

SUPREME COURT OF KENTUCKY  
No. 2013-SC-000007-D  
(2009-CA-001686)

SUD-CHEMIE, INC.

APPELLANT

versus

APPEAL FROM JEFFERSON CIRCUIT COURT  
HON. JUDITH McDONALD-BURKMAN  
No. 05-CI-8765

JOSEPH TOLER

APPELLEE

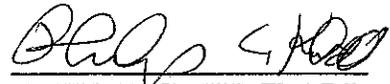
BRIEF FOR APPELLEE

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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 5<sup>th</sup> 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 8<sup>th</sup> day of February, 2014. 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

The issue in this case is: what is the proper standard for evaluating what evidence a plaintiff must produce to overcome a defamation defendant's qualified privilege in a case involving a private plaintiff and no issues of public concern? The Appellant Sud-Chemie and the Circuit Court believed that it is what the parties agree may be called "Constitutional actual malice" (i.e., a knowledge of falsity of a reckless disregard for the truth or falsity of a defamatory statement; the latter term properly defined). The Court of Appeals and the Appellee Joe Toler believe that it is "implied malice" (i.e., proof of the falsity of words defamatory per se); Appellee Toler also argues that he should have gotten his case to the jury under *any* standard that exists under the common law of Kentucky.

## STATEMENT CONCERNING ORAL ARGUMENT

Appellee Joe Toler agrees with the Appellant Sud-Chemie that oral argument should be had in this case. There is enough confusion in the law on the issues presented by this appeal to last for another century or so; Appellee Toler stands ready to assist the Court in any manner possible in grappling with these issues.

## STATEMENT OF POINTS & AUTHORITIES

### Standard of Review for a Directed Verdict

<i>Gibbs v. Wickersham</i> , 133 S.W.3d. 494 (Ky. App., 2004)	20-21
<i>Kelly v. Walgreen Drug Stores</i> , 293 Ky. 691, 170 S.W.2d. 34 (1943)	21
<i>Harte-Hanks Communications, Inc. v. Connaughton</i> , 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d. 562 (1989)	21
<i>United States Postal Service Board of Governors v. Aikens</i> , 460 U.S. 709, 103 S.Ct. 1478, 75 L.Ed.2d. 403 (1983)	21
<i>Edginton v. Fitzmaurice</i> , 29 Ch. Div. 459 (1885)	21

### I

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<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	23
<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d. 502	23, 25
<i>Garrison v. Louisiana</i> , 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d. 125 (1984)	23
<i>St. Amant v. Thompson</i> , 390 U.S. 727, 88 S.Ct. 1323	23

<i>Harte-Hanks Communications, Inc. v. Connaughton</i> , 491 U.S. 657, 109 S.Ct. 2678, 103 L.Ed.2d. 562 (1989)	23, 25
<i>Warford v. Lexington Herald-Leader Co.</i> , 789 S.W.2d. 758 (Ky., 1990)	25, 27
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S.Ct. 2502, 91 L.Ed.2d. 202 (1986)	25
<i>Ball v. E. W. Scripps Co.</i> , 801 S.W.2d. 684 (Ky., 1990)	26
<i>Columbia-Sussex Corp. Inc. v. Hay</i> , 627 S.W.2d. 270 (Ky. App., 1980), <i>dis. rev. denied</i> (1981)	27
<i>Gertz v. Welch</i> , 418 U.S. 323 (1974)	27

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ALL THAT APPELLEE TOLER HAD TO PROVE IN ORDER TO GET HIS CASE TO THE JURY IN THE FACE OF APPELLANT'S QUALIFIED PRIVILEGE WAS THAT APPELLANT'S DEFAMATORY STATEMENTS ABOUT HIM WERE FALSE.

<i>Stringer v. Wal-Mart Stores, Inc.</i> , 151 S.W.3d. 782 (Ky., 2004)	28, 29, 30, 33
<i>Evening Post Co. v. Richardson</i> , 68 S.W. 665 (1909)	28
<i>McClintock v. McClure</i> , 171 Ky. 714, 188 S.W. 867 (1916)	28
<i>Democrat Publishing Co. v. Harvey</i> , 181 Ky. 730, 205 S.W. 908 (1918)	28
<i>Commercial Tribune Publishing Co. v. Haines</i> , 228 Ky. 483, 15 S.W.2d. 306 (1929)	28

<i>Johnson v. Langley</i> , 247 Ky. 387, 57 S.W.2d. 21 (1933)	29
<i>Tucker v. Kilgore</i> , 388 S.W.2d. 112 (Ky., 1965)	29
<i>Morgan v. Booth</i> , 13 Bush 480 (Ky., 1877)	29
<i>Allen v. Wortham</i> , 89 Ky. 485, 13 S.W. 73 (1890)	29
<i>Vance v. Courier-Journal</i> , 95 Ky. 41, 23 S.W. 592 (1893)	29
<i>Sharp v. Bowler</i> , 45 S.W. 90 (1898)	29
<i>McClintock v. McClure</i> , 171 Ky. 714, 188 S.W. 867 (1916)	29
<i>Browning v. Commonwealth</i> , 116 Ky. 282, 76 S.W. 19 (1903)	29
<i>Democrat Publishing Co. v. Harvey</i> , 181 Ky. 730, 205 S.W. 908 (1918)	30
Elder, <i>Kentucky Tort Law: Defamation and the Right of Privacy</i> (Michie, 1983) §1.11 (G), P. 213	30, 32
<i>Baskett v. Crossfield</i> , 190 Ky. 751, 226 S.W. 673 (1921)	31
<i>Stewart v. Williams</i> , 218 S.W.2d. 948 (Ky., 1949)	31

### III

THERE ARE MULTIPLE GROUNDS WHEREBY A PRIVATE DEFAMATION PLAINTIFF MAY SHOW ABUSE OF THE QUALIFIED PRIVILEGE UNDER KENTUCKY LAW, WHICH MAY PROPERLY BE VIEWED AS SUPPLEMENTAL TO "IMPLIED MALICE," OR AS ALTERNATIVE SUBSTITUTES FOR IT.

<i>Elder, Kentucky Tort Law: Defamation and the Right of Privacy</i> (Michie, 1983) §1.11 (G), P. 213	34-35
<i>Stringer v. Wal-Mart Stores, Inc.</i> , 151 S.W.3d. 782 (Ky., 2004)	36, 39
<i>Browning v. Commonwealth</i> , 116 Ky. 282, 76 S.W. 19 (1903)	36
<i>Harstad v. Whiteman</i> , 338 S.W.3d. 804 (Ky. App., 2011)	37, 39
<i>Cargill v. Greater Salem Baptist Church</i> , 215 S.W.3d. 63 (Ky. App., 2006)	37, 38
<i>Restatement 2d of Torts</i> , §596, comment a (1977) (citing §600-605A)	37, 38, 39
<i>Ball v. E. W. Scripps Co.</i> , 801 S.W.2d. 684 (Ky., 1990)	38
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	38
<i>Holdaway Drugs, Inc. v. Braden</i> , 582 S.W.2d. 646 (1979)	39

#### IV

APPELLEE TOLER PRESENTED SUFFICIENT EVIDENCE SHOWING THAT APPELLANT SUD-CHEMIE ABUSED OR WAIVED ITS QUALIFIED PRIVILEGE IN THIS CASE TO GET HIS CASE TO THE JURY, SO THAT THE CIRCUIT COURT'S DIRECTED VERDICT AGAINST HIM AT THE CLOSE OF HIS EVIDENCE WAS REVERSIBLE ERROR.

<i>Stringer v. Wal-Mart Stores, Inc.</i> , 151 S.W.3d. 782 (Ky., 2004)	44
<i>Baker v. Clark</i> , 186 Ky. 816, 218 S.W. 280 (1920)	44

<i>Browning v. Commonwealth</i> , 116 Ky. 282, 76 S.W. 19 (1903)	44
<i>Miller v. Howe</i> , 245 Ky. 568, 53 S.W.2d. 938 (1932)	44
<i>Johnson v. Langley</i> , 247 Ky. 387, 57 S.W.2d. 21 (1933)	44
<i>Restatement 2d. of Torts</i> §596, comment a (1977) (citing §600-605A)	44, 45
<i>Holdaway Drugs, Inc. v. Braden</i> , 582 S.W.2d. 646 (1979)	45

V

UNDER THE CIRCUMSTANCES OF THIS CASE, THE JURY DID NOT NECESSARILY DETERMINE THAT THE DEFAMATORY STATEMENTS AT ISSUE WERE TRUE.

<i>Commonwealth Department of Highways v. Thomas</i> , 427 S.W.2d. 213 (Ky., 1967)	46
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## STATEMENT OF THE CASE

### A Note to the Reader

The late great Elmore Leonard once wrote that one of the secrets of good writing is to leave out the parts of the story that the reader is likely to skip over.

As happens frequently, this rule conflicts with legal ethics in this case. The Appellee in this case, Joe Toler, has an absolute duty to recite the relevant facts of this case in this portion of his Brief. This despite the fact that the following portion of this Brief is almost identical to relevant parts of the Statement of the Case in Toler's Brief as Appellee in case no. 2013-SC-000002-D, *Joseph Toler v. Sud-Chemie, Inc., et. al.* Only the respective appellations of the parties have been changed.

So, if the reader is confident of his or her grasp of the material that follows due to having read it previously, he or she may conscientiously skip it. And the Appellant and his attorney will, they hope, have complied with both the rules of good writing and legal ethics.

### Pre-Trial Procedural and Legal History

The Plaintiff/Appellee, 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 individual Defendants Glen Shull, Jude Ware, Mike Watson, Don Votaw, and Bob DeWeese had falsely accused him of uttering racist statements in the mutual workplace of the parties, Defendant/Appellant Sud-Chemie, Inc. He alleged that Sud-Chemie was also liable for the defamatory remarks because of a republication by company management. Toler also claimed 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 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 republished these defamatory reports to his boss, Bill Furlong, the Sud-Chemie plant manager, who fired Toler (TR, Pp. 507-514).

The case had been 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).

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 Appellee 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 Appellee, Joe Toler, is a high school graduate. He began working for the Girdler Chemical Company, which later became United Catalysts Company and finally Appellant 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. Sud-Chemie manufactures industrial catalysts using various ovens, mixers, furnaces, mills, and grinders (1:33-1:33:50). The work is dangerous and requires the use of goggles, respirators, and protective suits (1:37:10-1:37:40). The plant 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 duties 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; Appellee'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 of Toler's 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).

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 Defendants) 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 Appellee'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).

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 (Appellee's Trial Ex. 2).

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 sent 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 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 Appellee's Trial Exhibit #1 (2:00).

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 Appellee's proof, the Defendant Sud-Chemie moved for a directed verdict. Its attorneys argued that the Appellee 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 Appellee 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 Appellee 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 Appellee 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 an Appellee 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 then testified. Their testimony is irrelevant to this appeal, since it had no effect on the Circuit Court's directed verdict upon behalf of Appellant Sud-Chemie at the close of Toler's evidence.

### Instructions to the Jury

The Circuit Court's jury instructions are the issue in Joseph Toler's appeal in case No. 2013-SC-000002-D. Along with Toler's proposed and rejected instructions, the Circuit Court's instructions to the jury are relevant to this appeal for two reasons:

1. They indicate the legal standard that the Circuit Court applied in considering Sud-Chemie's motion for a directed verdict; and
2. Toler's proposed instructions illustrated his theory of the case in opposition to Sud-Chemie's motion for a directed verdict.

\* \* \* \* \*

At the conclusion of all of the evidence, the Appellee Toler 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; Appellant's Brief, APX, Tab F). They required that the Appellee 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 Appellee complains with malice from the falsity alone of the statement, (TR, P. 743; Appellant's Brief, APX, Tab F, P. 3).

Appellee'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 Appellee. 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; Appellant's Brief, APX, Tab G, P. 2).

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 Appellee 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).

The Court entered judgment on the jury verdict on September 1, 2009 (TR, Pp. 783-784; Appellant's Brief, APX, Tab A).

The Appellee, 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 Appellants' accusations that Toler had uttered racist remarks in the workplace (Opinion of the Court of Appeals, Appellant's Brief, APX, Tab B Pp. 20-21).

Of course, Appellee 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 Appellee a technical burden of proof in that respect. *This does not require any greater degree of proof by the Appellee 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 (*Id.*, Tab B, 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” (*Id.*, Tab B Pp. 17-18; the Court omitted the internal citations found in *Stringer*).

Of course, the Appellee Toler believes that the Court of Appeals was wrong to approve the Circuit Court’s instructions to the jury upon claims against the individual Defendants. Other than as previously indicated, this particular issue need not concern us in this appeal.

Before Toler could file his ultimately successful motion for discretionary review on the instructions issue, 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).

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. He sought a reversal and remand for a new trial on the Circuit Court's judgment for the individual Defendants, 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 v. Whiteman*, 338 S.W.3d. 804 (Ky. App., 2011).

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. However, the Court of Appeals approved jury instructions that encompassed the legal liability standards for overcoming the qualified privilege articulated in *Harstad*; hence, Toler’s appeal in case no. 2013-SC-000002-D.

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. Again, this is Toler’s responsive Brief in what is now Sud-Chemie’s appeal.

## ARGUMENT

### The Issues

Was the Circuit Court’s granting Appellant Sud-Chemie’s motion for a directed verdict upon Appellee Joe Toler’s defamation claim at the close of Toler’s presentation of evidence correct? There are sub-issues:

1. Did the Circuit Court use the right legal standard in evaluating Toler's proof that Sud-Chemie had abused its qualified privilege in repeating the individual Defendant's accusation that Toler had uttered racist statements in the workplace?

2. If no, what standard should the Circuit Court have applied in evaluating Toler's evidence on this issue; and did Toler's proof satisfy this standard?

Of course, in answering these questions, we must first acknowledge the legal standard that applies to any motion for a directed verdict, at both the trial and appellate level.

#### Standard of Review for a Directed Verdict

This standard was set out in *Gibbs v. Wickersham*, 133 S.W.3d. 494, 495 (Ky. App., 2004), and repeated verbatim by the Court of Appeals in this case (Appellant's Brief, Tab B, Pp. 11-12):

The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue, or there are no disputed issues of fact upon which reasonable minds could differ.

Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of the evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party

against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice," In such a case, a directed verdict should be given. Otherwise, the motion should be denied.

It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. While it is the jury's province to weigh evidence, the Court will direct a verdict where there is no evidence of probative value to support the opposite result, and the jury may not be permitted to reach a verdict based on mere speculation and conjecture.

Clearly, this standard contemplates the use of circumstantial evidence; indeed such evidence may by itself withstand a motion for a directed verdict even if it is not to the degree that expels all other probabilities as an explanation for an individual's behavior, so long as the circumstantial evidence is logical and reasonable, *Kelly v. Walgreen Drug Stores*, 293 Ky. 691, 170 S.W.2d. 34 (1943).

This rule is especially applicable in defamation cases where the qualified privilege is involved, since the applicability or abuse of the privilege almost always turns upon the defendant's state of mind, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 2686, 105 L.Ed.2d. 562 (1989).

As Justice Rehnquist wrote in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 709, 103 S.Ct. 1478, 1482, 75 L.Ed.2d. 403 (1983), citing *Edginton v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885):

The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

With these principles in mind, we should now examine the particular issues of this case.

## I

### THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD TO APPELLANT SUD-CHEMIE'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF APPELLEE TOLER'S EVIDENCE.

There is a dispute between the parties to this case as to what legal standard the Circuit Court applied upon Appellant Sud-Chemie's motion for a directed verdict at the close of Appellee Toler's presentation of evidence.

Appellee Toler believes that the Circuit Court applied the standard that the United States Supreme Court has denominated as "actual malice." Because this term is also frequently used at common law, and because common-law actual malice is different than what the U.S. Supreme Court has called "actual malice," the parties have both referred to the Supreme Court's version of the phrase as Constitutional actual malice.

Appellant Sud-Chemie believes that the Circuit Court applied some lesser standard, although obviously fairly similar to Constitutional actual malice.

Before continuing this discussion, we should define Constitutional actual malice.

It is a term created by the United States Supreme Court (again under the appellation of simply "actual malice") to apply in cases involving public figures (i.e. individuals in the public eye because of their position in life, such as

politicians, celebrities, etc) who sue media defendants for defamation. It was first used in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Since 1964, the term has been refined and adapted to apply to situations where the Court has perceived that the speech at issue involves issues of Constitutional importance: free speech, freedom of the press, and freedom of religion.

In such cases, in order to show abuse of the qualified privilege (or the Constitutional privilege as it has come to be called) a plaintiff must show with “convincing clarity,” that the defendant published the defamatory statement of which he complains with either: 1) knowledge of its falsity; or 2) a reckless disregard for its truth or falsity, *New York Times, supra*, 376 U.S., at 285-286; see *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511, 104 S.Ct. 1949, 1965, 80 L.Ed2d 502, for use of the term “clear and convincing” evidence. In turn, “reckless disregard” requires a showing:

. . . that the defendant must have made the false publication with a “high degree of awareness of . . . probable falsity,” *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d. 125 (1984) or must have “entertained serious doubts as to the truth of his publication, *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325

*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S.Ct. 2678, 2686, 103 L.Ed.2d. 562 (1989).

As near as the Appellee Toler can figure, the Appellant Sud-Chemie has admitted that the Circuit Court applied some sort of “knowing or reckless

disregard” standard in directing a verdict in its favor. The clearest indication of this may be found at page 38 of the Appellant’s Brief, in the first paragraph.

And of course this is correct (DVD 7-21-09, 4:17:30-4:19:20)

Furthermore, Sud-Chemie seems to concede that the Circuit Court’s use of the “high degree of awareness” and “entertained serious doubts” language in its instructions means that the Court applied these standards in ruling in favor of Sud-Chemie’s motion for a directed verdict (Appellant’s Brief, Pp. 23-27).

So upon what precisely does Sud-Chemie base its argument that the Circuit Court did not apply the Constitutional actual malice standard when evaluating its motion for a directed verdict?

Sud-Chemie’s argument is based upon the fact that the Court never uttered or wrote the words “clear and convincing” in reference to Appellee Toler’s burden of proof for overcoming the qualified privilege.

This argument might have some merit but for two facts.

One is that the Circuit Judge said that Toler had to prove that Sud-Chemie had republished the defamatory remarks about Toler with a “complete disregard” for their falsity in order to get his case to the jury (DVD, 7-21-09, 4:19:20-4:20).

The other fact is that Courts applying the Constitutional actual malice standard do not instruct the jury that it must find such “malice” by “clear and convincing” evidence.

As to number one: any evidence of “complete disregard” for the falsity of a statement would certainly also show “reckless disregard” for falsity. This is

because the adjective “complete” is all-encompassing, so that it naturally includes within its meaning all less culpable mental states (intentional, knowing, wanton, and reckless).

As to number two: trial Courts apply the “clear and convincing” test *preliminarily* to submitting a case involving Constitutional actual malice to the jury.

As the United States Supreme Court held in *Bose, supra*, at 511, 104 S.Ct. at 1965, and again in *Harte-Hanks, supra*, at 686, 109 S.Ct. 2695:

. . . “[j]udges, as expositors of the Constitution” have a duty to “independently decide whether the evidence in the record is sufficient to cross the Constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of “actual malice.”

This duty arises at the directed verdict stage of any proceedings in which a defendant is entitled to the Constitutional (qualified) privilege, as this Court pointed out in *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d. 758, 771, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2502, 2512, 91 L.Ed.2d. 202 (1986).

The Circuit Court’s actual instructions in this case as to the individual Defendants precisely embodied all that a jury must be told in a case involving Constitutional actual malice. This includes the definition of “reckless disregard” for falsity as requiring that the defendant entertained serious doubts about falsity or had a high degree of awareness of falsity, *Warford, supra*.

There is no need to burden the jury with “clear and convincing” language. The cases clearly indicate that a defendant may invoke this standard not only in a motion for a directed verdict, but also on appeal. Whether the facts come within the ambit of “clear and convincing” evidence is *completely* a legal issue for the Courts, *Ball v. E. W. Scripps Co.*, 801 S.W.2d. 684, 686 (Ky., 1990).

\* \* \* \* \*

Ironically, the Circuit Court’s “complete disregard” standard was obviously even harsher than the correct “clear and convincing” standard for Constitutional actual malice cases. This is true not only because the word “complete” is absolutely all-encompassing, as we have seen, but also because in this case the Circuit Judge did no independent review *of* the evidence to determine how the “clear and convincing” standard applied. In sum, the Circuit Judge even misapplied the “clear and convincing” standard in a manner that would have prejudiced the Appellee even if the Constitutional actual malice standard applied to this case!

Which it did not, as we shall now see.

\* \* \* \* \*

The reason that the Constitutional actual malice standard did not apply in this case is that the case involves no Constitutional issues: no free speech or free press rights, no right to the free exercise of religion, no issues whatsoever arising from the First Amendment to the Constitution of the United States.

Instead, as the Court of Appeals wrote, in this case, “... the statements at issue are of a purely private concern about a private individual,” so that “... [no]

constitutional protections for free speech and freedom of the press,” are implicated (Opinion of the Court of Appeals, Appellant’s Brief, Tab B, P. 19).

As a “private” plaintiff in a case involving no need for First Amendment protections, the Appellee Toler is simply, “... more deserving of recovery than a public [plaintiff],” *Columbia-Sussex Corp. Inc. v. Hay*, 627 S.W.2d. 270, 276 (Ky. App., 1980), *dis. rev. denied* (1981), citing *Gertz v. Welch*, 418 U.S. 323.

Because of his status as a private plaintiff, Appellee Toler should *not* be required to prove Constitutional actual malice in order to show abuse of the Appellant Sud-Chemie’s qualified privilege in this case, *Warford, supra*, at 771.

Since the Circuit Court certainly believed that Toler was required to prove Constitutional actual malice (if not an even more stringent standard of proof) in order to overcome the qualified privilege in our case, its directed verdict for Sud-Chemie cannot stand. This is because, as we shall see, Toler presented more than enough evidence to meet any common-law standard for showing abuse of the qualified privilege upon a motion for a directed verdict.

Before we examine this evidence, we should attempt to answer the question of what is the correct legal standard whereby a plaintiff such as the Appellee Toler may show abuse of the qualified privilege.

## II

ALL THAT APPELLEE TOLER HAD TO PROVE IN ORDER TO GET HIS CASE TO THE JURY IN THE FACE OF APPELLANT'S QUALIFIED PRIVILEGE WAS THAT APPELLANT'S DEFAMATORY STATEMENTS ABOUT HIM WERE FALSE.

Again, the Court of Appeals held that under *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.Sd. 782, 797, 799 (Ky., 2004), the malice necessary to show abuse of Sud-Chemie's qualified privilege could be inferred from the fact that its defamatory accusations against Toler were false (Opinion of the Court of Appeals; Appellant's Brief, Tab B, Pp. 16-17). The Court of Appeals held that Toler had presented sufficient evidence of falsity, in turn, to get his case to the jury; consequently, held the Court, the Circuit Court's directed verdict for Sud-Chemie at the close of Toler's proof was reversible error.

This Court's approach to this issue in *Stringer* was not an invention; rather it was a restatement of a major strand of Kentucky opinions over the years. The following cases unequivocally stated that the malice necessary to show abuse of a defendant's qualified privilege in a common-law defamation case could be inferred from the falsity of the defendant's words defamatory per se about the plaintiff:

*Evening Post Co. v. Richardson*, 68 S.W. 665, 668 (1909);

*McClintock v. McClure*, 171 Ky. 714, 188 S.W. 867, 872-873 (1916);

*Democrat Publishing Co. v. Harvey*, 181 Ky. 730, 205 S.W. 908, 911 (1918);

*Commercial Tribune Publishing Co. v. Haines*, 228 Ky. 483, 15 S.W.2d. 306, 307-308 (1929);

*Johnson v. Langley*, 247 Ky. 387, 57 S.W.2d. 21, 25 (1933);

*Tucker v. Kilgore*, 388 S.W.2d. 112, 114 (Ky., 1965).

Of course, the Appellant Sud-Chemie, believes that this rule of law is much too friendly to defamation plaintiffs. Sud-Chemie protests that the rule permits a plaintiff to get his case to a jury simply by denying the defamatory accusation of which he complains.

A plaintiff must do more than deny that of which he has been accused. He must prove that it is false. He must raise his right hand and swear to his denial of the accusation. This is in contrast to the law in defamation cases involving unprivileged statements; in such cases it is the defendant's complete burden to prove the truth of his defamatory words, *Stringer, supra*, at 797, citing *Tucker v. Kilgore*, 388 S.W.2d. 112, 114 (Ky., 1965).

Furthermore, the modern common law has relieved the defendant of *proving* that he is entitled to the qualified privilege to the jury, i.e. by proving that he made the defamatory statement at issue in good faith, believing it to be true, and without any malice or ill will; or under circumstances that entitled him to the privilege in all respects, see *Morgan v. Booth*, 13 Bush 480, 484 (Ky., 1877), *Allen v. Wortham*, 89 Ky. 485, 13 S.W. 73, 74 (1890), *Vance v. Courier-Journal*, 95 Ky. 41, 23 S.W. 592, 592 (1893), *Sharp v. Bowler*, 45 S.W. 90, 91 (1898), *McClintock v. McClure*, 171 Ky. 714, 188 S.W. 867, 872 [Instruction Number Two] (1916).

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

The immunity of a privileged communication is an exception... he who relies on an exception must prove the fact necessary to bring himself within it

This changed, apparently with the case of *Democrat Publishing Co. v. Harvey*, 181 Ky. 730, 205 S.W. 908, 911 (1918); the Court announced that: "Any attempt to impose upon the defendant the burden of proving the absence of abuse has been deemed reversible error," see Elder, *Kentucky Tort Law: Defamation and the Right of Privacy* (Michie, 1983) §1.11 (G), P. 213. While the Court's statement was not historically accurate, it did serve to announce the law on this issue for the future.

Not only does the plaintiff retain the burden of proof upon the issue of abuse of the privilege, but the inference derived from his required proof of falsity is just that: an inference. There are no conclusive or mandatory inferences. A jury may reject any inference, including the inference of malice in a case such as this. It remains the plaintiff's burden to persuade a jury not to do this. Absent some evidence beyond falsity, his chances of success in meeting this burden will likely remain poor.

Also, the "implied malice" standard set forth in *Stringer, supra*, and earlier cases, does not preclude summary judgment or a directed verdict in every case. Appellant Sud-Chemie correctly cited *Stringer, Id.*, at 798, as follows:

Thus a directed verdict [in Defendant's favor] would be appropriate despite plaintiff's prima facie case of defamation per se if the jury could not have reasonably found both that the statements in question were false and that the [defendant] had waived any claim of privilege through abuse and/or malice (Appellant's Brief, P. 15).

As we shall see, this is *not* such a case.

Appellant Sud-Chemie cites two cases where this Court's predecessor arguably applied this rule: *Baskett v. Crossfield*, 190 Ky. 751, 226 S.W. 673 (1921) and *Stewart v. Williams*, 218 S.W.2d. 948 (Ky., 1949) [Appellant's Brief, Pp. 21-22].

The *Baskett* case was about a young Transylvania University student. One day a faculty member reported seeing the student expose himself to Lexington passers-by from the window of his dormitory room. Female pedestrians also reported sighting the young man in his natural state to University authorities.

Upon inquiry from the boy's mother, the President of the University reported all of this in two letters to the boy's father, *Id.*, at 674. He also reported that the Lexington community was so incensed at the incident, "... that it was not really wise for your boy to remain on campus," or even for him, "... to board in town;" and that, "... so many witnesses [to the indecent exposure] makes him an utterly impossible student for our student body;" leastways because of the certainty of his arrest if he sought to stay in Lexington, *Id.*

Assuming that the *Baskett* case is still good law, it illustrates the extremely probative nature of the evidence of truth and absence of malice that is necessary to support summary judgment or a directed verdict in a defamation case involving the qualified privilege.

Furthermore, the *Baskett* case arguably involved the defense of consent as much as that of qualified privilege. The Transylvania University President wrote

his letters in response to an inquiry from the allegedly offending student's family. There was no 18 year *old* age of majority when the *Baskett* case was decided and no FERPA law. University officials stood in loco parentis to their students, *Id.* at 674. Certainly, a child legally dependent upon his parents and given to the charge of what are essentially surrogate parents, may be said to have consented to communications between and among his natural and surrogate parents.

The defense of consent was more clearly illustrated in the other case cited by Appellant, *Stewart v. Williams, supra*. As Appellant indicated in its brief, this case turned on the fact that, "... the plaintiff had caused the inquiry to be put to the defendant which led to the [allegedly defamatory] utterance," (Appellant's Brief, P. 21, note 18) As Professor Elder has noted, this fact clearly indicated that the case was properly dismissed because the plaintiff had consented to the publication of the defamatory remarks about him, and not because of the existence or non-existence of the qualified privilege, Elder, *Kentucky Tort Law: Defamation and the Right of Privacy* (Michie, 1983), §1.10(B), Pp. 138-139.

While the "implied malice" standard set forth in *Stringer* does permit summary judgment or a directed verdict, it certainly requires a jury trial in more cases than any alternative standard. It is also simple to apply.

Appellant's protestations to the contrary notwithstanding, these are good things. The more complex the standard for an issue like this, the greater the temptation for trial Courts to erroneously grant summary judgment or a directed verdict, as happened in this case. §14 of the Constitution creates a Constitutional

right in our citizens to their good reputations. It seems that at a minimum when a citizen goes to the trouble to invoke the judicial process and to swear that his reputation has been falsely attacked he should ordinarily be permitted to present his claim to a jury. The short cut of summary judgment or a directed verdict should be the exception in cases such as this, and not the rule.

\* \* \* \* \*

Appellee Toler certainly cannot deny that some of our cases explicitly require a plaintiff seeking to show that a defamation defendant has abused his common-law qualified privilege to show more than "implied malice" in order to get his case to a jury.

Toler believes that his case against Sud-Chemie should have gone to the jury even under these stricter standards for showing abuse *of* the qualified privilege.

Before we discover precisely why this is true we should examine the alternative bases whereby a common-law defamation plaintiff may show abuse of the qualified privilege under Kentucky law. This is so the Court can be fully aware of all of the possibilities available to it if it chooses to reject the "implied malice" standard that it arguably adopted in *Stringer, supra*, and which Appellee has just defended.

### III

THERE ARE MULTIPLE GROUNDS WHEREBY A PRIVATE DEFAMATION PLAINTIFF MAY SHOW ABUSE OF THE QUALIFIED PRIVILEGE UNDER KENTUCKY LAW, WHICH MAY PROPERLY BE VIEWED AS SUPPLEMENTAL TO "IMPLIED MALICE," OR AS ALTERNATIVE SUBSTITUTES FOR IT.

At the outset Appellee must point out that a common-law defamation plaintiff (a private figure) may certainly show abuse of the qualified privilege by proof of Constitutional actual malice if he has such proof. So that is one alternative available to such a plaintiff, although it will probably be rarely used.

Again, this Constitutional actual malice standard is the most difficult standard articulated in the law of defamation for showing abuse of the qualified privilege. It is at the opposite end of the spectrum from the "implied malice" standard that we have just analyzed.

If the latter is indeed the proper standard, it is obvious that very few defamation plaintiffs will solely rely upon it if they have any evidence beyond the falsity of the defamatory accusation against them. They will certainly want to present their additional evidence, even if it fails to arise to the quantum of proof necessary to prove Constitutional actual malice.

We should now examine how the Courts have described the sorts of evidence beyond the falsity of words defamatory per se, that illustrate abuse of the qualified privilege.

The easiest way to do this is to look to the man who "invented the wheel" on this topic: Professor David Elder of Northern Kentucky University. His estimable

tome, *Kentucky Tort Law: Defamation and the Right of Privacy*, *supra*, §1.11(G), Pp. 214-217, catalogued the various, "... alternative grounds for a plaintiff's showing abuse," of the qualified privilege; here they are without the citations, which include at one footnote or the other every case cited by both of the parties to this case in their briefs and then some:

... publication with knowledge of falsity, or reckless disregard of falsity, publication with reckless disregard of plaintiff's rights; publication without reasonable grounds or probable cause for a belief in the truth; publication of unprivileged defamatory matter in addition to that privileged [matter]; excessive publication to a person or persons not within the privilege; motivation by "actual malice," "express malice," or "malice in fact," i.e. for a purpose other than the protection of the interest for which the privilege is accorded [to] the publisher; where the publication is unnecessary to the accomplishment of the purpose upon which the privilege is based

As Professor Elder notes, each of these methods of showing abuse of the privilege represents the obverse of one of the many reasons that the privilege exists in the first place, *Id.*, at P. 214.

There is more. Even the catalogue of reasons above does not fully describe all of the ways that a plaintiff may show abuse of the privilege. This is because, according to Professor Elder, of the ambiguity of the term "malice," whether described as "actual malice," "express malice," or "malice in fact," (or "implied malice"), *Id.*, at Pp. 218-219. However denominated, the word malice:

... has been variously used as connoting "instigated by ill will (or "from ill-will, hatred, or other wrongful motive") a commonly accepted meaning of "common law malice," as a cover-all for any of the means of evidencing "abuse" stated afore-said,<sup>1</sup> and as not

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<sup>1</sup> This is how the Appellee Toler used the term in his rejected proposed

substantively dissimilar from “implied” or “presumed” malice under the common law *Id.*

Professor Elder does not much care for this latter type of malice which, Appellee has argued, this Court adopted in the *Stringer* case. Indeed, he condemns it as, “Perhaps the most extreme and aberrant use of ‘actual malice’ and its variants,” in the common law of defamation, *Id.*

Of course, Appellee Toler disagrees with the good professor on this point and believes that the “implied malice” is a fair standard for cases such as this.

\* \* \* \* \*

Although Appellee hopes that it does not do so, this Court could use this case to announce that: 1) the “implied malice” standard that Appellee believes was articulated, in *Stringer, supra*, is simply too plaintiff-friendly; or 2) that the *Stringer* opinion did not really endorse this standard at all. The second alternative has been urged by defamation defendants throughout the last decade, although it seems pretty untenable to the Appellee.

Nevertheless, in either of these events, the Appellee Toler recommends that this Court adopt the following language from the case of *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19, 20 (1903) as a guide to how a common-law plaintiff may show abuse of the qualified privilege in a case such as the one at bar:

There must be some evidence beyond the fact of publication [of false words defamatory per se]. It may be intrinsic from the style and

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Instructions to the Jury upon his claims against the individual Defendants in this case (TR, P. 743; Appellant’s Brief, APX, Tab G).

tone of the publication. If it contains expression which exceeds the limits of privilege, such expressions are evidence of malice. Or it may be extrinsic, as by proof of actual malice or that the statement was knowingly false, or that it was made without probable cause, or in any way that fairly and reasonably tends to overcome the prima facie presumption of protection under the privilege.

This formulation is broad enough to include all of the alternate grounds for showing abuse of the privilege listed by Professor Elder, as repeated earlier in this Brief.

The use of this standard would prevent defamation defendants from asserting, as Appellant Sud-Chemie has done in this case, that there is only one standard under which a plaintiff may show abuse of the qualified privilege (in this case, according to Appellant, by showing a knowledge of falsity or a reckless disregard for truth or falsity with all Constitutional accoutrements). Even without Constitutional bells and whistles, it would be wrong to confine a defamation plaintiff to showing abuse of the qualified privilege under this knowing/reckless disregard standard.

The only arguably valid authority for the exclusive use of the knowledge/reckless disregard standard for showing abuse of the qualified privilege in a common-law defamation case is the case of *Harstad v. Whiteman*, 338 S.W.3d. 804 (Ky. App., 2011), about which more later.

In addition to *Harstad*, Appellant Sud-Chemie cited the case of *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d. 63, 68 (Ky. App., 2006) and *Restatement 2d of Torts*, §596, comment a (1977) (citing §SOO-605A). In turn, the

only other authority cited in the *Harstad* opinion was the case of *Ball v. E. W. Scripps Co.*, 801 S.W.2d. 684, 689 (Ky., 1990).

None of these authorities stands for the proposition that a private figure (common-law) defamation plaintiff is restricted in proving abuse of the qualified privilege to showing the defendant's knowledge of falsity or reckless disregard for truth or falsity.

As the Court of Appeals noted in this case, in *Cargill* the Court of Appeals, "... extended the same First Amendment protections of the media to churches when writing or speaking about public officials or figures," (Appellant's Brief, Tab B, P. 12).

The *Ball v. E. W. Scripps* case, *supra*, was a public-figure/ media defendant case in which the Court quite properly applied the Constitutional actual malice standard handed down by the U.S. Supreme Court in the case of *New York Times*, *supra*, and later related cases.

That leaves the *Restatement* as purported authority for the knowing/reckless disregard standard as the sole way a common-law defamation plaintiff should be able to show abuse of the qualified privilege.

The *Restatement* does posit the knowing/reckless disregard standard as one suitable way of showing abuse of the qualified privilege. However, it does not apparently describe this standard as requiring that a plaintiff prove the standard by "clear and convincing evidence" or by showing that the defendant "entertained serious doubts" about the falsity of the defamatory words or had a "high degree of

awareness” of the probable falsity of the words. In other words, it describes a common-law version of the standard, and not Constitutional actual malice.

Furthermore, the *Restatement* also recognizes that a plaintiff may show abuse of the qualified privilege by proof that the defendant published, “... the defamatory matter for some improper purpose,” *Restatement, supra*.

This is, of course, synonymous with the “wrongful motive” branch of the common law “actual malice” that requires a showing of “hatred, ill will, or wrongful motive,” *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d. 646, 649, note 1 [referring to Instruction No. 3], 650 (1979).

*Harstad*, therefore, stands completely alone in Kentucky jurisprudence in purportedly confining a common-law defamation plaintiff to proof of Constitutional actual malice as a means of showing a defendant’s abuse of the qualified privilege. Also, as we have just seen, it basically ignores the rich and highly-developed history of the common law on this subject, including even this Court’s opinion in *Stringer, supra*.

The Circuit Court, in our case, had to have used its crystal ball in order to parrot every aspect of the *Harstad* opinion, which was several years in the future. Doubtlessly, its clairvoyance was badly misplaced, as *Harstad* articulates principles that violate the letter and spirit of all precedents upon the issue of how a private plaintiff may show abuse of the qualified privilege. The Court of Appeals was well-justified in not agreeing with *Harstad* upon Appellant’s Petition for Rehearing.

\* \* \* \* \*

Now that we have completed our review of potentially appropriate standards for evaluating a plaintiff's evidence of abuse of a defendant's qualified privilege in a case such as this, we should see why the Appellee Toler's evidence met any one or more of these standards.

#### IV

APPELLEE TOLER PRESENTED SUFFICIENT EVIDENCE SHOWING THAT APPELLANT SUD-CHEMIE ABUSED OR WAIVED ITS QUALIFIED PRIVILEGE IN THIS CASE TO GET HIS CASE TO THE JURY, SO THAT THE CIRCUIT COURT'S DIRECTED VERDICT AGAINST HIM AT THE CLOSE OF HIS EVIDENCE WAS REVERSIBLE ERROR.

There is no dispute in this case that the Appellee Toler proved that the accusations that he had uttered racist remarks in Sud-Chemie's workplace were false sufficiently to get his case to the jury. Both the Circuit Court (DVD, 7-21-09, 3:56) and the Court of Appeals agreed with this observation (Appellant's Brief, Tab B, Pp. 18-19).

If the Court of Appeals were correct in its interpretation of *Stringer, supra*, therefore, and this Court elects to readopt or adopt the "implied malice" standard that both the Court of Appeals and the Appellee believe is articulated in *Stringer* as proper for cases such as this, then this Court should obviously affirm the Court of Appeals' opinion and remand this case for a new trial.

It should also so act if it adopts the alternative standard(s) proposed by the Appellee in the previous section of this Brief. This will become apparent by an analytical review of Toler's evidence in this case. Toler's evidence that the

Appellant Sud-Chemie abused its qualified privilege, in light of the common law principles of Kentucky law on this issue, is as follows:

1. Scott Hinrichs, the Sud-Chemie manager who republished the defamatory statements at issue in this case, had evaluated Toler's job performance before he brought about Toler's discharge from Sud-Chemie's employment; Hinrichs had given Toler the highest mark in "trustworthiness," in this document (DVD, 7-21 09, 2:28:20-2:29:20; 3:20; Plaintiff's Trial Exhibit 3; Opinion of the Court of Appeals, Appellant's Brief, Tab B, P. 3).

2. Hinrichs knew that Toler was dedicated to his very difficult job at Sud-Chemie (DVD, 7-21-09, 3:17:20-3:18) and testified that Toler had never given him any reason to doubt or mistrust him (*Id.*, 3:34:30).

3. Hinrichs was completely unacquainted with any of the individual Defendants other than in relation to their accusations against Toler (*Id.*, 3:39-3:40:30). Like many unionized manufacturing facilities, Sud-Chemie did no formal evaluations of its hourly employees.

4. Hinrichs knew or should have known that the charges against Toler of the individual Defendant Mike Watson and one-time Defendant Bob DeWeese were stale (*Id.*, 3:34-3:34:15; 3:35:30;1:57:30); He also knew that the individual Don Votaw

disliked Toler (*Id.*, 3:37:20), and that company policy required the immediate reporting of discriminatory statements (*Id.*, 3:41:30-3:42:30).

5. Hinrichs knew or should have known that Toler had never exhibited racial discrimination in the workplace. Hinrichs knew that Toler had handled the Trice incident (which gave rise to the individual Defendants' defamatory statements about Toler) correctly and that Toler had had no input into Sud-Chemie's decision to fire Trice; Hinrichs also knew that Toler was unaware of Trice's complaint of race discrimination to the EEOC and Hinrichs had never bothered to tell Toler about it (*Id.*, 3:15:45; Opinion of the Court of Appeals, Appellant's Brief, Tab B, P. 4).

6. Hinrichs knew that the allegations that Trice had made in his EEOC complaint against Toler were false 7-21-09, DVD, 2:00:40-2:01:50; 2:03:50; 3:13:10-3:13:15; 3:14:15); and yet he and Sud-Chemie management brought Trice back to work to "resolve" the Complaint and Trice's groundless union grievance.

7. Hinrichs knew that none of the individual Defendants had any personal knowledge of the Trice incident, which, in turn led the individual Defendants to make their defamatory accusations about Toler (Opinion of the Court of Appeals, Appellant's Brief, Tab B, P. 4).

8. Hinrichs knew that the individual Defendant Mike Watson engineered the allegations of racism against Toler that led to Sud-Chemie's firing of Toler in order to make sure that Alan Trice would get a "fair shake" from Sud-Chemie in his efforts to get his discharge from employment with the company rescinded (7-21-09, DVD 3:34:20, 3:37:50-3:38:30; Opinion of the Court of Appeals, Appellant's Brief, Tab B, P. 10). Toler was a convenient scapegoat for "resolving" Trice's groundless claims of unfair treatment and racism.

9. Hinrichs must have known that, as Toler testified, the union of which the individual Defendants were members and officers, "... basically [ran] the plant," at which they and Toler worked (7-21-09, DVD, 1:38-1:38:20). Thus Hinrichs had a strong motive to mollify the union in matters such as its members' complaints against Toler.

10. Hinrichs and his boss Furlong had arguably decided to fire Toler before he was given a severely truncated "opportunity" to respond to the allegations of the individual Defendants against him on April 14, 2005. At this meeting Toler had to press Hinrichs even to get Hinrichs to identify the individuals who had accused him of making racist statements in the workplace. Also, Hinrichs gave him no details other than to recite the content of the statements: no dates, times, names of witnesses (or whether or not there were witnesses),

etc. Hinrichs did not even attribute any of the statements to a particular individual (This Brief, Pp. 5-7)

This evidence, viewed in a light most favorable to Toler as it should have been upon Sud-Chemie's motion for a directed verdict, meets the requirements of some of the multiple standards that (as we have seen) exist under the common law of Kentucky whereby a defamation plaintiff may show abuse of the qualified privilege.

The standards that apply in this case include the following:

1. Publication with a reckless disregard of Toler's rights, *Baker v. Clark*, 186 Ky. 816, 218 S.W.280, 286 (1920) [#4, #5, #9, and #10, above];

2. Publication without reasonable grounds, or probable cause, for a belief in the truth of the defamatory matter(*Id.*, *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19, 20 (1903) [#1 through #10, above];

3. Publication with a reckless disregard for the truth or falsity of the defamatory matter, in its common-law sense (i.e., not Constitutional actual malice's version of "reckless disregard,"), *Miller v. Howe*, 245 Ky. 568, 53 S.W.2d. 938, 939, *Johnson v. Langley*, 247 Ky. 387, 57 S.W.2d. 21, 25 (1933); *Restatement 2d. of Torts, supra* (#1 through #10, above).

4. Publication from a “wrongful motive,” one of the three alternative prongs of “actual malice,” *Holdaway Drugs, Inc. v. Braden, supra*; or from an “improper purpose,” *Restatement, supra*, [#9, #10, above].

Even if this Court should decide that Toler was required to prove more than the falsity of the defamatory accusations against him, therefore, the Circuit Court still should not have granted Sud-Chemie’s motion for a directed verdict against him at the close of his evidence. There was abundant evidence that Sud-Chemie abused its qualified privilege by republishing the defamatory accusations about Toler beyond Toler’s proof that the accusations were false, under several of the varied standards by which such abuse may be shown.

V

UNDER THE CIRCUMSTANCES OF THIS CASE, THE JURY DID NOT NECESSARILY DETERMINE THAT THE DEFAMATORY STATEMENTS AT ISSUE WERE TRUE.

Sud-Chemie has argued that the jury verdicts in favor of the individual Defendants established the complete defense of truth in this case. The basis of this argument is that the individual Defendants claim to have witnessed Toler making racist statements in the workplace; since the jury ruled against Toler and in favor of the individual Defendants it must have believed that Toler made the statements.

This argument has surface appeal. Perhaps it would prevail under different circumstances. However, in this case it must fail.

One reason it must fail is that Appellant Sud-Chemie made it for the first time in its Petition for Rehearing in the Court of Appeals. This is too late to make a substantive argument for the first time so that this Court should not consider this particular argument, *Commonwealth Department of Highways v. Thomas*, 427 S.W.2d. 213 (Ky., 1967). Sud-Chemie should have urged this argument upon the Court of Appeals as an alternative basis for affirming the Circuit Court's granting its motion for a directed verdict, but did not.

Another reason that this argument must fail is that it has no merit under the particular procedural circumstances of this case.

At the trial of this case, the jury heard Sud-Chemie's defense as part of the Appellee Joe Toler's case. Toler's lawyer spent thirty-five minutes questioning Sud-Chemie's Human Resources manager, Scott Hinrichs, about every aspect of his investigation into the individual Defendants' allegations that Toler has uttered racist statements in the workplace. When Toler's attorney had finished with Mr. Hinrichs, Sud-Chemie's attorney interrogated him.

Then the Circuit Court directed a verdict in favor of Sud-Chemie. The jury could well have concluded that the Court was putting its "seal of approval" upon Hinrich's investigation, which it was. At the very least, the jury no doubt saw the directed verdict as a strong indication that Hinrichs and Sud-Chemie were entitled to believe that the reports of the individual Defendants were, in fact, true.

Thus when the jury was presented with the question of whether or not the statements of the individual Defendants were true or false, the chances were quite

high that the Circuit Court (by its directed verdict for Sud-Chemie) had already insured that the answer would be "true." After all, if Sud-Chemie were entitled, as a matter of law, to rely upon its belief in the truth of the statements of the individual Defendants, why should not the jury be entitled to rely upon that belief as well?

The only way to insure a fair and just jury verdict in this case is for Appellee Toler's case against all of the remaining adverse parties to be tried to a jury. Also, as Appellee Toler has argued in case No. 2013-SC-000002-D, in which he is the Appellant, the Jury in the new trial should be properly instructed!

#### CONCLUSION

For the reasons stated in this Brief, the Appellee Joseph Toler requests that this Court affirm the Court of Appeals' reversal of the Circuit Court's directed verdict for the Appellant Sud-Chemie at the close of Toler's evidence, and remand this case to the Jefferson Circuit Court for a trial upon the merits of Toler's claim against Sud-Chemie.

Respectfully Submitted,

  
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