IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

OWEN SELBY,

Plaintiff-Appellant,

Vs.

Shelby Law No. 61864-TD
C.A. No. 02A01-9503-CV-00058

DR. PATRICIO ILABACA and GEORGE WHITWORTH,

Defendants-Appellees.

FROMT HE CIRCUIT COURT OF SHELBY COUNTY

THE HONORABLE JAMES E. SWEARENGEN, JUDGE

David M. Sullivan of Memphis
For Plaintiff-Appellant

Tim Edwards, James F. Horner, of Glassman,
Jeter, Edwards & Wade, P.C., of Memphis
For Defendant-Appellee, Whitworth

AFFIRMED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This is a libel suit. Plaintiff, Owen Selby, appeals from the order of the trial court

granting summary judgment to defendant, George Whitworth.[1] The sole issue as stated in plaintiff's brief is: "Whether the trial court erred in this libel action by finding plaintiff had not shown the defendant acted with 'actual malice'."

An examination of the pleadings, depositions, and affidavits filed in the cause reveals a rather bizarre factual scenario. Officer Owen Selby is assigned to the Memphis police force's motorcycle squad, a division of the police force that focuses on enforcing motor vehicle laws. On June 3, 1993, Selby stopped Dr. Patricio Ilabaca for speeding on Walnut Grove Road, close to its intersection with Mendenhall. According to Selby, after he obtained Ilabaca's license and walked to the back of Ilabaca's car to fill out the traffic summons, Ilabaca exited his car, approached Selby, and began cursing at him. Selby's complaint alleges that Ilabaca grabbed his license from Selby's hand, pushed Selby, and began to get back into his [Ilabaca's] car. Selby claims that he attempted to prevent Ilabaca from getting back into his car and when this failed, Selby reached into Ilabaca's car to turn off the ignition. Selby alleges that Ilabaca then pressed the accelerator and began to drive down Walnut Grove Road at 50 m.p.h., with Selby hanging out of the car. Selby claims that Ilabaca refused to stop his car until another car blocked Ilabaca at the intersection of Walnut Grove Road and White Station.

Not surprisingly, Ilabaca's rendition of the June 3, 1993 traffic stop conflicts with Selby's version of the event. Ilabaca's answer expressly denies that he was speeding or violating any other city ordinance when Selby stopped him. In his counter-claim against Selby and the City of Memphis, Ilabaca states that Selby stopped him in retaliation for past personal confrontations. Ilabaca claims that when Selby approached Ilabaca's car, Ilabaca objected to being stopped and asked to see Selby's superior. According to Ilabaca, Selby responded by swearing at Ilabaca, striking him in the chest, and placing Ilabaca in a choke hold. Ilabaca states that, as a result of Selby's conduct, he attempted to flee. Ilabaca claims that Selby jumped onto Ilabaca's moving car, sat on the open driver's door, and continued to kick Ilabaca as Ilabaca drove down Walnut Grove Road.

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[1] The plaintiff also sues Dr. Patricio Ilabaca for assault and battery and libel. Summary judgment was granted only to Whitworth, Ilabaca's lawyer, and the judgment was made final pursuant to Tenn.R.Civ.P. 54.02. Ilabaca is not a party to this appeal.

After this incident, police officers took Ilabaca to the Criminal Justice Center. When Ilabaca arrived at the Criminal Justice Center, Ilabaca called Whitworth, his lawyer, neighbor, and personal friend. Whitworth, who has some experience with criminal law, went to the jail and took an oral statement from Ilabaca.

At approximately 10:00 p.m. on June 3, 1993, Rob Johnson, a reporter with the *Commercial Appeal*, called Whitworth at home. The next day, June 4, 1993, Whitworth received a telephone call from reporter Angie Craig regarding the Selby-Ilabaca incident. Selby's complaint alleges that, as a result of Whitworth's responses to Johnson and Craig's questions, the following defamatory statements appeared in articles published in the *Commercial Appeal* on June 4 and June 5, 1993:

> A. Ilabaca was running in fear after Selby went crazy;
>
> B. I know this looks terrible for Dr. Ilabaca, but he is innocent. He was running for his life;
>
> C. The idea that a heart surgeon just hit this officer without provocation is ludicrous;
>
> D. The doctor was cooperating with the officer until he [plaintiff Selby] went crazy;
>
> E. Selby started yelling and kicking him [Ilabaca]. What he [Ilabaca] was trying to do was go to the precinct and protect himself.

Whitworth claims that it was his ethical duty, as Ilabaca's attorney, to respond to the *Commercial Appeal's* questions concerning his client.[2] Additionally, Whitworth testified in his deposition that he made it clear to the *Commercial Appeal* reporters that he had no personal knowledge of the events surrounding the traffic stop; rather, he was relying upon the statements made to him by Ilabaca. He also testified that although he tried, he was unable to obtain a copy of the arrest report while he was at the jail with Ilabaca.

A trial court should grant a motion for summary judgement when the movant demonstrates that there are no genuine issues of material fact and that the moving party is

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[2] Whether Whitworth's responses to questions posed by the *Commercial Appeal* violated the requirements of the Code of Professional Responsibility is not an issue before this Court.

entitled to a judgment as a matter of law. Tenn.R.Civ.P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). On a motion for summary judgment, the trial court and the appellate court must consider the matter in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party and discard all countervailing evidence. ***Id.*** at 210-11. The phrase "genuine issue" as stated in Tenn.R.Civ.P. 56.03 refers to genuine, factual issues and does not include issues involving legal conclusions to be drawn from the facts. ***Id***. at 211. In ***Byrd***, the court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. ***Fowler v. Happy Goodman Family***, 575 S.W.2d 496, 498 (Tenn. 1978); ***Merritt v. Wilson Cty. Bd. of Zoning Appeals***, 656 S.W.2d 846, 859 (Tenn. App. 1983). In this regard, Rule 56.05 provides that a nonmoving party cannot simply rely upon his pleadings but must set forth **specific facts** showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment . . . shall be entered against him." Rule 56.05 (Emphasis in original).

Prior to the decision of the Supreme Court in ***New York Times v. Sullivan***, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964), libelous statements were not accorded First Amendment protection in either the federal courts or the courts of this State. ***Memphis Publishing Co. v. Nichols***, 569 S.W.2d 412, 415 (Tenn. 1978). In ***New York Times***, the Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964).

Since the decisions of the United States Supreme Court in ***New York Times*** and its progeny, the standards for imposing liability in a suit for defamation have come to depend upon the plaintiff's status as either a private person or a public figure/official. ***Press, Inc. v. Verran***,

569 S.W.2d 435, 442 (Tenn. 1978). In ***Press***, our Supreme Court adopted the *Restatement (2d) Torts* (1977) standards for liability in a defamation suit:

> § 580A. *Defamation of Public Official or Public Figure.* One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
> (a) knows that the statement is false and that it defames that other person, or
> (b) acts in reckless disregard of these matters.
>
> § 580B. *Defamation of Private Person.* One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
> (a) knows that the statement is false and that it defames the other,
> (b) acts in reckless disregard of these matters, or
> (c) acts negligently in failing to ascertain them.

Id. at 442.

Whether someone is a private person or a public official/figure within the meaning of the rule stated in ***New York Times*** is a question of law. ***Ferguson v. Union City Daily Messenger***, 845 S.W.2d 162, 165 (Tenn. 1992), *cert. denied*, ---U.S.---, 113 S. Ct. 2931, 124 L.Ed.2d 681 (1993). Although the issue for review appears to concede that Selby is a public official, we will briefly address that point. In ***Press, Inc.***, the court stated that a public official, within the meaning of the constitutional privilege, includes "[a]ny position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family . . . ." ***Id***. 569 S.W.2d at 441. The term "public figure" encompasses:

> those who have thrust themselves into the vortex of important public controversies; those who achieve such pervasive fame or notoriety that they become public figures for all purposes, and in all contexts; those who voluntarily interject themselves, or are drawn into public controversies, and become public figures for a limited range of issues; and those who assume special prominence in the resolution of public questions.

Id.

In ***Press, Inc.***, the court held that a junior social worker, who claimed that she had been defamed by an article appearing in the local newspaper, was a public official. The article contained comments from the parents of children whom the social worker had removed from the

parents' home. The court acknowledged that the social worker ranked low in the hierarchy of state government, but stated "we do not perceive that the 'pecking order' is pertinent." ***Id.***, 569 S.W.2d at 443. The court concluded that the social worker was "the very epitome of government" to the family quoted in the allegedly defamatory article. ***Id***.

In ***Ferguson***, the court found that plaintiff, the purchasing agent for Obion County, was a public official. The court based its finding on the fact that the plaintiff's duties included substantial responsibility with regard to the county's financial and business affairs. The court stated: "The right of the press to criticize government and its agents is not bound by the niceties of titles or the legalistic definition of duties." ***Id.***, 845 S.W.2d at 167.

Although no Tennessee case has specifically considered whether a police officer is a public official,[3] courts in numerous other jurisdictions have so found. ***See*** E.H. Schopler, Annotation, ***Libel and Slander: Who is a Public Official or Otherwise within the Federal Constitutional Rule Requiring Public Officials to Show Actual Malice***, 19 A.L.R. 3d 1361, § 5[d] (1968 & Supp. 1995), and cases cited therein. Under the facts of the present case, we hold that Owen Selby is a public official within the meaning of the constitutional privilege. Selby's duties affect the lives, liberty and property of citizens, and there is little doubt that Ilabaca viewed Selby as an instrument of the government.

It is clear that in order to successfully assert a cause of action for defamation, a public official must establish that the speaker acted with actual malice. Plaintiff, in his brief, however, asserts that "Tennessee has not specifically dealt with the issue of whether the ***New York Times*** 'actual malice' standard applies in cases where the defendant is not a media organization." We disagree. In ***Trigg v. Lakeway Publishers, Inc.***, 720 S.W.2d 69, 75 (Tenn. App. 1986) the Middle Section of this Court specifically held that a non-media co-defendant was entitled to the same First Amendment protection as the media defendant. We consider this most persuasive authority which, unless overruled by the Supreme Court, will be followed by this section of the

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[3] In ***Jones v. Metropolitan Government of Nashville and Davidson County,*** No. 3-92-0151, slip op. at 4 (M.D. Tenn. June 29, 1993), Officer Jeffrey Goforth, a metro police officer, conceded that he was a public figure for First Amendment purposes. The court accepted this concession without comment.

Court.

The existence of actual malice is a proper question to be decided by a court in a motion for summary judgment. ***Trigg v. Lakeway Publishers***, 720 S.W.2d 69, 74 (Tenn. App. 1986). To defeat the motion for summary judgment, a public official plaintiff must demonstrate evidence of actual malice with "convincing clarity." ***Id***. (citing ***New York Times***, 376 U.S. at 285-86, 84 S. Ct. at 729, 11 L.Ed.2d at 710). Actual malice exists when a statement is made with knowledge that the statement is false, or with reckless disregard of whether it is false. ***Nichols***, 569 S.W.2d at 415 (quoting ***New York Times***, 376 U.S. at 279, 84 S. Ct. at 726). The trial court found that "actual malice" could not be imputed to Whitworth's responses to the questions posed by the *Commercial Appeal*. On appeal, Selby argues that Whitworth knowingly made false statements about Selby or, alternatively, Whitworth made the statements about Selby in reckless disregard of whether those statements were true.

The record is clear that in answering questions posed by *Commercial Appeal* reporters, Whitworth related his client's rendition of the events that occurred June 3, 1993, not his own. Whitworth's uncontradicted deposition testimony is that he told the *Commercial Appeal* that he had no first hand knowledge of the events which transpired between Selby and Ilabaca. We cannot agree with Selby's position that, because Ilabaca allegedly knew his own statements about Selby were false, Whitworth, consequently, had constructive knowledge that Ilabaca's statements were false. Significantly, the record reveals that Ilabaca and Whitworth were longstanding friends and neighbors. In ***Trigg***, Mr. Trigg, chairman of "Citizens for Tax Reform," demanded that a county judge resign from office. Defendant Thompson circulated a petition expressing confidence in the judge. When the petition was printed in the *Elk Valley Times*, Trigg brought suit against both the newspaper and Thompson, alleging that the contents of the petition were defamatory. In that case, this Court noted that the judge and Thompson had gone to school together and were lifelong friends. Thompson believed the contents of her petition were true, despite her admission that she did not have personal knowledge of the truth of the publication. ***Id.***, 720 S.W.2d at 75. In ***Trigg***, this Court said:

> Plaintiff must show that "a false publication was made with a high degree of awareness of . . . probable falsity . . . . There must be sufficient evidence to permit the conclusion that the defendant

> in fact entertained serious doubts as to the truth of his publication. . . . Failure to investigate does not in itself establish bad faith." ***St. Amant v. Thompson***, 390 U.S. at 731-733, 88 S.Ct. at 1325-1326, 20 L.Ed.2d at 267-268.

Id. at 75.

Similarly, in the present case, we cannot say that Whitworth should have presumed that Ilabaca's statements were false. Although Ilabaca's allegation that a police officer stopped him without reason, and proceeded to attack him, is incredible, Selby's claim that a heart surgeon assaulted him on Walnut Grove Road in broad daylight, because he received a speeding ticket, is equally amazing.

The evidence in this record does not establish, with convincing clarity, that Whitworth acted with reckless disregard for the truth when he answered questions raised by the *Commercial Appeal*. Although it is true that Whitworth had not investigated the matter prior to answering the *Commercial Appeal's* questions (the newspaper called Whitworth approximately six hours after Ilabaca's arrest), there is absolutely no evidence that Whitworth did not believe Ilabaca's version of the events surrounding Ilabaca's June 3, 1993 arrest. Moreover, even if Whitworth had read the arrest ticket or affidavit of complaint, he was not bound to believe the police officer's version of the events, nor was it his duty to suggest to the newspaper that Officer Selby's version of the events conflicted with that of his own client.

For the reasons stated herein, we hold that the trial court properly granted Whitworth's motion for summary judgment. Accordingly, the order of the trial court is affirmed. Costs of the appeal are assessed against the appellant.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE