Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01102-CV

DR. ARTHUR B. CONDE, Appellant

V.

VINCENT R. GARDNER, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 99,829

O P I N I O N

A jury found that Dr. Arthur Conde ("Conde"), appellant, made defamatory statements about Vincent R. Gardner ("Gardner"), appellee, with actual malice, and awarded Gardner $99,500.00 in actual damages and $62,500.00 in punitive damages. Conde appeals, asserting two points of error. His first point of error, however, seems to encompass two distinct arguments. First, Conde argues that the trial court erroneously excluded evidence of his status as an indemnitee. Second, Conde asserts that Gardner's counsel intentionally injected his indemnitee status in violation of the trial court's motion in limine. Lastly, in what Conde identifies as his second point of error, he argues that the

trial court erred in failing to instruct the jury that actual malice required a showing of more than the mere failure to investigate. We affirm.

Conde was the Unit Medical Director at the Ramsey I unit of the Texas Department of Criminal Justice ("TDCJ") and Gardner was a clinical pharmacist at the TDCJ. As a clinical pharmacist, Gardner reviewed the drug therapy of patient inmates, as shown in their medical records, and prepared written recommendations, called "consults," to the doctors concerning possible ways to more efficiently treat the inmates through drug treatment. The consult was only a recommendation, and the doctors were not required to follow the consult. After the doctors reviewed these consults, they were to be destroyed to ensure that such consults did not become part of the medical record.

In 1994, Conde and Gardner had a dispute regarding the treatment of a patient, Steven Blevins ("Blevins"). Conde approached Gardner about the file. Gardner reviewed the file and determined that Conde had been ordering drugs that could not be filled because of certain restrictions. Gardner then prepared a consult advising Conde of alternative medications that could be prescribed to Blevins. On the same day that Conde asked Gardner to review Blevins' file, Conde wrote the following statement in Blevins' file:

> Mr. Gardner does not agree with the line management of Dr. Conde. He D/C [discontinued] Tagamet and Carafate and Bentyl. Mr. Gardner is a pharmacist and not [illegible] attending or consult in Internal Medicine and definitely has no clinical experience. My orders will stand.

This statement formed the basis of Gardner's defamation claim against Conde. The record reflects that Conde knew this statement was false when it was made. In addition to placing the statement in Blevins' file, Conde told two nurses and another inmate that Gardner had discontinued inmate prescriptions. Lastly, Conde, encouraged Michael David, an inmate, in exchange for narcotics, to file a complaint against Gardner for discontinuing inmate prescriptions.

Conde, in his first point error, contends that the trial court should have admitted evidence about the indemnification statute for the purpose of clarifying a misconception caused by Gardner as to who would pay for any judgment. Conde contends this misconception, created by Gardner's counsel during his opening statement, was harmful per se because it injected the issue of indemnification into the trial. With regard to the trial court's exclusion of evidence on Conde's status as an indemnitee, we find that he failed to preserve error for our review.

To preserve error in the exclusion of evidence, a party must do the following: 1) attempt to introduce the evidence, 2) if an objection is lodged, specify the purpose for which the evidence is offered and specify reasons why the evidence is admissible, and 3) if the judge rules the evidence inadmissible, make a record, through a bill of exceptions, of the precise evidence the party desires admitted. *Melendez v. Exxon Corporation*, 998 S.W.2d 266, 274 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 660 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Error is not preserved as to exclusion of evidence unless the complaining party supplies the appellate court with the substance of the evidence that would have been admitted and shows its relevancy. *Penwell v. Barrett*, 724 S.W.2d 902, 907 (Tex. App.—San Antonio 1987, no writ). To properly pass on the question of the exclusion of testimony, the record should indicate the questions that would have been asked, what the answers would have been, and what was expected to be proved by those answers. *Dames v. Strong*, 659 S.W.2d 127, 132 (Tex. App.—Houston [14th Dist.] 1983, no writ).

The record reflects that counsel for Conde approached the trial court, outside the presence of the jury, and requested that he be allowed to question witnesses who worked for TDCJ regarding who represents it in grievances by inmates, and whether an indemnification statute applies to that representation. The trial court denied counsel's request. Conde's counsel, however, failed to make a bill of exceptions setting forth the specific evidence that he wanted admitted, and the relevance of such evidence. As a result, Conde has failed to preserve error for our review. Accordingly, we are left to determine

whether Gardner's counsel's statements during his opening argument, which allegedly injected the issue of indemnification into the trial, warrant reversal.

Appellant complains of the following statement: "We will not ask you for any relief or any judgment or any money from the State of Texas. This case is strictly against Arthur Conde, and he's the one we're going to ask you for the judgment against." Specifically, appellant argues that this statement impermissibly injected the issue of indemnification into the trial and according to the decision of *A.J. Miller Trucking Co. v. Wood*, constitutes harm per se which can not be cured.

In *A.J. Miller Trucking Co. v. Wood,* appellee's counsel, during voir dire examination, questioned the jury panel on whether any members of the jury panel had any connection to the insurance industry. 474 S.W.2d 763, 764 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.). The court of appeals held that "[s]uch an examination of the panel . . . violates the rule of injection of insurance into the case before the jury and is not an inadvertent reference." *Id.* at 766. We find *Wood* distinguishable from our present situation. Gardner's counsel's statement did not use the words insurance or indemnity, and in no way suggested that Conde, if found liable, would be indemnified by the State of Texas. Moreover, the statement clearly conveyed the message that Gardner was seeking a money judgment against Conde in his individual capacity. Conde argues that the misconception created is not that the State would indemnify him, but that the State would not be obligated to indemnify him. However, Conde concedes that whether or not the State of Texas indemnifies him, such a decision is left to the discretion of the Attorney General. Accordingly, the complained of statement can not create a misconception, because by Conde's own admission, the State is not obligated to indemnify him.

After evaluation of the record before us, we cannot say that the probability the alleged improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence. No other reference to indemnification, however vague or disguised, occurs anywhere during the trial, and the jury was never

made aware of Conde's possible status as an indemnitee. By failing to object and request an instruction at the time of opening statement, or at any point thereafter, appellant has waived his complaint on appeal.

Having determined that appellant has waived his right to complain regarding the trial court's refusal to allow appellant to put on evidence of his indemnification status, and Gardner's counsel's alleged improper opening statement, we overrule appellant's first point of error.

In Conde's second point of error, he contends that the trial court erred in failing to instruct the jury that actual malice required a showing of something more than the mere failure to investigate. Once again, Conde has failed to preserve error for our review.

Rule 278 provides:

> Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

TEX. R. CIV. P. 278. At the very least, to preserve error in the jury charge, the complaining party must make the trial court aware of the complaint, timely and plainly, and obtain a ruling. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451–52 (Tex. 1995); *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

The charge submitted to the jury contained the following instruction regarding actual malice:

> [A]ctual malice means knowledge by Conde of the falsity of the publication, whether orally or in writing, or reckless disregard for whether the publication was false or not. Proof that a statement was false when made by the defendant, absent any other credible evidence of malice, is not sufficient, standing alone, to establish "actual malice."

It is undisputed that appellant lodged no objection to this instruction. Conde argues, however, that he requested an instruction that contained language regarding "actual malice" which he wanted included in the charge.

Under the specific requirements of Rule 278, Conde has failed to preserve error because his instruction, while in writing, was not a substantially correct instruction. Conde requested that the jury be instructed:

> [T]he communication written in the medical records of Steven Blevins by Defendant on October 24, 1994, was privileged. When a communication is made in good faith on a subject matter in which the writer has an interest or with reference to which he has a duty to perform, to another person having a corresponding interest or duty, that communication, under such circumstances, is qualifiedly privileged. This means that such a communication cannot be the basis of a slander claim for damages against a Defendant, even though the communication may be false, unless the Plaintiff proves that the communication was made with "actual malice." A communication is made with "actual malice" and the privilege of making such communication is lost when the person making the communication knows that the matters stated are false, or acts in reckless disregard as to the truth or falsity of the statements. Reckless disregard as to the truth or falsity exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement. Malice is not implied or presumed from the mere fact of the publication, nor may it be inferred alone from the character or vehemence of the language used or found from the falsity of the statement alone.
>
> You are further instructed that failure to investigate the truth or the falsity of the statement before it is communicated, standing alone, is, insufficient to show actual malice. Negligence or failure to act as a reasonably prudent person is likewise insufficient.

Regardless of whether Conde's statements regarding actual malice were correct statements of the law, it was couched in relation to a qualified privilege, which is an

affirmative defense. *See Knox v. Taylor*, 922 S.W.2d 40, 55-56 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Conde had the burden of proving the communication was privileged, which was controverted by Gardner; yet Conde's proffered instruction assumed that the communication was privileged. An instruction that assumes a materially controverted fact is not in substantially correct form, and it preserves nothing for appeal. *Placencio v. Allied Indust. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987). Accordingly, under the strict requirements of Rule 278, Conde has failed to preserve error for our review.

The question then becomes, even though Conde has failed to follow the requirements of Rule 278, did he, at the very least, make the trial court aware of his complaint, timely and plainly, and obtain a ruling. We find that he did not.

At the charge conference, Conde made no objections to the instruction on actual malice that was submitted by the trial court. While Conde objected to instructions regarding "discretionary duties," "the reasonably prudent doctor standard," and "scope of authority," no objection was made to instruction number six regarding "actual malice." Conde did request at the charge conference that the jury be given the instruction found in his earlier charge regarding the privileged nature of the communications written in medical records, but at no time did he inform the trial court that the instruction also contained wording regarding actual malice.

> Mr. Vance: And, Your Honor, I would just submit my earlier charge in that we would request that we be given the instruction that is contained at the bottom of pages 7 and 8 where I've got them marked with stars as to the privileged nature of the communications written in medical records; and I made a place over at the very back of the – my request for you to rule on it, if it would be satisfactory. It was on 7 and 8, Your Honor. It's simply as to the privileged nature of the communication

Moreover, immediately preceding the submitted section found on pages 7 and 8 of appellant's proposed charge, was the following language:

> **ACTUAL MALICE** is defined as knowledge of the falsity of the publication or reckless disregard for whether the publication is false or not. It necessarily involves inquiry into the state of mind of those responsible for the article at the time of publication. The state of mind required for actual malice is one which prompts a person to do a wrongful act willfully—that is, on purpose to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.
>
> You are instructed that under our law even the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth.

Conde never requested that this language be included in the charge, going so far as to exclude this language from the review of the trial court by indicating that appellant was only requesting that the trial court rule on that part of the instruction marked with stars. Additionally, Conde represented to the trial court that the requested instruction was "simply to the privileged nature of the communication." At no time was the trial court ever made aware of Conde's complaint regarding the actual malice instruction contained in the submitted charge. Accordingly, Conde has failed to preserve error for our review. We overrule Conde's second point of error.

We affirm the judgment of the trial court.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.*

Do Not Publish TEX. R. APP. P. 47.3(b).

---

* Senior Chief Justice Paul C. Murphy sitting by assignment.