words still is sufficient by itself to support an inference of malice.* The practical difference, therefore, is that in the one case the instructions do not require a finding of malice as a condition to recover and in the other they do (APX, Tab 1 P. 17, emphasis by Court of Appeals).

The Court of Appeals also cited this passage from *Stringer, supra*, at 799:

It is clear that "when . . . there is any evidence of actual malice or malice in fact, the case should go to the jury." While actual malice "requires a showing of knowledge of falsity of the defamatory statement or reckless disregard of its truth or falsity," "[m]alice can be inferred from the fact of ... falsity" (APX, Tab 1 Pp. 17-18; the Court omitted the internal citations found in *Stringer*).

Appellant Toler is complaining about the Court of Appeals' approval of the Circuit Court's instructions to the jury, which would probably have to be used upon a retrial of this case as to the Appellee Sud-Chemie, absent intervention by this Court.

The Circuit Court's instructions, as recited at page 18 of this Brief, and as found at TR Pp. 764-772 and APX, Tab 4 Pp. 28-36, required Appellant to prove what we may call Constitutional actual malice in order to recover from the individual defendants. This is because it recited the burden of proof for defamation plaintiffs who are public figures or who complain of words that touch upon matters of public concern. There is an entire school of jurisprudence concerning such cases, the first of which was *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Court of Appeals, again following *Stringer*, specifically held that this case was *not* such a case. It correctly held that:

... No churches, media organizations, or public officials or figures are involved [in this case], thus the First Amendment protections addressed in the aforementioned cases are inapplicable (APX, Tab 1 P. 14).

Appellant believes that the Circuit Court's instruction to the jury clearly collided with the principles that the Court of Appeals properly extracted from *Stringer, supra*.

The Court of Appeals, on the other hand, insisted that the Circuit Court's instructions to the jury were consistent with *Stringer*. It opined as follows on this point.

A review of *Stringer* is clear that in cases where qualified privilege exists, which Toler does not dispute, the "burden of showing *actual malice* is put upon the plaintiff. . ." *Stringer*, at 797 (emphasis added by the Court of Appeals) [APX, Tab 1 P. 23].

As we shall see, this citation is incorrect. In fact, the law as set forth in *Stringer* militates against the sort of instructions now associated with Constitutional actual malice in a case such as the one at bar.

Appellant believes that the Court of Appeals was wrong to affirm the judgment for the individual Appellees based upon the purported correctness of the Circuit Court's use of the principles applicable to cases involving Constitutional protections in its instructions to the jury. Thus he sought discretionary review.

* * * * *

Before Toler could move for discretionary review, however, Sud-Chemie filed a Petition for Rehearing in the Court of Appeals, on March 24, 2011. Sud-Chemie argued that the opinion of the Court of Appeals:

- 1) Was based on a misconception of the Kentucky Supreme Court in *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d. 782 (Ky., 2004) and the [then] non-final decision of the Kentucky Supreme Court in *Calor v. Ashland Hospital Corp.*, 2007-SC-573Dg, 2008-SC-317-DG (to be published)

2) Stands in direct conflict with the holding reached by the Court in a case decided the same day as the instant matter, *Harstad v. Whiteman*... No. 2009-CA-190, No. 2009-CA-194, No. 2009-CA-1044 and 3) if left undisturbed, eviscerate CR 50.01 and CR 56 practice in all defamation cases in the Commonwealth involving a qualified privilege (Petition for Rehearing, P.1).

Toler responded with the arguments, or variations thereof, that he had presented in his briefs for the Court of Appeals and that he presented in his motion for discretionary review and his response to Sud-Chemie's motion for discretionary review.

Toler's arguments, and their variations, appear in the Argument section of this brief. Thus there is no need to advance them here.

The Court of Appeals denied Sud-Chemie's Petition for Rehearing on December 3, 2012 (APX, Tab 2 P. 25a).

Toler then moved for discretionary review as indicated above. He sought a reversal and remand for a new trial on the Circuit Court's judgment for the individual Appellees, which the Court of Appeals had affirmed, based, again, upon the Circuit Court's defective instructions.

Toler also urged this Court to hear his case because of the conflict between this Court's *Stringer* opinion and the more recent opinion of the Court of Appeals in *Harstad, supra*.

Sud-Chemie also moved for discretionary review. It argued that the Court of Appeals has misconceived the meaning of *Stringer, supra*, and another opinion from this Court, *Calor v. Ashland Hospital Corp.*, 2007 SC-573-DG, 2008-SC-317. The *Calor* opinion was designated as “to be published” at the time Sud-Chemie petitioned the Court of Appeals for rehearing in this case (This Brief, P. 21). Since then, and after this Court granted a Petition for Rehearing, the *Calor* opinion ended up being designated “not to be published.”

Sud-Chemie also pointed to the conflict between the opinion of the Court of Appeals in this case and that of a different panel of the Court of Appeals in *Harstad, supra*.

Certainly, there is such a conflict as to the Court of Appeals reversal of the directed verdict in favor of Sud-Chemie in this case. Again, however, the Court of Appeals in our case approved jury instructions that encompassed the legal liability standards for overcoming the qualified privilege articulated in *Harstad*.

Finally, Sud-Chemie argued in its Motion for Discretionary Review, that the opinion of the Court of Appeals in this case, “... eviscerates Sud-Chemie’s right to CR 50.01 and CR 56 practice notwithstanding its entitlement to the qualified privilege,” (Motion for Discretionary Review, Pp. 14-15).

This Court granted both Toler’s and Sud-Chemie’s respective Motions for Discretionary Review.

PRESERVATION OF ERROR & STANDARD OF REVIEW

The Appellant Toler preserved his objections to the Circuit Court's instructions to the jury in the two ways authorized by CR 51.03:

1. He submitted his own proposed instructions to the jury to the Court at the appropriate time (This Brief, supra, Pp. 17-18);
2. He objected to the Court's actual instructions as being an erroneous statement of the law during the instructions conference before the Court read its instructions to the jury (*Id.*).

Where an instruction contains a clear error of law, it is presumed that the improper instruction influenced a verdict adverse to the party claiming the error, *Barret v. Stephany*, 510 S.W.2d. 524, 527 (1974). This, in turn, is the definition of "prejudicial" error, and distinguishes such error, which is reversible error, from mere technical error, *Miller v. Miller*, 296 S.W.2d 684, 687 (Ky., 1956).

The Circuit Court's instructions in this case were reversible error.

ARGUMENT

The Appellant will endeavor to confine his arguments in this Brief to the issue of jury instructions. But he must also discuss the Court of Appeals' obvious mistake in its reading of *Stringer* and provide some more general analysis of the principles surrounding how a common law defamation plaintiff may show abuse of the qualified privilege.

We should begin with the Court of Appeals' misreading of *Stringer, supra*.

I

NOTHING IN THIS COURT'S *STRINGER* OPINION REQUIRES THE APPELLANT TO PROVE CONSTITUTIONAL "ACTUAL MALICE" IN ORDER TO SHOW ABUSE OR WAIVER OF THE QUALIFIED PRIVILEGE IN THIS PRIVATE PERSON/PRIVATE INTEREST CASE.

Again, the Court of Appeals' analysis was mostly correct, as was its reversal of the Circuit Court's directed verdict in favor of Appellee Sud-Chemie in this case.

However, the Court of Appeals was wrong to affirm the Circuit Court's use of Constitutional actual malice instructions as to the individual Appellees. In support of its position on this issue, the Court opined as follows:

A review of *Stringer* is clear that in cases where qualified privilege exists, which Toler does not dispute, the "burden of showing *actual malice* is put upon the plaintiff..." *Stringer*, at 797 [emphasis added by the Court of Appeals] (APX, Tab 1 P. 23).

The undersigned has examined page 797 of the *Stringer* opinion and could find no reference to "actual malice" on that page of the case. There is a reference to these two words at page 799 of the opinion, in that portion of it quoted by the Court of Appeals at pages 17-18 of its opinion in this case, as repeated at page 20 of this Brief. The *Stringer* opinion, *supra* at 796, also cites *Baker v. Clark*, 186 Ky. 816, 218 S.W. 280, 285) (1920) for the proposition that a, "... communication is privileged if made in good faith and without actual malice."

This citation from *Baker v. Clark* hardly means that this Court was endorsing a Constitutional actual malice instruction for use in cases such as this one. As the Court of Appeals noted, First Amendment protections addressed in cases involving Churches, media organizations, or public officials (or matters of public concern) are *not* involved in this case (APX, Tab 1 P. 14)

So there is no reason that such protections be reflected in the jury instructions for this case.

Indeed, the “actual malice” referenced in *Baker v. Clark* and other common law cases, is *not* the same thing as Constitutional actual malice, as we shall see later in this Brief. Furthermore, it is, however defined, but one of several *alternative* ways that a plaintiff in a case such as this may show abuse of the qualified privilege.

Nothing in the *Stringer* opinion, therefore, requires that instructions to the jury in a private party/private interest defamation case include a Constitutional actual malice burden of proof for a plaintiff seeking to show abuse of the qualified privilege.

The Circuit Court’s use of this proof burden in its instructions to the jury was, as we shall now see, clear error.

II

THE CIRCUIT COURT'S JURY INSTRUCTIONS IN THIS CASE WERE CLEARLY ERRONEOUS BECAUSE THEY REQUIRED THE APPELLANT TO PROVE CONSTITUTIONAL ACTUAL MALICE IN ORDER TO RECOVER.

The Circuit Court's jury instructions in this case were patterned upon the proof requirements for a public figure plaintiff suing a media defendant, or for a case in which the publication at issue involved some matter of public concern.

Since the United States Supreme Court decided the case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), our Courts have been required to use such instructions in such cases. The Court has dubbed the heightened proof burden in these cases as one of "actual malice."

This particular form of "actual malice" consists of proof of a defendant's knowledge of the falsity of his defamatory statements or a reckless disregard of the truth or falsity of the statement. Furthermore, as to the "reckless disregard" component of the proof burden, the plaintiff must prove that the defendant entertained serious doubts as to the truth or falsity of his statements or had a high degree of awareness of the statements' probable falsity, *Ball v. E. W. Scripps Co.*, 801 S.W.2d. 684, 699 (Ky., 1990) [applying Constitutional actual malice standards in a public figure/media defendant case].

Again, the Circuit Court's instructions in this case perfectly followed these principles (This Brief, *supra*, P. 18; TR, P. 765; APX, P. 29).

This was wrong.

As the Court of Appeals recognized, at the time that the Appellees defamed him, "... No churches, media organizations, or public officials or figures are involved [in this case]" (APX, Tab 1 P. 14). Obviously, no issue of public concern was involved either. Thus, the Court correctly opined, "... the First Amendment protections addressed," in cases involving such persons or issues are inapplicable to this case (*Id.*).

The Court of Appeals was following the clear language of this Court in *Stringer, supra*, at 792, on this issue. Cases such as the one at bar involving, "... allegedly defamatory statements of a purely private concern about private persons, do not implicate these Constitutional protections of free speech and freedom of the press," (*Id.*) Again, it is these protections alone that, "... require heightened proof requirements and other modifications of the common law of defamation in certain situations." *Id.* None of these situations have any application in this case.

In fact, none of these protections apply as to liability even when a private plaintiff is suing a media defendant. In *Warford v. Lexington Herald Leader*, 789 S.W.2d. 758, 771 (Ky. , 1990), this Court held that Reggie Warford, a University of Kentucky basketball player, was not a public figure and was not, therefore, required to prove Constitutional actual malice in order to recover from the Lexington newspaper, except as to punitive damages.

Appellant Toler stands in Warford's shoes, except he has not sued a media defendant, and his appeal involves jury instructions and not a directed verdict.

In *Columbia-Sussex Corp., Inc. v. Hay*, 627 S.W.2d. 270, 276 (Ky. App., 1980), *dis. rev. denied*, (1981) , the Court of Appeals explained the reason that private plaintiffs should not have to prove Constitutional actual malice in the course of its discussion of the case of *Gertz v. Welch*, 418 U.S. 323 (1971):

... Not only does the private plaintiff have less effective opportunities for rebuttal [of attacks upon his reputation] but also he has not voluntarily exposed himself to greater publicity by entering the public forum...

Because of this, opined the Court, "... a private plaintiff... is more deserving of recovery than a public one," *Id.*

Again, per *Warford, supra* at 771, a private person plaintiff suing on a matter of private concern need prove Constitutional actual malice *only* when seeking punitive damages from a media defendant.

So the Circuit Court's instructions to the jury in this case were clearly erroneous because they required the Appellant Toler to prove Constitutional actual malice in order to recover against the individual Appellees.

We could leave this issue at this point. But some analysis of the likely reason for the Circuit Court's error may be helpful to the Court on the issue of determining what instructions were proper in this case.

* * * * *

As Professor Prosser has noted, "The word 'malice' has plagued the law of defamation from the beginning," i.e. since the law of slander developed in medieval England, Prosser, *Law of Torts*, §115, P. 97 (4th Ed., 1971), cited in *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d. 646, 649 (1979).

Unfortunately the "Constitutional revolution" in the law of defamation which began with the *New York Times Co. v. Sullivan* case, *supra*, only served to spread this plague.

In that case, the United States Supreme Court adopted the term "actual malice" to define the knowledge/reckless disregard burden upon plaintiffs seeking to prove abuse of what the Court deemed to be the "Constitutional" privilege. Again this privilege applies to cases implicating interests protected by the Constitutional provisions of a free press and freedom of speech.

The Appellant has referred to this particular species of malice as Constitutional actual malice in this Brief, and will continue to do so.

His reason for doing so is that "actual malice" has long had a well-defined meaning at common law, and continues to have this meaning, which is certainly different from the meaning of Constitutional actual malice.

In Kentucky, actual malice has been defined as a state of mind arising from, "... motives of personal spite or ill will," *Allen v. Wortham*, 18 S.W.73, 74 (Ky., 1890; "actual ill will or hatred," *Tanner v. Stevenson*, 138 Ky. 578, 128 S.W. 878,

883 (1910); "... motives of ill will, hatred, or wrongful motive," *Ideal Motor Co. v. Warfield*, 211 Ky. 576, 277 S.W. 862, 864 (1925); *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d. 646, 649, note 1 [referring to Instruction #3], 650 (1970); or some combination of these words, *Weinstein v. Rhorer*, 240 Ky. 679, 42 S.W.2d. 892, 895 (1931).

The Supreme Court of the United States itself has taken note of the identity of its term for Constitutional actual malice (again, simply "actual malice") and the common law term using the same words. In *Harte-Hanks Communication, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 2685, note 7, 105 L.Ed.2d. 562 (1989), the Court stated that its use of the words "actual malice," "... is unfortunately confusing in that it has nothing to do with bad motive or ill will."

Indeed, the high Court informed us, the actual knowledge/reckless disregard [Constitutional] malice standard incorporated in the Circuit Court's instructions to the jury in this case, "... is not satisfied merely through a showing of ill will or malice in the ordinary sense of the term," *Id.*, at 2685. The distinction here is so central to the law that the Supreme Court has suggested that judges trying cases involving Constitutional protections for a defendant's speech should instruct the jury that:

... actual malice may not be inferred alone from evidence of personal spite, ill will, or intention to injure the plaintiff, *Id.*, note 7.

Clearly, Constitutional actual malice is a much heavier burden for a plaintiff attempting to overcome a defendant's privilege in a defamation case than is common law actual malice.

This is significant because at common law, proof of the actual malice that consists of a showing of a defendant's ill will, hatred, spite, or wrongful motive, is *the most difficult* of the potential proof burdens that a plaintiff may face in seeking to overcome a defendant's qualified privilege in a defamation case.

In Kentucky, fortunately for private citizens, proof of actual malice is but one way in which such a plaintiff may show abuse of the qualified privilege. The Appellant Toler's proposed instructions to the jury reflected this legal principle.

III

THE CIRCUIT COURT SHOULD HAVE USED THE LIABILITY INSTRUCTIONS PROPOSED BY THE APPELLANT, JOSEPH TOLER.

Again, Toler's proposed instructions to the jury authorized his recovery upon alternate grounds, namely:

1. The Appellees' bad faith in making their accusations that Toler had uttered racist remarks in the workplace;
2. The Appellees' lack of probable cause to believe that these accusations were true;
3. The Appellees' reckless or knowing disregard for the truth or falsity of these accusations; or

4. The Appellees' improper motive in making these accusations.

Toler's proposed instructions characterized these alternate grounds of showing abuse of the qualified privilege as different manifestations of "malice," and ended with the directive that the jury could infer whatever malice it needed to find upon the Appellees' part from the falsity of Appellees' defamatory words about Toler (This Brief, *supra*, Pp. 17-18; TR, P. 743; APX, Tab 5 P. 39).

This directive is authorized at *Stringer, supra*, at 799, as cited by the Court of Appeals (APX, Tab 1 Pp. 17-18) and set down at page 20 of this Brief. The quotation reads: "... [m]alice can be inferred from the fact of falsity," of words defamatory per se, citing *Thompson v. Bridges*, 209 Ky. 710, 273 S.W., 529,531 (1929).

Of course, there are many other Kentucky cases that affirm this principle. They include *Evening Post Co. v. Richardson*, 68 S.W. 665, 668 (1902), *McClintock v. McClure*, 171 Ky. 714, 188 S.W. 867, 872-873 (1918), *Democrat Publishing Co. v. Harvey*, 181 Ky. 730, 205 S.W. 908, 911 (1918), *Commercial Tribune Publishing Co. v. Raines*, 228 Ky. 483, 15 S.W.2d. 306, 307-308 (1929), *Johnson v. Langley*, 247 Ky. 387, 57 S.W.2d. 21, 25 (1933) and *Tucker v. Kilgore*, 388 S.W.2d. 112, 114 (Ky. , 1965).

This form of malice, inferred from the falsity of words defamatory per se, is usually denominated as "implied" or "presumed" malice. However, one case characterized it as "actual malice," *Johnson v. Langley, supra*.

As in most cases such as this, there is much more evidence tending to show that the Appellees abused their qualified privilege in accusing the Appellant of making racist remarks in the workplace than simply the evidence that these accusations were false.

Certainly, a defamation plaintiff such as Toler should be able to present this cumulative evidence, as Toler has done, and secure instructions showing the different ways in which it illustrates abuse of the qualified privilege.

The law in Kentucky recognizes a plaintiff's right to show, "... alternative grounds for a plaintiff's showing of 'abuse' of [qualified] privilege (or [the obverse] of cumulative grounds for the existence of the privilege in the first place)," [Elder, *Kentucky Tort Law; Defamation and the Right of Privacy* (Michie, 1983), §1.11(G), Pp. 214-217]. We have already encountered two such grounds: "actual malice" (hatred, ill will, or wrongful motive, etc.) and "implied malice."

This Court recognized several of these additional grounds in its *Stringer* opinion, *supra*, 798, note 60 citing *Baker v. Clark*, 186 Ky 816, 218 S.W. 280, 285 (1920); one was "over publication" of defamatory matter, the other publication with knowledge of the falsity of the communication.

The Court in *Baker v. Clark, Id.*, at 285-286, recognized even more alternative grounds whereby a defamation plaintiff may show abuse of the qualified privilege. One is proof that a defendant published the defamatory matter with a "reckless disregard for the plaintiff's rights." *Id.* The other is proof that a defendant published such matter without any, "... probable cause to believe [the defamatory matter] to be true," *Id.* Of course, another way of stating this particular ground for showing abuse of the privilege is as a reckless disregard for the truth or falsity of the defamatory matter, *Elder, supra*, §1.11(G), P. 214. But with no necessity of proving that the defendant entertained serious doubts as to the truth or falsity of the statement or had a high degree of awareness as to whether the statement was probably false!

Each of these alternative grounds for showing abuse of the qualified privilege was articulated in Appellant Toler's proposed instructions to the jury, except that he confined his "actual malice" theory of the case to the "wrongful motive" branch of the usual three sub-alternatives for showing this sort of malice. Also, his proposed instructions permitted him to recover if the jury found that the Appellees had acted in "bad faith." This was probably surplusage, as it is arguably encompassed within "wrongful motive."

* * * * *

A review of the cases in which this Court or its predecessor have discussed actual jury instructions reflecting the law on this issue reveals that the Court has "picked and chosen" from among the alternative methods whereby a plaintiff may show abuse of the qualified privilege.

Most recently in *Holdaway Drugs Inc. v Braden, supra*, the Court approved the use of a common law "actual malice" instruction. It required the plaintiff to show that the defendant had published the defamatory matter of which the plaintiff complained with, "... ill will, hatred, or wrongful motive," in order to show abuse of the qualified privilege. The Court did the same thing in *Ideal Motor Co. v. Warfield*, 211 Ky. 576, 277 S.W. 862, 864 (1925).

An insistence upon only proof of common law actual malice as a means of showing abuse of the qualified privilege now seems to be unjustified.

Stringer appears to preclude any argument that only proof of common law "actual malice" will suffice to show abuse of the qualified privilege. To the extent that the *Holdaway Drugs, Inc.* and *Ideal Motor Co.* cases require such proof and only such proof, therefore, they are no longer good law. This Court heavily relied upon Professor Elder's tome in *Stringer* and Professor Elder stressed the importance of recognizing the alternative methods of showing abuse of the qualified privilege. In addition, of course, *Stringer* stands for the proposition that a plaintiff can usually get to the jury upon a showing of "implied malice," i.e. the

malice that may be implied from the falsity of words defamatory per se. This sort of malice—as well as the other alternative methods whereby a plaintiff may show abuse of the qualified privilege—are far easier for a plaintiff to prove than is “actual malice” as defined in *Holdaway Drugs, Inc.*

As the Court said in *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19, 20 (1903):

Actual malice can rarely be proven and the only chance for redress for the plaintiff is ordinarily the want of probable cause in the publication; it therefore follows that the defendant must show the information on which he relies in the publication to show probable cause.

Of course, the latter portion of this statement reflects the archaic legal principle that the defendant asserting the qualified privilege had the burden of proving his entitlement to it as a matter of fact (the probable origin of the term “absence of malice”). Certainly any defamation defendant would endeavor to do this as a practical matter, but under modern cases, the burden is upon the plaintiff to prove that the defamation defendant abused his privilege. Appellant Toler’s proposed instructions reflected this burden of proof.

Nevertheless, the first portion of the Court’s reasoning in the *Browning* case is certainly apt, and serves to highlight the legal principle that there are more ways to show abuse of the privilege than by proof of “actual malice.”

In addition to showing a lack of probable cause for a defendant's belief in the truth of the defamatory statements of which the plaintiff complains, this Court's predecessor has improved instructions permitting recovery where a plaintiff has shown that the defendant has exhibited:

... a reckless disregard for the plaintiff's rights or [that] defendant knew that the publication was, or some material part of it was, false, or that it was false...

Baker v. Clark, supra, 218 S.W. at 285-286. This opinion also recognized the alternative ground of a lack of probable cause as a means of showing abuse of the qualified privilege, *Id.*

Most of the approved instructions from this Court's predecessor seem to assume that the jury will know that it is authorized to infer the malice necessary to overcome the qualified privilege from the falsity of the words defamatory per se of which the plaintiff complains. However, there is at least one case in which the Court explicitly informed the jury of this fact. In *Democrat Publishing Co. v. Harvey*, 181 Ky. 730, 205 S.W. 908, 911 (1918), the Court authorized the following instruction in a case involving the "fair comment" variation of the qualified privilege:

... malice may be presumed from the falsity of the statements contained in the publication and that if they [the jury] believe from the evidence that the publication was false and maliciously made, they will find for the plaintiff; but if they believe from the evidence that the statements contained in the publication were substantially true as

published or were a reasonable and fair criticism of the acts and the conduct of the plaintiff as a representative and were made in good faith and without malice, they should find for the defendant.

In addition to authorizing a verdict for the plaintiff based upon implied malice, this approved instruction also included the alternative ground of bad faith. Again, it did so in the obverse fashion of the time that placed the burden of proving the privilege upon the defendant, instead of employing the modern practice of placing the burden of showing abuse of the privilege upon the plaintiff.

Finally, for purposes of this case, a defamation plaintiff is entitled to a jury instruction based upon evidence showing that the defendant has abused his qualified privilege by showing that he published the defamatory statement with a reckless disregard for its truth or falsity; or, as the Court said in *Miller v. Howe*, 245 Ky. 568, 53 S.W.2d. 938, 939 (1932), with no grounds "for an honest belief" in the truth of the statement.

* * * * *

Again, Appellant Toler sought to incorporate these alternative grounds for proving that the Appellees abused their qualified privilege into his proposed instructions. As the foregoing analysis has shown, Toler's proposed instructions were a reasonably accurate statement not only of Toler's theory of the case, but the law of the case as well. Therefore, the Circuit Court should have given them to the jury instead of the instructions that it gave to the jury.

IV

EVEN IF THE APPELLANT TOLER'S PROPOSED INSTRUCTION TO THE JURY WERE NOT CORRECT IN EVERY RESPECT, THEY WERE SUFFICIENT TO ENTITLE HIM TO A NEW TRIAL, GIVEN THE FACT THAT THE CIRCUIT COURT'S INSTRUCTIONS WERE CLEARLY ERRONEOUS.

Even if the Appellant Toler's instructions to the jury were not completely correct, they clearly sufficed to call the Court's attention to the fact that he was entitled to instructions properly outlining the law of this case, *Palmore, Kentucky Instructions to Juries*, Vol. II (Anderson, 1989), §13.15, Pp. 23-24, citing *Edwards v. Johnson*, 306 S.W.2d. 845, 848 (1957) and other cases at footnote 185. And Toler's proposed instructions to the jury made reasonably clear what he had in mind as appropriate instructions in contrast to the Circuit Court's actual instructions, *Id.*, citing *Rainbo Baking Co. v. S & S Trucking Co.*, 459 S.W.2d. 155, 161 (Ky., 1970), at footnote 186.

Therefore, given the obvious error of the Circuit Court's instructions, Toler's objections to those instructions coupled with his proposed instructions clearly entitle him to a new trial with appropriate instructions.

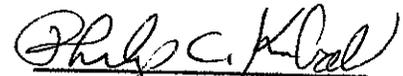
Of course, in this situation, this Court may inform the Court and the parties of the precise form that proper instructions should take in this case. Obviously, the bench and bar could use some guidance in this area. The cases that we have examined in this Brief indicate a wide variety of approved instructions; their only

obvious similarity, in fact, is that none of them come anywhere close to requiring a plaintiff to prove Constitutional actual malice!

CONCLUSION

For the reasons stated in this Brief, the Plaintiff/Appellant, Joe Toler, requests that this Court reverse the Opinion of the Court of Appeals upon the issue of the Circuit Court's jury instructions, reverse the judgment of the Circuit Court in favor of the individual Appellees based upon its erroneous jury instructions, remand this case to the Jefferson Circuit Court for a new trial, and give directions to that Court as to how properly to instruct the jury at the new trial.

Respectfully Submitted,



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SUPREME COURT OF KENTUCKY
TO THE CLERK

OSBERT TOLBERT

APPEAL FROM THE CIRCUIT COURT
OF THE COUNTY OF BOONE

ED-CHENUE INC. et al.

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ORDER FOR APPELLANT

PHILIP C. KIMBALL
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THE CLERK

I hereby certify that I have served a true and correct copy of this Decree on Philip C. Kimball, Esq., 1970 Doughty Boulevard, Louisville, KY 40205, and Roy Colton, Esq., P.O. Box 272, Salt Spring, TN 37177, Clerk, Court of Appeals, 500 Jefferson Drive, Frankfort, KY 40601, and Hon. Judge McDonald Benjamin Underhill, Circuit Court, 600 East Jefferson County Judicial Center, by mailing or hand delivering the same, with a return receipt, on the day of December, 2013. I also certify that I have not removed the record on appeal to the Jefferson Circuit Clerk on the day above written.

Philip C. Kimball
PHILIP C. KIMBALL
Attorney for Appellant
1970 Doughty Boulevard
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INDEX TO APPENDIX

<u>Description of Item</u>	<u>Record Location</u>	<u>Appendix Location</u>
Opinion of the Court of Appeals, Rendered March 4, 2011 (Not to be Published)	N/A	1-25 (Tab 1)
Order denying Petition for Rehearing, by the Court of Appeals, entered December 3, 2012	N/A	25a (Tab 2)
Order (Final Judgment) upon Jury Verdict and Directed Verdict, entered by the Jefferson Circuit Court on April 15, 2009	783-784	26-27 (Tab 3)
Instructions of the Jefferson Circuit Court to the Jury, given at trial, July 22, 2009	764-772	28-36 (Tab 4)
Plaintiff's Revised Proposed Instructions, tendered at trial, July 22, 2009	741-746	37-42 (Tab 5)
Opinion and Order of the Jefferson Circuit Court, partially granting and partially denying Motion for Summary Judgment, entered April 15, 2009	732-737	43-48 (Tab 6)
Plaintiff's Trial Exhibit #1 (statements of individual Defendants/Appellees)	Trial Ex.	49-52 (Tab 7)
Plaintiff's Trial Exhibit #2, "Charge of Discrimination" by Allen Trice, filed with EEOC, March 7, 2005	Trial Ex.	53 (Tab 8)
Opinion of the United States Court of Appeals for the Sixth Circuit, <u>Steve Hodges v. Jack Halverson and Ford Motor Company</u> , No. 06-6223 (6th Cir., 4-1-08), unpublished	N/A	54-65 (Tab 9).