IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

THOMAS NATHAN LOFTIS, SR.	)	
	)	
Appellant/Plaintiff,	)	
	)	**No. M2017-01502-COA-R3-CV**
	)	
v.	)	
	)	
RANDY RAYBURN	)	
	)	
Appellee/Defendant.	)	

Appeal from the Final Judgment of the Eighth Circuit Court For Davidson County, Case No. 17C-295

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESED

INTRODUCTION

Among the more torturous aspects of the Brief of Appellee is its citation to mere motivated blogs containing *ad hominem* attacks and the listing of them among its table of "Authorities." Brief of Appellee, p. ix "Additional Authorities." The undersigned is constrained to observe that these citations are puerile, unprofessional and beneath the dignity of this Court.

The Appellee's "Statement of Facts" fails to acknowledge, indeed stubbornly ignores, the only "facts" relevant to the trial court's ruling: those contained in the First Amended Complaint ("FAC"). By moving to dismiss under Tenn. R. Civ. P. 12.02(6), the Appellee admitted to all of the allegations of the FAC, which are presumed to be true in the context of this appeal as well. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011). The purported "Statement of Facts" then devolves into mere argument and references which appropriately should be placed within a "Statement of the Case," a section omitted from the Brief.

Appellee does eventually acknowledge that one of the central arguments presented in this appeal is that the trial court failed to address the elements of false light invasion of privacy and defamation by innuendo. The Brief, however fails to explain how Mr. Loftis' FAC, assumed to have been true, fails to state a claim under the only theories presented by him.

ARGUMENT

I. MR. LOFTIS HAS WAIVED NOTHING AND THE COURT DID NOT RULE ON HIS CLAIM

The ruling of the Circuit Court was quoted at page 6 of the Brief of Appellant, including a citation to where it may be found in the Record. (R. 275). This ruling failed entirely to discuss whether Rayburn's words contained mischaracterizations or omissions, whether they portrayed Mr. Loftis in a negative and unfair light, and most importantly, whether Mr. Loftis, as a reasonable

man, would have been justified in the eyes of the community in feeling seriously offended and aggrieved by the unwanted publicity gratuitously generated by Mr. Rayburn.

Rayburn's brief does not deny that these are the well-established elements of the Plaintiff's claim. He merely states oddly that Mr. Loftis "waived" this claim by failing to cite to the record "to support the argument raised." Having stated the well-recognized elements of the tort and having cited to the ruling which is devoid of any discussion of them, it is difficult to fathom the point of this argument. How does one point to an absence, other than to observe it?

Waiver "has long been defined in the Tennessee cases as the voluntary relinquishment of a known right." *Dallas Glass of Hendersonville, Inc. v. Bituminous Fire & Marine Ins. Co.,* 544 S.W.2d 351, 354 (Tenn. 1976). Mr. Loftis did not waive his right to have his essential claim ruled upon by the trial court and nothing has been cited on behalf of Mr. Rayburn to suggest that he did. The pretentious reference by Rayburn on page 11 of his brief, that "based upon multiple rules and countless decisions of this Court, Mr. Loftis' failure to support his argument with even a single record citation necessarily results in its waiver," is nonsensical. A cursory reading of these "multiple rules and countless decisions" demonstrates not a single case supporting this argument.

Certainly an appeal must cite to pages in the record where an action appealed from is recorded. Mr. Loftis cited the ruling and noted the absence of any discussion of the elements of false light invasion of privacy and defamation by innuendo. References to the record are obviously intended to encompass citations to specific evidentiary rulings or allegedly erroneous findings of the court. If this were an automobile accident case and the trial judge had failed to charge the jury on the elements of negligence, then the citation would be to the charge and its obvious omission.

What would Rayburn have had Mr. Loftis to reference, other than the very ruling complained of?

Mr. Rayburn's brief states that this "failure" to cite to the record is "unsurprising. Presumably, this omission is explained by the fact that a citation to the trial court's actual order immediately exposes the argument as meritless." (Brief of Appellee p. 11-12). Impertinence aside, the ruling acknowledged that Mr. Loftis had filed claims for false light invasion of privacy and defamation by implication or innuendo. The court did observe that there was a "significant and substantial overlap between false light and defamation." He did not however, state what that overlap might have been; how these theories differ from standard defamation cases; apply any identified elements to Mr. Rayburn's words; state whether there were any omissions that adversely impacted a public's perception of Mr. Loftis; or, discuss whatsoever any element of these torts.

To the extent that the language cited by Mr. Rayburn was germane at all, it merely demonstrates and acknowledges the Court's failure to rule on the claims as presented.

II. THE TRIAL COURT DID NOT, BY MERE REFERENCE, DEAL WITH THE ELEMENTS OF FALSE LIGHT AND DEFAMATION BY IMPLICATION OR INNUENDO

The Brief of Appellee at p. 14 states that "Mr. Loftis appears to believe that the tort of defamation by implication has elements that differ from those of standard defamation claims." The mere "belief" of the party or the counsel is immaterial. It is the Appellate Courts of this State which have established the separate nature of Mr. Lofts' claims, and yes, they do differ.

In a Brief rife with cavalier citations to supposed authorities, the Appellee states that "...the tort of defamation by implication or innuendo is a subset of defamation that carries all of its elements." *Id.* He cites *Grant v. Commercial Appeal*, 2015 WL 5772524, at *12 (Tenn. Ct. App. Sept. 18, 2015) for this proposition.

The Brief cites these words from *Grant*: "For defamation by implication, a plaintiff must prove all elements of defamation ..." but the quotation is intentionally incomplete. It continued

"...including that a statement is provably false – **either because it is a false statement or leaves a false impression.**" *Id.* (Emphasis in original)(citing *Corey v. Pierce Cnty*, 154 Wn. App. 752, 761-762 (Wash. Ct. App. 2010).

Immediately preceding the misleading quote provided by Appellee's language from this Court which demonstrates the premise of the Appellant:

"Defamation by implication occurs when statements that are true are nevertheless actionable if they imply facts that are not true." *Grant* at *12 (citing *Aegis Sciences Corp. v. Zelenik,* 2013 WL 175807 at *11 (Tenn. Ct. App. Jan 16, 2013).

The *Grant* Court elaborated on important differences:

> "'Defamation by implication' is false suggestions, impressions, and implications arising from otherwise truthful statements. Defamation by implication arises not from what is stated but from what is implied when a Defendant juxtaposes a series of facts so as to imply a defamatory connection between them or (2) creates a defamatory implication by omitting facts that the Defendant may be responsible for the defamatory implication. [...]."
>
> *Id.*

The *Grant* Court cites *Zius v. Shelton*, 2000 WL 739466 (Tenn. Ct.App. June 6, 2000), a case in which the implication of suggestions made in a newspaper editorial "could be found to be detrimental to (the Plaintiff's) reputation...". *Id.* at *13 (citing *Zius* at *1).

The *Grant* Court unequivocally stated:

> Tennessee law provides that courts reviewing defamation complaints should consider whether the statements could be harmful to the plaintiff's reputation. Here, we must conclude that the implication that Mr. Grant is a dishonest businessman could cause harm to his reputation in the community. A statement will be deemed capable of defamation "if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Grant v. Commercial Appeal, Supra* at *14. (Emphasis added).

The *Grant* Court then cited to *McWhorter v. Barre*, 132 S.W.3d 354 (Tenn.Ct.App. 2003) as "guidance." In *McWhorter*, a letter from the Defendant stated that the Plaintiff was medically

unfit to be a pilot. The Court concluded that the letter "was capable of being understood as defamatory because it held the plaintiff up to ridicule and carried an element of disgrace." *Grant* at *14 (quoting *McWhorter* at * 365). According to the Court, the words used in the letter, taken at their "plain and natural import," were capable of defamatory meaning because they held the plaintiff up to disgrace and ridicule *as a pilot*." *Id.* (Emphasis added).

The words here attributed to Mr. Rayburn portray the Plaintiff as an incompetent leader who is responsible for incompetent line cooks in the Nashville restaurant industry. He was held up to disgrace and ridicule in his chosen profession. His reputation was in impugned.

The best evidence that this is true is that Mr. Rayburn believed it himself. His name had been attached to the school. He felt it necessary to start "at the top" by removing Mr. Loftis in order to protect his own reputation in the same community.

If Mr. Rayburn's reputation were threatened by mere association with Mr. Loftis, how can it plausibly be argued that these hasty generalizations failed to harm the reputation of Mr. Loftis himself?

A better indication of the distinctions to be drawn between defamation claims and defamation by innuendo is that the *Grant* Court affirmed dismissal of the Complaint as to the defamation claim but reversed the dismissal with regard to the defamation by implication claim. *Id.* at *1. This was expressly "[b]ecause the Article is capable of harming Mr. Grant's reputation as a businessperson, it will also likely 'deter third persons from associating or dealing with him.' " *Id.* at *14 (citing *Biltcliffe v. Hailey's Harbor, Inc.*, 2005 WL 3860164, at *4 (Tenn.Ct.App. Oct. 27, 2005).

III. THE TRIAL COURT NEVER APPLIED THE ELEMENTS OF FALSE LIGHT INVASION OF PRIVACY OR DEFAMATION BY INNUENDO TO FACTS IN THE FIRST AMENDED COMPLAINT.

The question is not whether Rayburn spoke truthfully in some context. The question is not whether Rayburn's words were "defamatory." The question is whether a person in the position of Mr. Loftis would have found the words to have been highly offensive to him as a reasonable man. The question is whether he was reasonable in being as offended, as was Mr. Rayburn, when he thought blame for poor work performances could be laid as his own feet. He was entitled to a ruling that measured the alleged facts against the elements of the torts.

Rayburn's Brief argues that describing someone as "incompetent" is a "non actionable statement of opinion." He contends, with his habitual failure of analysis and tendency to generalize, that "court after court has held without qualification" this to be the case. Brief of Appellee, p. 17.

As this Court will see, for most of the case law advanced on behalf of Mr. Rayburn not only is there not a plethora of cases as suggested, but they are not even holdings within this jurisdiction and are cited with such imprecision as to, shall we say, cast them all in a false light. The *Am. Hermitage Capital, LP v. Gonzales* case, cited at footnote 84, is a Texas opinion. The case was brought by a mortgage company on the basis of defamation and tortious interference. The principles of false light and defamation by innuendo were not discussed.

In the second non-binding Texas case cited, *Einhorn v. LaChance*, 823 S.W.2d 405, 412 (Tex. App. 1992), the Court described references to the Plaintiff as incompetent being "assertions of pure opinion." The *Einhorn* Court nonetheless found that "a statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule or financial injury." *Einhorn v. LaChance*, 823 S.W.2d at 410, 411. The Court found, under Texas

law, that an exception to the general rule that a defendant's pleading of special damages was required *except* that words "sometimes become actionable if they refer to a person engaged in a *particular business or profession* where they charge him with fraud, incorrect dealings, or *incapacity*, and tend to *injure him in his trade or occupation, employment, or business*." *Id.* (emphasis added).

The Texas Court found that the words were part of a "real dispute, the outcome of which affects the general public or some segment of it in an appreciable way" *Id.* Plaintiffs had been referred to as "incompetent, trouble makers, and liars", which in the context of the debate in question was not capable of proof, one way or another. Consequently, an absolute constitutional privilege applied to the words. *Einhorn v. LaChance*, at 413. In other words, this was a public debate, essentially political in nature. The case at bar is not.

The remaining cases cited in footnote 84 are of the same ilk. They concern other issues, did not involve claims of false light or defamation by innuendo, are based on foreign law, and in any event are not binding on this Court.

This case does not involve a fact-free, mere conclusory assertion that a person is "incompetent." The allegations of this complaint refer to a series of alleged facts suggested by Randy Rayburn. The only means he had to do something about the rampant incompetence of line cooks in Nashville was to replace "the man at the top," Tom Loftis. (R. 11, 75).

More pertinent is this Court's case of *Patterson v. Grant-Herms*, 2013 WL 5568427 (Tenn. Ct. App. Oct. 8, 2013). The Defendant had characterized the Plaintiff's performance as a flight attendant as the "WORST" because she was not allowed to board at the same time as her four-year-old daughter. *Id*, at *1. The Defendant argued that the statements were not "highly offensive" and were statements likely to have been uttered by airline passengers for decades. *Id.* at *4.

This Court observed:

"This argument, however, does not address the threshold question of whether the statements themselves put Ms. Patterson in a false light; that is, was there such a 'major misrepresentation of [her] activities that serious offense may reasonably be expected to be taken.'" *Id.* (citing Restatement (Second) of Torts § 652e, comment c). The Court found, in language directly applicable to the case at bar, as follows:

> "Thus, the falsehood involved in a false light action 'may consist in dissemination in matters which, while technically true, give an objectively false impression, where the communicator fails to modify the statement with amplifying facts that modify the statement that create a less objectionable impression corresponding to full reality.'"
>
> *Id.* at *5 (citing Russell G. Donaldson, Annotation, False Light Invasion of Privacy-Cognizability and Elements, 57 A.L.R 4th 22, § 13 (Cum.Supp.2012); *Eisenstein v. WTFV-TV, News Channel 5, LLC* 389 S.W.3d 313, 317-318 (Tenn. Ct. App. 2012).

The Plaintiff in *Grant-Herms* was not accused of being responsible for laying waste to the entire restaurant industry in Nashville, Tennessee through the placement of feckless employees who graduated from the program of which he was in charge. She was found to have stated a claim simply because it placed the Plaintiff in a position affecting her livelihood and suggested that she behaved in a manner which would affect the perception of others of her as a flight attendant. Therefore, a serious offense might reasonably have been expected to have been taken.

IV. RAYBURN'S "ADDITIONAL GROUNDS"

In section B of Brief of Appellee, Mr. Rayburn's arguments have passed from the careless or improper use of citations to pure casuistry.

A. MR. LOFTIS'S CLAIM IS NOT TIME BARRED.

This lawsuit is premised upon a publication in the Tennessean dated March 2, 2016. (R. 74, FAC ¶ 12). Mr. Rayburn oddly argues that the allegation that these words were "told to" a Tennessean reporter somehow established a six-month statute of limitations period for slander

commencing upon an unidentified date. Of course nothing in this records contains a date upon which Mr. Rayburn (who denies the words were his in any event) actually said them. Nonetheless, the claim is based upon the words as published and it is at best disingenuous to argue that they were never published in a fixed form.

Appellee's citation to *Barbee v. Wal-mart Stores, Inc.*, 2004 WL 239763 (Tenn.Ct.App. Feb. 9, 2004), continues the familiar pattern of selective citations to create a false impression of holdings. It is certainly true and undisputed that the statute of limitations for slander is six months and for libel one year. This is based upon the sound reasoning that a written or broadcast publication reaches a larger number of persons and because it is contained in an indelible form, the words are not subject to loss due to the failure of recollection of hearers. Traditionally, slander was considered to be the less damaging form of defamation, as the spoken word lacks permanence, and the potential audience is limited to those who hear the statement at the moment it is uttered. *See Matherson v. Marchello*, 100 A.D. 2d 233, 239-40 (N.Y. App. Div. 1984). Published writings, however, are more permanent and have the potential to become widely disseminated and read by many. *Id.*

As Justice Cardozo eloquently stated:

> "The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident. It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence in form. The spoken word dissolves but the written one abides and 'perpetuates the scandal.'"

Ostrowe v. Lee, 256 N.Y. 36, 39, 175 N.E. 505 (1931)(internal citations omitted).

The publicity to which the plaintiff referred in *Barbee* and *Lee* contained accusations of dishonesty surrounding plaintiff's arrests for charges of which they were subsequently acquitted. The case was not dismissed because they were found to have been time barred by the Court of

Appeals. The Court found that Barbee and Lee had failed "to adduce any proof of, any instance where the Defendants publicized the arrest or prosecution of Barbee and Lee." As a result, the grant of summary judgment was affirmed, because publication is an essential element of any defamation claim. *Barbee v. Wal-mart Stores, Inc.* at *5.

Publication in this case indisputably occurred on March 2, 2016. Because the words were published in a newspaper, the statute of limitations for libel applied. It is undisputed the suit was filed within a year of the publication.

Had Mr. Rayburn expressed these words in a public meeting and they were published again more than six months thereafter, some argument on this point might be necessary.

The article is attached to the FAC as Exhibit A, and maybe found at p. 172, 173 and 174 of the Record. The context of what obviously was an interview with Rayburn was an event said to be "coming up Tuesday following the publication, called "Tennessee Flavors." It was described as an event with more than 75 vendors as a fundraiser to benefit the culinary arts program of Nashville State Community College. "And that's where Rayburn comes in," it states. (R. 172).

This was plainly an interview conducted by Myers with Rayburn as a run-up to the event. There is no evidence that these words were published at all prior to the unequivocal publication of March 2, 2016. At any rate, a new cause of action arose immediately upon the publication of the Tennessean article.

The "single publication" rule was recognized in *Applewhite v. Memphis State University*, 495 S.W.2d 190, 194 (Tenn. 1973). The publication at issue in *Applewhite* involved a publishing where "large numbers of copies of a book, newspaper, or magazine are circulated." It obviously would be extraordinarily difficult to allow multiple recoveries premised upon each copy of a book, magazine or newspaper. "Therefore we hold under Tennessee law a plaintiff should be limited to

a single cause of action based upon the *circulation of copies of an edition of a book, newspaper or periodical." Applewhite,* 495 S.W.2d at 194; *See also Swafford v. Memphis Individual Practice Assoc.*, 1998 WL 281935. The *Swafford* Court referred to language in the Restatement (Second) of Torts § 577A, as quoted in *Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446 (5th Cir. 1998):

> The Restatement of Torts (2d) § 577A appears to diverge from the single-publication rule and its Comment in subsection (1) when it states that "each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises."

Id. at *7 (Emphasis added).

The *Hyde* Court adopted the Restatement's formulation, which the *Swafford* cited with approval. *Swafford* concerned information stored in a computer databank. This information was not in the public domain. "Unlike the mass publication of a book, magazine or television commercial," the Court found, "it is unlikely that more than a handful of individuals or any entities would gain access to information stored in the database." *Swafford v. Memphis Individual Practice Assoc.*, at *8.

This proof is devoid of evidence that Mr. Loftis or indeed anyone else in Nashville other than Mr. Myers knew of the defamatory words of Randy Rayburn at the time they were uttered. Because the elements of the single publication rule do not apply, the cause of action nonetheless would have accrued when the significant publication broadcasting these words to the world was made by the Tennessean. Mr. Loftis had no reasonable way to discover the defamatory words until that publication.

While it is true that every issue sold of the Tennessean containing the defamatory language did not create a new cause of action, the publication itself indisputably did.

Rayburn's "publicity" argument directly contradicts his argument on the statute of limitations. The Appellee argues that the first element of a false light claim is publicity. The

Restatement (Second) of Torts Comment (a) to § 652D, observes that "publicity," involves communication,

> "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of communication that reaches, or is sure to reach the public."
>
> Thus it is not an invasion of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."

Assuming the applicability of this language, Mr. Loftis' claim for false light invasion of privacy could not have accrued until its publication in the Tennessean.

Mr. Rayburn then incongruously argues that he did not communicate the statements at issue. (Appellee Brief, at p. 28). This is in the face of an express allegation in the FAC that he did, and the statements were published in the Tennessean. (R. 74).

He then continues his parade of improbable arguments by stating that the words in the article did not "concern" Mr. Loftis (Appellee Brief, at p. 5). This is a bit difficult to fathom, in that the article mentions Mr. Loftis by name and states that because something had to be done to save from catastrophe the obviously unfeebled restaurant industry in Nashville from the profusion of incompetent line cooks discharged from Nashville State and Rayburn had to "start at the top" by seeing that Mr. Loftis was fired. (R. 80).

Appellee then argued in Section D (Appellee Brief, at p. 31) that the statements had "long been in the public domain." He remarkably characterized the discussion of Loftis as concerning "prior matters of longstanding public record." (Appellee Brief, at p. 32). Of course, Counsel does not cite to <u>any</u> "long standing public record" except to state that Mr. Myers was present at a public meeting in February, 2015, following which Mr. Loftis was terminated. (Appellee Brief, at p. 32, R. 41).

Counsel for Mr. Rayburn ignores, however, Paragraph 7 of the FAC that in February, 2015, Plaintiff attended a Nashville State Advisory committee meeting at which Defendant Randy Rayburn and Tennessean reporter Jim Myers were present. "There was no discussion of any complaint of any graduate not being qualified. The annual advisory committee meeting was considered an opportunity for an update on the status of the program." (R. 165).

B. RAYBURN IS NOT IMMUNE FROM SUIT

It should first be observed that defense of this case has not been assumed by the Attorney General of the State of Tennessee. There is no proof in this record that Rayburn is employed by or received compensation from the State.

At pages 32 and 33 of his Brief, Counsel claimed that Mr. Loftis "adopted this position himself" before filing a lawsuit and cites a letter to the Board of Regents.

The letter in question was from the undersigned to Mr. Donald R. Ungurait, Associate General Counsel for the Tennessee Board of Regents. It has not been authenticated and is not evidence in this record. The purpose plainly was to discuss some friendly resolution of the controversy. The letter constituted settlement discussions and would be inadmissible under T.R.E. 408.

The letter recounts that Rayburn had told the writer that President Van Allan had told him that Mr. Bill Freeman intended to sue him. (R. 141, 142). The letter states the writer had disabused him of this notion, but the greater part of the conversation concerned obvious personal antagonism between Rayburn and Freeman. (R. 141, 142).

To the extent this letter was even admissible evidence, it also observed that Rayburn claimed that some meeting had been held at some unidentified time in which criticisms of the program and/Loftis were conveyed. The writer responded: "I told him there is no record of such

a meeting, and that such a meeting, if it concerned public business and included deliberations, would be in violation of the Sunshine law." Counsel for the Board of Regents insisted that Rayburn had not acted on behalf of the institution. (R. 76, FAC, ¶ 23, 24).

The words were not uttered in the context of the judicial or quasi-judicial proceeding. Mr. Loftis was not a public figure. This record contains no factual basis for the argument nor any law in support of it.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING A TRANSCRIPT OF A MERE ORAL ARGUMENT TO BE FILED AND BY ORDERING MR. LOFTIS TO BEAR THE COST IN PREPARING IT.

The approach of counsel for Mr. Rayburn in this lawsuit from the inception has been this: if a fight can conceivably be identified, however attenuated, then it must be picked.

In this vein, Mr. Rayburn insisted that a transcript of oral argument should be filed with the Circuit Court for transmission to this Court. Of course, this case was decided on a motion brought pursuant to Rule 12.02(6) Tenn. R. Civ. P. No evidentiary hearing has been conducted in this case. No evidence exists aside from the allegations of the complaint.

No conceivable utility for a transcript of the oral argument before Judge Jones exists. None have honestly been given. Yet Mr. Rayburn filed "Notice that a Transcript or Statement of Proceedings is to be Filed," replete with tedious citations to cases involving judicial admissions by counsel. (R. 281, 282, 283). This "statement of proceedings" was tendered to the Court as an attachment (R. 283). The notice alleges that "...counsel for the Plaintiff adopted the position that the Defendant was speaking as the 'voice of the Board' when making the statements that Plaintiff's amended complaint were tortious." (R. 282). This supposed judicial admission was not stated in the notice, because none exists.

Eight (8) days later, Judge Jones entered an order, R. 285, 286, without motion or hearing, providing that the "Transcript of Evidence" from the July 10, 2017 hearing would be filed with the Clerk, transmitted with the Record, and that the expense of the preparation of this "transcript of evidence" would be assessed to Mr. Loftis.

Appellant then filed a Motion to Alter, Amend and to Set Aside this order, R. 287 because no "evidence" had been taken and none was contained in the "transcript."

In response, Rayburn's counsel changed the Court's characterization of the transcript from that "evidence" to "proceedings." (R. 290).

Rayburn's counsel argued pointlessly that judicial admissions may be deemed evidence. While this may be true in some circumstances, the only actual citation to the "transcript of evidence," now renamed "transcript of proceedings" was at p. 25, line 18. (R. 290).

In the Brief of Appellant, lines 14-22 were quoted in their entirety. This hardly constitutes a "judicial admission" or indeed an admission of any kind. In response to a question from the Court, the undersigned stated "well they are describing him as the 'voice of the school'..." See Brief of Appellant, p. 12. How quoting the offending article in response to a question from the Court as to who "they" are might conceivably be viewed as a "judicial admission" is not, and cannot be explained.

It is certainly correct that the standard of review for this particular action of the Trial Court is one of abuse of discretion. Even in this context, the Defendant's brief could not refrain from its pattern of conflating words and concepts and thereby improperly citing a case. The Appellee cited *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (S.Ct. 1993) for the proposition "the applicable standard, however, is whether the Trial Court *extraordinarily* abused its discretion." (Brief of Appellee, p. 37, 38).

The Supreme Court in *Bradshaw* quoted Rule 24(e), including the final sentence therein: "absent extraordinary circumstances, determination of the Trial Court is conclusive. If necessary, the Appellant or Trial Court may direct that a supplemental record be certified and transmitted." The Court stated that the purpose of Rule 24 is best served in recognizing that the Trial Judge is in the best position to determine which matters are necessary "to convey a fair, accurate and complete account of what transpired with respect to those issues that are the basis of appeal." *Bradshaw v. Daniel* at 869.

In observing that the Trial Court's determination will not be disturbed "absent extraordinary circumstances" the Court is merely stating the abuse of discretion standard. Nowhere in *Bradshaw* nor in any other case submitted by the Appellee has there ever been a holding that there must be found an "extraordinary" abuse of discretion. Are not all abuses of discretion "extraordinary?"

Discretion was plainly abused in this matter because the colloquy between Court and counsel with regard to the contents of the offending article cannot conceivably be shown as material to any issue to be raised in this appeal, and the words on their face contain no admission or stipulation. They were tendered in bad faith.

Despite having been asked to explain in the context of Appellant's Motion to Alter, Amend, the Court gave no reason whatever for including the oral argument in the record or for assessing the expense of it to the Appellant. Something that cannot be justified on its face and which carries no justification enunciated by the Court is, respectfully, a text book example of "abuse of discretion."

V. MR. RAYBURN HAS NO BASIS WHATSOEVER FOR THE ASSESSMENT OF ATTORNEY'S FEES PURSUANT TO T.C.A. § 29-20-113.

The cited statute provides that attorney's fees shall be awarded "...if a claim is filed with a Tennessee or Federal Court...against an employee of the State or of a Governmental entity of the State in the persons' individual capacity, and the claim arises from actions or omissions of the employee acting in an official capacity or under color of law..."

Mr. Rayburn was not and is not an employee of the State of Tennessee and there is no evidence whatever in the record to say that he was or is. His conduct in placing the Plaintiff in a false light was not done in his official capacity or under color of any law. This was an ego driven interview which he gave to a newspaper reporter. In the absence of a fee shifting statute that actually applies, or some agreement by contract, or the existence of a common fund, Tennessee law does not permit the award of attorney's fee to a prevailing party. *Cracker Barrel Old Country Stores, Inc. v. Epperson*, 284 S.W.3d 303, 308-309, 312-313 (Tenn. 2009).

Mr. Rayburn asserts that a claim for sanctions was not raised in the Trial Court. The Trial Court failed to consider any of the arguments and simply denied the Motion to Alter or Amend. There could have been no basis for seeking sanctions in the Trial Court because Rayburn prevailed on the motion. This is the very decision argued by Loftis to have been an abuse of discretion.

Finally, the Briefs regardless of the outcome, plainly show that serious legal issues have been presented to this Court. Regardless of the fervor with which counsel for Rayburn disagrees with the points raised and regardless of the volume at which he chooses to raise them, there is no basis whatever to determine that this appeal is frivolous in any respect.

Mr. Loftis has argued that the Trial Judge has failed to rule on the essential elements of his claim. This Court may choose to reverse or to affirm on whatever basis it deems proper, but it is absurd, even churlish, to argue that this appeal is frivolous.

CONCLUSION

Appellant Tom Loftis Jr. reiterates his request that the Trial Court's dismissal under Rule 12.02(6) be reversed and that this matter be remanded to the Circuit Court for Davidson County for further proceedings consistent with the ruling of the Court. Appellant further asks that the lower court's order permitting a transcript of oral argument, and assessed to him of the cost of the transcript be set aside as an abuse of discretion, and that sanctions be awarded because no "judicial admissions" were ever made known to the Circuit Court or to this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via electronic mail and by United States Mail, postage prepaid, upon the following:

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On this 26th day of January, 2018,

W. Gary Blackburn