

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE

THOMAS NATHAN LOFTIS, SR.     \*  
                                  \*  
                          Plaintiff,     \* Case No. 17C-295  
                                  \*  
vs.                                 \*  
                                  \*  
RANDY RAYBURN,                 \*  
                                  \*  
                          Defendant.     \*  
                                  \*                 July 10, 2017  
\* \* \* \* \*                         \*  
\* \* \* \* \*

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE KELVIN D. JONES

**Transcript of proceedings**

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                                  615-351-6293

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A P P E A R A N C E S

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1 THE COURT: All right. Good afternoon.

2 Please be seated.

3 MR. HORWITZ: Thank you.

4 MR. BLACK: Thank you.

5 THE COURT: Okay. This is the matter of  
6 Thomas Nathan Loftis, Sr., Plaintiff, versus Randy  
7 Rayburn, Defendant, Case Number 17C-295, here today on  
8 the defendant's motion to dismiss. And we have  
9 received the pleadings filed by -- by both defendant  
10 and plaintiff.

11 All right. Please.

12 MR. HORWITZ: Thank you, Your Honor. Good  
13 afternoon, Daniel Horwitz of the Nashville Bar. I'm  
14 here with my co-counsel, Mr. Alan Sowell, on behalf of  
15 the defendant in this matter, Mr. Rayburn, who is with  
16 us here today as well.

17 We're here this afternoon on Mr. Rayburn's  
18 Motion to Dismiss the Plaintiff's Complaint For Failure  
19 to State a Claim Upon Which Relief Can Be Granted.

20 Your Honor, I am well aware that in the  
21 typical case when a defendant comes up here and stands  
22 before you and tells you that there are eight separate  
23 reasons why a plaintiff's complaint must be dismissed  
24 it usually means there are only one or two good ones.

25 Respectfully, Your Honor, this is not a

1 typical case. And there are, in fact, eight separate  
2 reasons why the plaintiff's complaint must be dismissed  
3 outright and should never see the light of the day.

4 To begin, though, I do want to note that this  
5 is a defamation case, and that defamation complaints  
6 are subject to heightened scrutiny at the motion to  
7 dismiss stage because of their capacity to chill free  
8 speech.

9 As a result, our Supreme Court and our Court  
10 of Appeals have held repeatedly that the preliminary  
11 question of whether a statement is capable of a  
12 defamatory meaning presents a question of law to be  
13 determined by this Court.

14 Precedent also dictates that courts owe no  
15 deference whatsoever to a plaintiff's own  
16 characterizations of the allegations in his complaint,  
17 which is crucial in this particular case because the  
18 article at issue simply does not say what the plaintiff  
19 claims it says.

20 Further, to avoid frivolous litigation over  
21 statements that a plaintiff merely finds annoying,  
22 offensive or embarrassing, a statement must also hold a  
23 plaintiff up to public hatred, contempt or ridicule,  
24 and carry with it an element of disgrace before it can  
25 legally be deemed actionable.

1           For this Court's convenience, we have attached  
2 a very thorough and recent opinion offered by  
3 Judge McClendon to our motion to dismiss, that details  
4 the heightened scrutiny that applies to defamation  
5 cases. And I have an additional copy here as well if  
6 it would be useful.

7           Your Honor, this plaintiff's complaint in this  
8 case contains two overlapping theories of relief: The  
9 defamation by implication claim, and a false light  
10 claim.

11           Defamation by implication carries all of the  
12 elements of defamation. And our Court -- Court of  
13 Appeals has observed that there is also significant and  
14 substantial overlap between false light and defamation.  
15 Because the plaintiff's complaint does not satisfy all  
16 or even most of the elements of either theory, however,  
17 his complaint should be dismissed.

18           The first fatal deficiency of the plaintiff's  
19 complaint is that he has sued the wrong person. Any  
20 defamation claim requires a plaintiff to prove that the  
21 defendant communicated the defamatory statement rather  
22 than somebody else.

23           In this case, the plaintiff's complaint is  
24 premised upon a single news article attached to it as  
25 an exhibit. Critically, that article makes clear that

1 it was written by Jim Myers and that it was published  
2 by the Tennessean.

3 Mr. Rayburn, for his part, was not even quoted  
4 in the article and no statement contained in the  
5 article is attributed to him. Thus, having neither  
6 written the article in question, nor published it, nor  
7 even been quoted in it, Mr. Rayburn is simply the wrong  
8 defendant.

9 The second fatal deficiency in the plaintiff's  
10 complaint is that the vast majority of the statements  
11 that he complains about do not even reference him. Let  
12 me just read some of the statements the plaintiff has  
13 sued over, verbatim. Here's the first one:

14 "Rayburn recognized the need for qualified  
15 line cooks in Nashville every day in his kitchens of  
16 the old Sunset Grill, Midtown Café, and Cabana, so he  
17 decided to do something about it by dedicating himself  
18 to helping build the Culinary Arts Program at what used  
19 to be called Nashville Tech."

20 In addition to being completely innocuous, I  
21 respectfully submit that the statement contains no  
22 mention of Mr. Loftis whatsoever.

23 Statement two: "Rayburn will tell you that  
24 helping build the Culinary Arts Program at Nashville  
25 Tech hasn't been easy." Same problem, innocuous

1 statement and no mention of Mr. Loftis at all.

2 Here are the next two: "When Rayburn enlisted  
3 the help of local restauranteurs and chefs to offer  
4 feedback on the program and the quality of its  
5 graduates, the reports he got back weren't flattering.  
6 And if the election had gone a different way it might  
7 have affected funding for the school."

8 No mention of Mr. Loftis in these statements  
9 either. Simply put, nearly all of the statements that  
10 the plaintiff complains about do not even reference  
11 him. His -- his complaint fails as a result.

12 Your Honor, the third fatal defect in  
13 Mr. Loftis' complaint is that none of the statements in  
14 the article is even remotely capable of a defamatory  
15 meaning, as a matter of law.

16 As noted earlier, whether the statements in  
17 the plaintiff's complaint are capable of a defamatory  
18 meaning is a question of law for  
19 Your Honor to decide on its own following an  
20 independent review.

21 As a result, I urge Your Honor just to take a  
22 look at the article itself rather than the plaintiff's  
23 fantastical characterizations of it which bear  
24 absolutely no resemblance to reality.

25 As the plaintiff himself characterizes the

1 article, though, his complaint still fails as a matter  
2 of law. The plaintiff essentially advances two  
3 arguments on this point. First, he claims that the  
4 article makes him out to be -- and I'm quoting here --  
5 "incompetent." Second, he claims that the article  
6 implies that if his brother-in-law had been elected  
7 mayor, it might have caused him to retaliate.

8           The problem is that precedent establishes very  
9 clearly that calling someone incompetent is a  
10 nonactionable opinion. We've cited half a dozen cases  
11 that stand for that proposition, which I have here as  
12 well.

13           I'll just read the holdings. This is American  
14 Heritage Capital versus Gonzalez, 436 S.W.3d 865: "A  
15 statement expressly calling someone incompetent is a  
16 nonactionable statement of opinion."

17           Another, 190 S.W.3d 899: "A statement  
18 implying a coworker is incompetent is not a statement  
19 of fact, but rather a nonactionable opinion."

20           This is 750 F.2d 970, this is out of the DC  
21 Circuit, citing precedent that concluded that "the term  
22 'incompetent' as applied to a judge was too vague to  
23 support a claim of liable."

24           This is 823 S.W.2d 405: "References to  
25 appellant as incompetent are assertions of pure

1 opinion. These terms of derision considered in context  
2 are not capable of proof one way or the other.  
3 Therefore, as to each of these statements the absolute  
4 constitutional privilege applies."

5 This is 299 Ill. Appellate 3d 513: "Fired  
6 because of incompetence is a nonactionable opinion.  
7 There are numerous reasons why one might conclude that  
8 another is incompetent.

9 One person's idea of when one reaches the  
10 threshold of incompetence will vary from the next  
11 person's." In some -- calling someone "incompetent" --  
12 which it should be emphasized the article does not  
13 actually do -- is not actionable.

14 The plaintiff's second allegation fails for  
15 the same reason. Simply stated, a hypothetical  
16 assertion about what someone might have done in the  
17 future if a different reality had unfolded is also  
18 nonactionable. We've cited half a dozen cases in  
19 support of that proposition as well.

20 And it's also worth noting that the subject of  
21 the hypothetical prediction here is the plaintiff's  
22 brother-in-law Bill Freeman, who is not a party to this  
23 case, and Mr. Loftis cannot sue on his brother-in-law's  
24 behalf.

25 Your Honor, the fourth fatal problem with the

1 plaintiff's complaint is that none of the statements  
2 could have been made with reckless disregard for their  
3 falsity. We know this because in this extraordinary  
4 case the plaintiff does not even allege that any  
5 statement in the article is false. And that failure  
6 probably makes this lawsuit unprecedented.

7           In fact, rather than claiming that the  
8 statements at issue were false, the plaintiff himself  
9 actually believes that they are true. For example, the  
10 plaintiff himself pleads that he was fired. He also  
11 pleads that the board that terminated him received  
12 complaints about the quality of his program's graduates  
13 from local chefs.

14           Simply put, the plaintiff cannot premises a  
15 defamation claim of a false claim -- false light claim  
16 on statements that he himself acknowledges are true.

17           The fifth problem with the plaintiff's  
18 complaint is that it could not plausibly have injured  
19 his reputation. Tennessee law requires that statements  
20 be read as a person of ordinary intelligence would read  
21 them.

22           With all due respect to opposing counsel, here  
23 no person of ordinary intelligence would or even could  
24 have inferred the fantastical meanings that the  
25 plaintiff is claiming. Nothing in the article comes

1 even close to holding him up to public hatred or  
2 disgrace. As a result, the article is not actionable.

3 The sixth fatal defect of the plaintiff's  
4 complaint is that the statements at issue are not  
5 capable of being proven false. Opinions cannot be  
6 proven false, nor can hypothetical predictions about  
7 future events that never transpired.

8 And as noted before, the plaintiff is not even  
9 alleging that anything in the article was false. He  
10 actually admits that the most critical statements that  
11 he's complaining about are true.

12 The seventh fatal deficiency in the  
13 plaintiff's complaint is that Mr. Rayburn is immune  
14 from this lawsuit because he is a public official.  
15 Nashville State Community College Foundation is a  
16 public entity that is under the purview of the Board of  
17 Regents. It is a public foundation incorporated under  
18 Tennessee's Public Foundation Statute, and Mr. Rayburn  
19 is a member of it.

20 And despite his protestations, Mr. Loftis has  
21 previously acknowledged this fact. We know that  
22 because his demand letter to the Board of Regents just  
23 a few months before this complaint was filed said as  
24 much.

25 Quoting from that demand letter which I have

1 here as well, "The circumstances and context of these  
2 remarks strongly suggest that Mr. Rayburn was speaking  
3 on behalf of the college and he served on the board at  
4 the time."

5 As a result, I simply ask this -- this Court  
6 to reach the uncontroversial conclusion that the  
7 plaintiff said what he meant and meant what he said in  
8 the demand letter that he sent to the Board of Regents  
9 just a few months before this lawsuit was filed.

10 Eighth and finally, the last fatal deficiency  
11 in the plaintiff's complaint is that it is time barred  
12 by the statute of limitations due to the Single  
13 Publication Rule.

14 The plaintiff himself pleads the statements  
15 that give rise to this complaint had previously been  
16 made or discussed during meetings at which several  
17 people, including a Tennessean reporter, were present.

18 Under the Single Publication Rule the statute  
19 of limitations begins to run when such a mass  
20 publication is first communicated. Because the  
21 communications referenced in the article took place  
22 well over a year before the plaintiff's complaint was  
23 filed his claims are time-barred.

24 I recognize the plaintiff's counsel has  
25 attempted to respond to this problem by asserting that

1 the Single Publication Rule is difficult to fathom.  
2 Respectfully, Your Honor, it is nonetheless the law in  
3 Tennessee, and his complaint is untimely because of it.

4 In closing, Your Honor, this is not a case  
5 involving a false allegation of criminality, or drug  
6 use, or a bribe, or a false claim that someone  
7 deliberately endangered a child.

8 Instead this is a case involving a grown man  
9 who is upset about being terminated and is angry that  
10 the circumstances of his term -- termination were  
11 accurately reported by the Tennessean. That is not  
12 false light, and it is not defamation. The plaintiff's  
13 complaint should be dismissed as a result.

14 Thank you, Your Honor.

15 THE COURT: Okay. All right.

16 MR. BLACKBURN: Your Honor, Gary Blackburn  
17 with the Nashville Bar. Your Honor, I think you've  
18 previously met Mr. Kroll, who is an associate in our  
19 office. But I wanted to introduce Your Honor to  
20 Mr. Alex Hines.

21 Mr. Hines?

22 Mr. Hines is a Rising Senior at Hume-Fogg. He  
23 is an intern at my wife's General Sessions Court.  
24 She's out of town this week, so I thought if I brought  
25 him over here and let him watch what real lawyers do,

1 he'd be dissuaded from this whole idea of pursuing a  
2 legal career.

3 THE COURT: Well, welcome.

4 MR. BLACKBURN: May it please the Court,  
5 if I can start with this interesting argument that the  
6 statute of limitations has run. I'm aware of no  
7 authority in Tennessee that does not say that the  
8 statute of limitations commences -- the period  
9 commences at the time of the publication of the  
10 defamatory language attributed to the particular  
11 defendant was published.

12 There is no question here about what -- when  
13 that was. The article is attached. There's no  
14 argument made that this complaint was filed in more  
15 than a year from the date of that publication.

16 I could point out initially that, although I  
17 don't think the letter that I wrote -- which was an  
18 attempt to avoid this -- which should have been  
19 accepted by rational people -- was a demand letter, as  
20 it is characterized by counsel. That means it was  
21 expressly privileged, it was settlement discussions,  
22 and under the Rules of Evidence cannot be considered.

23 And I would raise that objection again today  
24 in the context of this motion. However, the things  
25 that were said were not attributed to Mr. Rayburn at

1 the time those things allegedly were said.

2 And the complaint points out that Mr. Loftis'  
3 personnel file was devoid of any of these; never a  
4 single person to whom these comments, if they were  
5 made, were attributed, nor was any explanation given.

6 Now, he was told that his year-to-year  
7 contract would not be renewed. Mr. Loftis could have  
8 made some claim under some other theory. A failure to  
9 renew is a violation of the law if it's based upon an  
10 illegal purpose or intention such as age  
11 discrimination, race, gender, and so forth. We didn't  
12 contend that. His contract was non-renewed.

13 He chose the graceful approach at that time  
14 and resigned in the -- in the face of having been told  
15 that he was being -- his services were being terminated  
16 at the end of that contract period. None of this  
17 implicates the statute of limitations whatsoever.

18 Counsel has cited some foreign cases, some  
19 Texas cases. Interestingly, he hasn't discussed any of  
20 the false light cases that have been cited in our  
21 breach -- our brief. In fact, the first motion that  
22 was filed in this case did not even mention false light  
23 or defamation by implication.

24 Defamation by implication would trigger some  
25 of the standards of defamation. I think that's true.

1 False light does not necessarily do so. What has been  
2 quoted in these cases and has been essentially adopted  
3 in spirit by our courts is the Restatement (Second) of  
4 Torts 652(e), which says -- I have a copy of this --  
5 I'm not sure if we provided that or not, but I do have  
6 a copy:

7           "One who gives publicity to a matter  
8 concerning another that places the other before the  
9 public in a false light is subject to liability to the  
10 other for invasion of his privacy if, A, the false  
11 light in which the other was placed would be highly  
12 offensive to a reasonable person; and B, the actor had  
13 knowledge of or acted in reckless disregard as to the  
14 falsity of the published -- the publicized matter and  
15 the false light in which the other would be placed."

16           Interestingly, in the comments, the committee  
17 comments to the restatement under Subsection B it  
18 stated, "It is not, however, necessary to the action  
19 for invasion of privacy that the plaintiff be defamed.  
20 It is enough that he be given unreasonable and highly  
21 objectionable publicity that attributes to him  
22 characteristics, conduct or beliefs that are false and  
23 so is placed before the public in a false position."

24           Now, the cases that are cited by us that are  
25 truly false light cases include, most notably, the one

1 involving former Judge Eisenstein and Channel 5 News.  
2 In that case, Judge Eisenstein was asked a number of  
3 questions. The manner in which he responded to those  
4 questions tended to suggest -- or so he alleged -- that  
5 he had intentionally hired a person in a -- in a  
6 capacity with his court who was not qualified to have  
7 that position, the -- the -- the sense being that the  
8 application for funding made to the United States must  
9 have been false because this person had not yet  
10 achieved this degree or qualification for which he  
11 should have had.

12 That was dismissed in the trial court here in  
13 this county. There was a great deal more to it than  
14 that. But that very part was dismissed, and the Court  
15 of Appeals reversed because it placed Judge Eisenstein  
16 in a position of placing him in a false light, as a  
17 person who, even though he was a judge, could have been  
18 capable of misstating things to the United States or to  
19 some -- some agency.

20 One of the curious cases had to do with the  
21 woman who was a flight attendant -- not a flight  
22 attendant, excuse me -- a -- a clerk, you know, one of  
23 these persons that allows you to board. And things  
24 were said to her by a customer, and this was published  
25 later. Frankly, if I had been Judge Binkley I

1 think I would have granted the motion too. Just --  
2 just sounded like a dustup at the airport; pales in  
3 comparison to what we've been seeing on the news in the  
4 last little -- little bit.

5 But the Court of Appeals said, no this  
6 reflected upon her, reflected upon her -- her work, and  
7 on her reputation in that -- in that work. That is  
8 important because before we were scheduled on the last  
9 occasion, we filed two cases, supplemental authority,  
10 and furnished those to opposing counsel.

11 One of those was McWhorter versus Barre -- I  
12 guess it's pronounced -- B-a-r-r-e. In this case a  
13 person had stated that the plaintiff was unfit to be a  
14 pilot. The Court of Appeals said -- this is a 2003  
15 case -- in this case: "The letter was capable, without  
16 doubt, of being understood as defamatory, constituted a  
17 serious threat to the pilot's reputation as a pilot,  
18 the only career plaintiff has ever known."

19 So that was considered sufficient in terms of  
20 the allegation in the complaint, that it was a threat  
21 to the only career he has ever known. That's exactly  
22 what our complaint alleges, that these comments,  
23 attributable to Mr. Rayburn, constituted and in fact  
24 have been a threat to the career in culinary programs,  
25 which -- which was the only thing that he had known.

1           This case also rejects the idea that opinion  
2 -- that opinion evidence, despite what Texas courts may  
3 hold, is automatically subject to protection. Now what  
4 this case says is that's not true because it has to do  
5 with a failure to disclose non-defamatory facts.

6           So if one says that, "In my opinion, John  
7 Smith is a liar," by placing the words "in my opinion"  
8 in front of that statement, that's insufficient,  
9 because in order to conclude that John Smith is a liar,  
10 then it's necessary for there to be facts from which  
11 that has been established, which were not disclosed.

12           That's precisely what we -- what we have here.  
13 Your Honor, the -- the idea that an opinion is  
14 protected in Tennessee is simply contrary to our -- our  
15 law.

16           This is in the Zius case that was also  
17 submitted: The Court said that, "Opinions are not  
18 automatically protected by the United States  
19 Constitution."

20           The restatement, followed by the Supreme Court  
21 in Milkovich -- the US Supreme Court, position is that:  
22 "An opinion may be actionable if the communicated  
23 opinion may be reasonably be understood to imply the  
24 existence of undisclosed defamatory facts justifying  
25 the opinion." So those factors are not really at play

1 in this case.

2 One of the things that has not been discussed  
3 here by counsel is his standard under Rule 12. These  
4 are discussions of things which might have more  
5 meaning, and Your Honor may be in a better position to  
6 determine them, if this were on a Rule 56 motion. Not  
7 only do we not have discovery, we don't even have an  
8 answer filed in this -- this case yet, only these --  
9 these motions.

10 The complaint alleges things that in the  
11 context of this discussion today are true. That is to  
12 say that the sense of a Rule 12 motion is: Here's all  
13 of these things, assuming for the sake of my motion,  
14 their truth, their accuracy, then you still haven't  
15 stated a claim. That concession not only has not been  
16 made, but the absurd argument has been made that  
17 somehow Mr. Loftis has -- has agreed with these various  
18 things. That's -- you won't find that in the  
19 complaint.

20 As to whether this involves Mr. Rayburn, I'm  
21 not going to discuss it further, but I have a factual  
22 basis for those statements based upon a conversation  
23 that I've had with -- Mr. Rayburn will recall. But in  
24 this article it states -- it -- it quotes Mr. Rayburn  
25 as stating that, "It hasn't been easy" -- that is, his

1 work in the -- in this business. "When he sought the  
2 help of local restaurateurs and chefs to offer  
3 feedback on the program and the quality of his  
4 graduates he was"--

5 THE COURT: Wait, now, which quote, again?

6 MR. BLACKBURN: I'm sorry. It's on Page 15 --  
7 excuse me -- Paragraph 15 of the complaint. Now, we  
8 attached the entire article to the--

9 THE COURT: I have the article. But where in  
10 the article is the quote, again?

11 MR. BLACKBURN: Okay. Well, let me -- I was  
12 reading from the complaint. Let me turn to that, which  
13 is Exhibit A. Your Honor, let me -- since we're  
14 returning to the article, if I may, if I could go just  
15 chronologically as--

16 THE COURT: Sure, sure.

17 MR. BLACKBURN: -- those -- as it's stated.

18 On the very first page, where the Exhibit A is  
19 marked, in the third paragraph from the end, it states  
20 -- Mr. Myers states that he's "written before about the  
21 dearth of qualified line cooks in town, from our best  
22 restaurants to the hotels and convention centers that  
23 need to feed the burgeoning throngs," et cetera. Now,  
24 obviously that is a statement that Mr. Myers is  
25 attributing to himself. No disagreement there.

1           Then the next paragraph states, "Rayburn  
2 recognized this need every day in his kitchens at the  
3 old Sunset Grill, Midtown Café and Cabana, so he  
4 decided to do something about it, dedicating himself to  
5 helping build the Culinary Arts Program at what used to  
6 be called Nashville Tech."

7           That's the program that Mr. Loftis had served  
8 for many years as the chief of. They didn't call him a  
9 dean -- I'm not sure what his title was, but he was in  
10 charge of that program. He graduated from that program  
11 and had fewer than 50 students when he began, and had  
12 over 300 students by that time.

13           The -- he says -- this is the in next  
14 paragraph, it says, "To honor him, they named the  
15 school after Mr. Rayburn." Then the next sentence  
16 says, "However, Rayburn will tell you it hasn't been  
17 easy." Now, we've alleged in this complaint that the  
18 words that are here such as this are Mr. Rayburn's  
19 words told to Mr. Myers and published by him.

20           For our purposes today, that's an assumed  
21 fact. If we were here on a Rule 56 motion, we might  
22 have some dispute over that. But there is no dispute  
23 today in the context of a Rule 12 motion. "When he  
24 enlisted the help of local restaurateurs and chefs to  
25 offer feedback on the program and the quality of its

1 graduates, he reports that -- the reports he got back  
2 weren't flattering. The program was simply turning out  
3 unqualified students."

4 Now, we have had an entire program universally  
5 turning out unqualified students, so that every person  
6 who graduated from or who had taken classes there and  
7 left and went into the food industry were unqualified,  
8 every single one of them.

9 On the next page it says that, "In the face of  
10 this crisis," he says, "Rayburn didn't flinch."

11 THE COURT: That's -- but that's not what it  
12 says, though. Is that -- is that the suggestion?

13 MR. BLACKBURN: I beg your pardon?

14 THE COURT: The suggestion that the program  
15 did not turn out qualified students?

16 MR. BLACKBURN: Yes. He said--

17 THE COURT: "The program was simply turning  
18 out unqualified students," and so that's your--

19 MR. BLACKBURN: Yeah. "The program was simply  
20 turning out unqualified students." So--

21 THE COURT: Exclusive -- exclusively?

22 MR. BLACKBURN: That's the only thing that  
23 could be inferred from these words. It says, "When he  
24 enlisted the help of the local restaurateurs and chefs  
25 to offer feedback on the program and the quality of its

1 graduates, the reports he got back weren't flattering.  
2 The program was simply turning out unqualified  
3 students." There's no qualification to that statement  
4 in the article.

5 THE COURT: Is that Mr. Rayburn's statement,  
6 or is this the statement of the -- the chefs who  
7 provided this -- this feedback, their reports?

8 MR. BLACKBURN: This is -- this is a statement  
9 that Mr. Rayburn made, according to the complaint, that  
10 was then published. He is characterizing -- he is  
11 characterizing what he says that he has heard from  
12 unidentified people. So there are additional facts yet  
13 to be discovered. I understand the distinction, but we  
14 have to have discovery to resolve that distinction, if  
15 that's the case.

16 But the next sentence is: "In the face of  
17 these" 'charges' -- we'll call them, these statements  
18 that are made -- it says, "Rayburn didn't flinch,  
19 because a career of running successful restaurants  
20 teaches you how to cut losses and to move on quickly."  
21 And then it talks about having the name on the building  
22 and his involvement.

23 The next sentence -- paragraph says -- now,  
24 he's not flinching. What's he going to do because he's  
25 hearing these reports? Is he going to investigate it?

1 Is he going to determine the truth of that? Is he  
2 going to say, "Tell me the names of these people"? Is  
3 he going to determine that they even graduated from  
4 there? No. What he says, and this article is: "They  
5 started by cleaning house from the top by removing  
6 director Tom Loftis."

7 Now, the only inference that could be made is  
8 is that you have a problem. It's being said that the  
9 program is turning out incompetent people, or  
10 unqualified people, and that Rayburn didn't flinch, and  
11 he's going to confront this, and the way to confront  
12 this is by removing Tom Loftis.

13 It then says, "It was a politically"--  
14 THE COURT: Now, wait, but it says -- it  
15 didn't say -- he says "they." Who's the "they" in  
16 "They started by cleaning house"?

17 MR. BLACKBURN: Well, they're describing him  
18 as the -- as the voice of the school, as the board, as  
19 the -- the person for whom the school is named --  
20 named. And the next paragraph begins with, "Rayburn's  
21 group knew they needed fresh blood." That's what they  
22 knew.

23 Now, is he stating an opinion that's someone  
24 else's that he dissents from? That's not what the --  
25 not what the article says. He is not distinguished

1 from these things at all, and he's the one that was --  
2 who -- who is described as not having flinched at this  
3 difficulty.

4 Now, for the purpose of -- of Rule 12, I think  
5 a fair inference from this is that Mr. Rayburn was the  
6 person behind the dismissal of Mr. Loftis, but this is  
7 not an employment case. This is a false light case.  
8 And even if this is the -- this happens to be the words  
9 of other people, it's Mr. Rayburn who's passing this on  
10 to the press, to the great embarrassment of Mr. Loftis.

11 We -- in -- in a false light case, in most any  
12 defamation case, you can't cherrypick phrases or  
13 sentences; you have to look at the whole thrust of the  
14 article and what impression did it create. The  
15 impression this creates is that a school that Loftis --  
16 Mr. Loftis was in charge of was turning out incompetent  
17 students and that the only way to remedy this was by  
18 getting rid of Tom Loftis.

19 It then says that -- the "cleaning house," is  
20 what this uses. Now, I mention this because it was  
21 mentioned by counsel: "It was a politically  
22 inexpedient move last year, since Loftis was the  
23 brother-in-law of Bill Freeman who was running for  
24 mayor at the time. If the election had gone a  
25 different way, it might have affected funding for the

1 school."

2           Well, now, that's -- that's a patently false  
3 statement. Nashville State is a State of Tennessee  
4 entity. Mr. Freeman was running for mayor. Metro does  
5 not fund Nashville State -- or Nashville Tech, before  
6 it.

7           And so Mr. Rayburn, in not flinching, is  
8 taking on this imaginary threat that Mr. Freeman might,  
9 in retaliation for what he was doing, remove funding  
10 from an entity that didn't receive Metro funding. Now,  
11 why would that be in there?

12           The complaint alleges that the motivation in  
13 part behind what was done was that Mr. Rayburn had  
14 sought a position in Mr. Freeman's campaign and was not  
15 offered the position that he thought was appropriate,  
16 and he had hard feelings about that.

17           Now, I'm not taking sides as to whether --  
18 who's right or who's wrong in that. But it does supply  
19 some sort of motivation and it explains why this odd  
20 comment would be made in the middle of this paragraph.

21           Now, in any sort of defamation or false light  
22 claim, if actual malice can be proved, of course, this  
23 would be something from which a reasonable person could  
24 find actual malice. But whether that's actual or not,  
25 stating things that are false, that a reasonable

1 inquiry would prove to be false or that you know to be  
2 false, implies malice at law -- to satisfy that  
3 element, if that element is involved. That is true in  
4 malicious prosecution cases; it's true in every sort of  
5 lawsuit in Tennessee that involves malice, actual or  
6 implied.

7           This says that "Rayburn's group -- they knew  
8 they needed fresh blood." And then they started this  
9 search to find someone with fresh blood. Now, the  
10 fresh blood, that could have given -- it could have  
11 been some evidence of age discrimination. That's one  
12 of those  
13 so-called stray comments that's argued in every age  
14 discrimination case in which that's used. That's not  
15 material in this case. It does mean somebody other  
16 than -- than Mr. Loftis.

17           Now, the idea that every fault of every person  
18 who works in the restaurant community of this town --  
19 which is exploding -- it was exploding then -- is  
20 incompetent, is absurd on its face. The idea that if  
21 that were true itself that that is the fault of Tom  
22 Loftis and it only -- can only be cured by someone who  
23 does not flinch, by starting at the top and by removing  
24 the person at the top, plainly gives rise to the  
25 inference that it's his fault, that this is the case.

1 That statement is -- is untrue, and cannot possibly be  
2 demonstrated to be true.

3 Your Honor, I saw -- I saw, and -- and  
4 mentioned earlier in the year that even in January, I  
5 believe it was, there were over 90 new restaurants  
6 scheduled to be opened. Now, these probably would have  
7 included the fast-food franchises and so forth.

8 But the Court can take judicial notice that  
9 this town is exploding with restaurants, new  
10 restaurants. It is inconceivable that every single  
11 person is a graduate of Nashville Tech and that every  
12 single one of those persons is incompetent, and it is  
13 therefore the fault of Tom Loftis because he was in  
14 charge of that -- of that school.

15 The demand letter that's been attached here is  
16 plainly a suggestion that there be a means to resolve  
17 this case short of litigation. Initially there was  
18 interest expressed in that. And then the meeting which  
19 I requested was declined by the president of the  
20 school.

21 The idea that he is a state employee, that is,  
22 Mr. Rayburn is or was a state employee apparently did  
23 not occur to the Attorney General's office, which  
24 expressly denies it. If Mr. Rayburn is a state  
25 employee, where is the Attorney General today? The

1 Attorney General would be here making this argument if  
2 that were the case.

3 We allege, because it's simply true, that  
4 Mr. Rayburn is not a state employee; that they've not  
5 furnished any response that says he's been paid by the  
6 State employ -- the -- the State of Tennessee, from the  
7 State Treasury; that he is on any program of -- of  
8 benefits or retirement or any of the other things that  
9 state -- to which state employees are allowed to  
10 participate. That argument is -- is difficult to  
11 understand.

12 But at least the State of Tennessee doesn't  
13 look at it that way. And we've alleged that he's not a  
14 state employee -- for the purpose of this motion today,  
15 he's not a state employee.

16 Now, if he -- if in the context of a Rule 56  
17 motion he wants to offer sufficient evidence to show  
18 that he is a state employee, then Your Honor will be  
19 compelled to -- to look at it again. But based on what  
20 we have here today, that's -- that's an absurd sort of  
21 argument.

22 The idea, based on the cases we've cited, that  
23 is a person is unfit for what he's doing, is directly  
24 held by our courts -- not Texas -- our courts, to be an  
25 actionable statement. Now, is it possible in the -- in

1 the fullness of time that Your Honor may see evidence  
2 that causes you to question that or that a jury might  
3 look at this and cause -- and -- and be caused to  
4 question it based on Your Honor's charge? That's  
5 entirely possible.

6 But we're here today with a publication that  
7 described basically as unfit and absurdly responsible  
8 for things for which he could not possibly be -- be --  
9 to which could not possibly be attributed to him, a  
10 good and decent man who's done no harm to anybody, and  
11 who had resigned quietly, who had not filed a charge of  
12 discrimination, who acted with grace, and as a  
13 gentlemen.

14 And then he is singled out for a publication  
15 to say, "Here's the problem, we've got to fix it. We  
16 started by getting rid of Loftis." Totally  
17 unnecessary, unseemly, ungentlemenly, and defamatory,  
18 based upon facts that aren't here, facts that won't be  
19 here.

20 Now, all of these restaurateurs that have  
21 been named, many of whom are well-known, none of those  
22 persons have been quoted. None of those persons are  
23 specifically involved. None of those persons are said  
24 to have insisted on removal of Mr. Loftis or any other  
25 change at the program.

1           The idea -- oh, before I forget it -- the --  
2 the opinion that was attached from Judge McClendon, the  
3 -- the facts in that are totally separate from these.  
4 Those facts happened in the context of a political  
5 campaign. I've been involved in litigation involving  
6 unpleasant statements made in a political campaign.  
7 And our courts and our appellate courts just aren't  
8 going to deal with those right now. And I don't blame  
9 them.

10           But the person who was the plaintiff in that  
11 case was a public figure. The measure, the standard  
12 under which these comments are judged are totally  
13 different for a public figure. This is where the  
14 Constitutional issues most likely arise.

15           Can we make a negative comment about a public  
16 official? There is, really, I don't think, any other  
17 right more thoroughly protected by our constitution  
18 than the right to -- to criticize our -- our government  
19 or specific leaders, some of whom I wish would  
20 understand that today.

21           But the fact is is that those are public  
22 officials, and if they bring a lawsuit based upon  
23 criticism of them, they have to show far more than a  
24 nonpublic official -- no one has -- or public figure --  
25 no one has alleged that Mr. Loftis was a public figure.

1 Of course, they haven't alleged anything. All they've  
2 done is respond to a complaint. The complaint says  
3 that he was not, and he plainly was not. He was a man  
4 who was entitled to his privacy.

5 And having been -- had a digni -- let them get  
6 their way and have a dignified departure, he's then  
7 publicly humiliated in -- in -- in -- in words that  
8 reflect upon his career and what he has done, and the  
9 only thing that he has known, just as this pilot was in  
10 the case that I've cited, which was a Tennessee, not a  
11 Texas case.

12 So I respectfully submit, Your Honor, that we  
13 read this as a whole, and if we read this in the  
14 context of the -- of the restatement, and the comments  
15 in the restatement that I began with, then I  
16 respectfully submit that a dismissal of this on a Rule  
17 12 motion, based upon our pleading, is not sustainable.

18 This could be a different circumstance in a  
19 Rule 56, when Your Honor would have the answers to the  
20 questions that you've ably asked. We don't have those  
21 answers. We only have the allegations of the  
22 complaint.

23 I believe the responses, when they are  
24 discovered, will be favorable to Mr. Loftis, but I've  
25 been surprised many times over 45 years, so it's not

1 impossible that that will occur. But Mr. Loftis  
2 deserves the right to have discovery in this case, and  
3 to meet these defenses as they have been raised, which  
4 are most -- mostly based on -- on countervailing  
5 allegations of fact, such as the one about whether he's  
6 a state employee.

7           So we respectfully submit that the -- the  
8 motion should be granted. We should be permitted to  
9 commence discovery in this case, and this can be  
10 revisited another time when Your Honor has more than  
11 just a complaint, which for our purposes today is  
12 presumed to be true. Thank you.

13           THE COURT: Thank you.

14           All right. Mr. Horwitz?

15           MR. HORWITZ: I'll be brief, Your Honor. I  
16 think the greatest difficulty here that the plaintiff  
17 has is that he wants the article to be Mr. Rayburn's  
18 words, but they are clearly not. It is an article that  
19 is reported about him, that is not his article, that he  
20 did it not publish.

21           He also wants the article to contain salacious  
22 allegations and inferences. They just aren't in there  
23 when you actually read the article itself.

24           It was stated that we did not touch some of  
25 the false light claims that the defendant has claimed

1 do not apply here. And we did. As noted, this is not  
2 a case involving false allegations of criminality or  
3 drug use by a pilot, or a bribe accepted by someone, or  
4 a claim that a flight attendant deliberate --  
5 deliberately endangered a child -- nothing remotely  
6 like that. This is simply a case of an adult who was  
7 terminated and is upset about it, and is now here for  
8 that reason.

9           Opposing counsel stated that the plaintiff  
10 does not agree with any of the claims that we've said  
11 he agrees to. Just quoting verbatim from his own  
12 complaint, admitting that in October of 2014, Dean  
13 Karen Stevenson and the director from the Southeast  
14 Campus claimed to have been contacted by local chefs  
15 with concerns regarding the qualifications of program  
16 graduates.

17           He also admits that in March 2015, plaintiff  
18 was informed the decision had been made not to renew  
19 his contract at the conclusion of the academic year.  
20 That's what this case is about. He admits that these  
21 statements are true; they are not actionable as a  
22 result.

23           He stated that there was not a single case  
24 known to counsel in which the Single Publication Rule  
25 has been adopted in Tennessee. Several cases are cited

1 in our pleadings: Apple White versus Memphis State  
2 University, 495 S.W.2d 190, says: "The Single  
3 Publication Rule, the statute of limitations accrues at  
4 the time of the original publication. The statute of  
5 limitations runs from that date." These statements  
6 were made well in advance of this article being  
7 published, they've been out in the public domain for  
8 years. The statute of limitations has run, as a  
9 result.

10 Your Honor, opposing counsel described  
11 Mr. Rayburn as "the voice of the board," in the context  
12 of this article. At the same time they're trying to  
13 claim he's not a government employee. I do note that  
14 the statute under which we sought fee shifting here  
15 allows the Attorney General to represent a defendant or  
16 the defendant to hire private counsel. Fee shifting is  
17 appropriate in both cases when a government official is  
18 sued in their capacity as such and -- and the -- the  
19 complaint turns out to be dismissed.

20 Also note that the objection that counsel  
21 raised to the addition of the demand letter to the  
22 board, first of all, has not been raised in the  
23 plaintiff's pleadings, number one. Number two, the  
24 plaintiff himself attached half of that correspondence  
25 to his own complaint. We have a rule of completeness

1 in the State of Tennessee. We are entitled to include  
2 the first half of that correspondence with the Board of  
3 Regents.

4           Something about judicial notice was said. If  
5 we are going to do that, I'd just like to flag the fact  
6 that Nashville State Community College does receive  
7 funding from Metro. There were two public articles  
8 that we -- we noted in our -- in our response. The  
9 first one is from the Tennessean.

10           The title was, "Mayor Dean Proposes Pay Raise,  
11 \$520 Million in New Projects," and it contains the  
12 statement, "This plan calls for \$2 million to now --  
13 allow Nashville State Community College to launch a  
14 planned satellite campus." There is also press release  
15 from Nashville State thanking Mayor Berry for -- and  
16 then hoping that she continues her support for  
17 Nashville State Community College.

18           I do also want to note one final thing about  
19 the -- the demand letter that was sent, and the -- the  
20 same statements that were echoed in a Nashville  
21 Business Journal publication from a couple of weeks  
22 ago.

23           The point of this lawsuit is to coerce  
24 government action. The plaintiff would like Nashville  
25 State Community College to honor him. The notion that

1 this is not a complaint against a government official  
2 when the whole point of it is to -- to result in  
3 government action is, I -- I respectfully submit,  
4 difficult to swallow.

5 We respectfully request that this complaint be  
6 dismissed and that fees be awarded as a result.

7 Thank you.

8 THE COURT: All right. I'm going to take a  
9 few minutes and we'll be back shortly.

10 COURT CLERK: All rise.

11 THE COURT: Should be about 10 minutes.

12 (Recess taken.)

13 THE COURT: Okay. Again, this is Thomas  
14 Nathan -- Nathan Loftis versus -- oh, Sr. -- versus  
15 Randy Rayburn, defendant, Case Number 17C-295.

16 Let me see -- as a factual background, Thomas  
17 Nathan Loftis has brought this action for defamation  
18 and false light, invasion of privacy, against Mr. Randy  
19 Rayburn -- Rayburn, based upon a newspaper article  
20 written by Jim Myers and published in the Tennessean on  
21 or about March the 2nd, 2016.

22 The article was entitled -- or titled,  
23 "Tennessee Flavors Offers Way to Eat, Drink, Aid  
24 Cooking Arts." Plaintiff claims that the article  
25 contains statements spoken by the defendant, and that

1 those statements placed him before the public in a  
2 false light. Plaintiff also claims that those  
3 statements are defamatory, by implication or innuendo.

4 Plaintiff claims that as a result of the  
5 statements he has suffered great embarrassment,  
6 humiliation and emotional distress, and as a direct  
7 consequence has been unable to find comparable work in  
8 Nashville, Tennessee.

9 We are here today on the defendant Randy  
10 Rayburn's Rule 12.02(6) of the Tennessee Rules of Civil  
11 Procedure, Motion to Dismiss Plaintiff's Amended  
12 Complaint for Failure to State a Claim For Which Relief  
13 Can Be Granted.

14 And pursuant to Rule 12.02(6) of the Tennessee  
15 Rules of Civil -- Civil Procedure: "A motion to  
16 dismiss should not be granted unless it appears that  
17 the plaintiff can prove no set of facts -- can prove  
18 that no set of facts in support of the claim that would  
19 en -- entitle him to relief -- a motion for -- motion  
20 to dismiss challenges only the legal sufficiency of the  
21 complaint."

22 Now, the question of whether something is  
23 capable of conveying a defamatory meaning presents a  
24 question of law for the trial court. A trial court may  
25 determine that a statement is not defamatory as a



1 STATE OF TENNESSEE )  
 )  
2 COUNTY OF DAVIDSON )

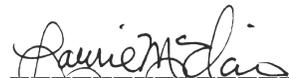
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I FURTHER CERTIFY I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of this action.

Date 8/18/2017

  
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Laurie McClain  
Transcriber

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