

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

FILED
JUN 05 2018
Clerk of the Appellate Courts
Rec'd By _____

GLENN R. FUNK.)

Plaintiff/Appellant.)

v.)

SCRIPPS MEDIA, INC., and)
PHIL WILLIAMS,)

Defendants/Appellees.)

No. M2017-00256-SC-R11-CV

Davidson County Circuit No. 16C-333

DEFENDANTS/APPELLEES' RESPONSE TO AMICI CURIAE BRIEF

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INTRODUCTION

Defendants/Appellees Scripps Media, Inc. and Phil Williams file this brief in response to the Brief of Amici Curiae pursuant to the Order of this Court dated May 21, 2018. Defendants/Appellees support the positions taken by Amici Curiae that express malice should not be an element of the fair report privilege and that the Plaintiff/Appellant's interpretation of the exception to the shield law is erroneous.

ARGUMENT

I. THE DISTINCTION BETWEEN ACTUAL MALICE AND EXPRESS MALICE REMAINS IMPORTANT.

The Amici Brief filed herein focuses on arguing that the common law concept of "express malice" is not properly a component of the fair report privilege. Defendants/Appellees agree with that position and the Amici's argument as contained in that brief. Because Plaintiff/Appellant has shifted his approach at this stage of the case, that issue is now certainly before this Court.

It cannot be said enough (although Defendants/Appellees have done so numerous times in this lawsuit) that "actual malice" as that term applies to defamation and false light claims is a much different concept from the old common law concept of "express malice."

At the trial court level and Court of Appeals, Plaintiff/Appellant argued "actual malice" was an element of the fair report privilege in order to support his argument for broad discovery of the Defendant reporter and his files. (T.R. 414-415, 871.) Plaintiff's arguments contained citations to the United States Supreme Court *New York Times v. Sullivan* case which first defined "actual malice" in 1964. *Id.* "Actual malice" for defamation actions was defined as requiring that the Defendant published the allegedly actionable statement "with knowledge that it was false or with reckless disregard of whether it was true or not." *New York Times v. Sullivan*, 276 U.S. 254, 279-

80 (1964). The trial court used that definition in granting the Plaintiff's Motion to Compel discovery into the reporter's files to search for evidence of "actual malice." (T.R. 1035-1036.)

In overturning the trial court's findings, the Court of Appeals correctly ruled in this case that:

Actual malice is not a component of the fair report privilege. Mr. Funk cannot defeat the privilege by presenting evidence of actual malice, and the defendants are not required to show an absence of actual malice in asserting the privilege. If the defendants can show the broadcasts and publications at issue were 'a fair and accurate summation of the proceedings' and that they 'displayed balance and neutrality,' they will be entitled to rely on the fair report privilege as a defense to Mr. Funk's defamation claims.

Court of Appeals Opinion at 8.

"Actual malice" has never been an element of the fair report privilege in Tennessee. *See* Appellees' Brief at 24-26. The Court of Appeals' decision is correct on that point and should be affirmed. That important concept should not be undercut by Plaintiff's arguments that serve to conflate and confuse the separate concepts of "actual malice" and "express malice."

In his arguments at the trial court and Court of Appeals, Plaintiff interchangeably relied upon cases dealing with the common law concept of "express malice." At this level, the cases that Plaintiff relies upon for its "100 years of precedent" of this Court are cases before 1964 that deal with, and only use, the term "express malice." *See* Appellant's Supplemental Brief at 6; Appellant's Reply Brief at 1. In his Application for Permission to Appeal to this Court and his Supplemental Brief (which are virtually identical), Plaintiff/Appellant has now claimed, based upon one malicious prosecution case, that "express malice" is the same thing as "actual malice."¹

¹ It is not accurate for Plaintiff/Appellant to simply attach "actual malice" in tandem when it uses the term "express malice." For example, in Plaintiff/Appellant's Reply Brief, his "100 years' worth of precedent" cases simply say "express malice." When he is arguing and not directly quoting, he uses the phrase "actual or express malice" at least thirteen times in the first five pages of his brief. Plaintiff/Appellant's grouping of the two words together with a conjunction does not make them the same or interchangeable.

Supp. Brief at 7. The discussion in that case clearly relates to the ill will or personal spite type of express malice. Appellee's Brief at 24. Plaintiff's Supplemental Brief filed herein also now specifically argues that it is "express malice" that is a component of a fair report privilege and not the "actual malice" as defined in *New York Times v. Sullivan*. Pl.'s Supp. Brief at 7, fn.2. That shift by Plaintiff puts that issue before this Court.

Defendants/Appellees have already responded to that issue in Appellees' Brief at 28 to 31 showing that express malice is not properly part of a fair report defense. Amici's Brief contains important arguments that demonstrate that the application of express malice to the fair report privilege would be unconstitutional.

II. ALLOWING EXPRESS MALICE TO DEFEAT THE FAIR REPORT PRIVILEGE WOULD IMPERMISSIBLY ALLOW PUNISHMENT FOR PUBLICATION OF TRUTHFUL INFORMATION.

The Amici's Brief correctly points out that the United States Supreme Court has held that the free speech and free press protections in the First Amendment restrict punishment for publication of truthful information about matters of public concern. Amici Brief at 6-15. The Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964) stated that "[T]ruth may not be the subject of either civil or criminal sanctions where discussions of public affairs was concerned." *Id.* at 74.

It is clear that Plaintiff's argument that "express malice" is a way to defeat a fair report privilege claim impermissibly would allow a defendant to be held liable for truthful and accurate reporting. The absurdity of Plaintiff's position concerning the fair report privilege was demonstrated during the following exchange at oral argument in this case before the Court of Appeals.

JUDGE (to Plaintiff's Counsel): So long as a newspaper – let's take an abstract example - - reports something very fair, totally accurate as to what was done in the

proceedings, but they just hate one of the parties' guts, that hatred is enough to waive that privilege.

MR. ENKEMA: Yes. And that is up to the jury.

JUDGE: Even though it was fair and accurate.

MR. ENKEMA: Even though if it is a verbatim. It is – if you're . .

JUDGE: How does that make sense?

MR. ENKEMA: It's not up to me to make the sense, Your Honor.

Transcript of Oral Argument, Court of Appeals, September 6, 2017 at 25.²

This exchange clearly shows that if Plaintiff's position is adopted, a news reporter could be held liable for fairly and "totally" accurately reporting on a public proceeding or action if he has express malice towards a person mentioned in the report. Such a position would allow for punishment of truthful speech, i.e. liability for defamation even if the reports were fair and accurate. As shown by the authorities cited in Amici's Brief, such an outcome is clearly unconstitutional.

The position Plaintiff now asserts regarding express malice would surely chill and deter important news reporting. The United States Supreme Court has said that "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; . . . *Garrison v. Louisiana, supra* at 73. The fair report privilege provides important protection for truthful reporting on public proceedings and official action.

As stated in *Lewis v. NewsChannel 5 Network, LLC*, 238 S.W.3d 270 (Tenn. Ct. App. 2007), "The privilege enables persons reporting on official actions or proceedings to broadcast, print, post, or now blog about official actions or proceedings without the fear of being subject to a

² This full transcript is attached as an addendum to the Brief. It was transcribed from the recording that is available on the website www.tncourts.gov/courts.

tort action for fair and accurate reports, even if those reports contain defamatory or embarrassing statements by governmental employees.” 238 S.W.3d at 285.

“Express malice” and the inquiries it brings with it should not be interjected into a fair report privilege case. The requirement that the report be fair and accurate protects the subjects of such reports and would allow for liability where the reporting did not meet that standard.

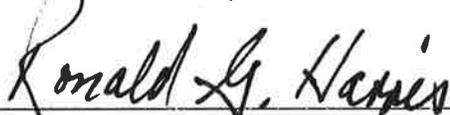
CONCLUSION

Defendants join with Amici Curiae to urge this Court that the common law concept of “express malice” should not be a component of a fair report privilege asserted as a defense in a defamation/false light case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 5th day of June, 2018.

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In The Matter Of:
Scripps Media, Inc., et al. v.
Glenn R. Funk

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I N D E X

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1 The above-styled cause came on for hearing
2 on Wednesday, September 6, 2017, Court of Appeals of
3 Tennessee, Middle Section, Davidson County, when the
4 following proceedings were had, to wit:

5 P R O C E E D I N G S

6 JUDGE 1: Thank you both very much.

7 Would you please call the next case.

8 THE CLERK: Glenn R. Funk versus Scripps
9 Media, Inc. et al.

10 MR. HARRIS: Good afternoon, Your Honors.
11 My name is Ron Harris, and I would like to reserve
12 three minutes for a rebuttal.

13 I represent the appellants in this action,
14 Scripps Media, Inc., who owns NewsChannel 5, the
15 television station here in Nashville, and the other
16 defendant, Mr. Phil Williams, their chief
17 investigative reporter.

18 My clients are the defendants in the case in
19 the trial court. It's a defamation/false light case
20 based upon two news stories that the defendants
21 published back in February of last year.

22 We're here today on interlocutory appeal on
23 two really important issues that arose in the context
24 of a motion to compel. These two issues have really
25 broad implications, not only for this case, and I say

1 for this case, not only just on the discovery context
2 that we're in, but further proceedings because of what
3 the judge has ordered. So it will come up -- this
4 issue will come up in our case as we progress both
5 with further discovery, summary judgment, charging a
6 jury, scope of proof.

7 And we also believe it's an important issue
8 for media reporting on judicial proceedings and in
9 official actions. So we do appreciate being granted
10 the interlocutory appeal.

11 The first issue is whether the concept of
12 actual malice is an element of the fair report
13 privilege. And I think it's important for -- and I
14 know Your Honors have read the briefs to know, but the
15 context that this arose in the lower court.

16 Instead of filing an answer to the amended
17 complaint, the defendants filed a motion to dismiss, a
18 motion to dismiss all claims in the amended complaint.

19 And in our initial motion papers, we
20 acknowledged, as we would have to, because of Rule 12
21 specifics, that this will be treated as a motion for
22 summary judgment. So this is a motion for summary
23 judgment. I refer to it as a motion to dismiss
24 because that's how we styled it.

25 But our primary basis for dismissing the

1 claims on the first story were this fair report
2 privilege, which has existed in Tennessee for some
3 time.

4 Now, the plaintiff, instead of filing a
5 response to our motion to dismiss -- and there never
6 has been a motion -- excuse me -- a response to our
7 motion to dismiss.

8 Instead, the plaintiff told The Court that
9 before we go forward on hearing the defendants' motion
10 to dismiss, we need to take discovery. We need to
11 take some of this broad discovery to find out about
12 the investigative file of the reporter and who they've
13 talked -- who the reporter has talked to and those
14 things.

15 Our response was to say to that, look. That
16 information, that discovery, is not relevant on our
17 motion to dismiss. It's not relevant or necessary to
18 get into it on the issues that we have raised.

19 JUDGE 2: But if it's treated as a motion
20 for summary judgment, then one of the reasons for The
21 Court not to rule on summary judgment is to allow a
22 time to do that sort of discovery, right?

23 MR. HARRIS: Yes. And --

24 JUDGE 2: You're not arguing that.

25 MR. HARRIS: No, no. I'm not arguing with

1 that at all. In fact, it didn't come up that way.

2 But they said the reason we don't want to
3 have the hearing -- the hearing was set for such and
4 such a day. They said we first need discovery.

5 And we objected to it, of course. And the
6 reason we objected to it was it's not relevant or
7 necessary at this time.

8 And their response to our response was wait.
9 It's relevant on the issue of actual malice. It's a
10 way to defeat this actual mal -- excuse me -- it's a
11 way to defeat this fair report privilege that you're
12 relying on. And that's what they raised with The
13 Court to defeat or to get their motion to compel
14 actually. And it was the basis that The Court ruled
15 on.

16 So the issue that we're here today on and
17 the issue that we hope to convince The Court is that
18 actual malice is not an element of the fair report
19 privilege claim when it's used as a defense. And our
20 position legally is that actual malice is not now and
21 never has been an issue when you're raising the fair
22 report privilege in Tennessee.

23 Some of the --

24 JUDGE 2: Actual -- whoa, whoa, whoa.

25 Actual malice is not an element of claim --

1 MR. HARRIS: No. It's not an element of the
2 fair report privilege defense claim.

3 And part of the confusion, Your Honor, below
4 has resulted from the fact that it most certainly --
5 actual malice most certainly is an element of
6 plaintiff's --

7 JUDGE 2: Okay, okay, okay.

8 MR. HARRIS: -- case in chief. He's a
9 public official. And if we ever get to that stage, if
10 they survive our motion to dismiss, then actual malice
11 is an element of his claim.

12 And if you read the lower court's opinion,
13 you see that when he's reciting actual malice, he's
14 talking about since Mr. Funk is a public official and
15 those things.

16 But we want to stand and say look. We're
17 talking about something different than the plaintiff's
18 case in chief. We're talking about the elements of a
19 fair report privilege defense.

20 JUDGE 3: A fair report privilege requires a
21 fair and accurate summation of the proceedings, right?

22 MR. HARRIS: That's correct, Your Honor.

23 JUDGE 3: The Lewis case says that reports
24 of judicial proceedings won't be shielded from the
25 privilege if the report contains a false statement of

1 fact regarding the proceeding that conveys an
2 inaccurate impression of the proceeding.

3 So what someone who wants to defeat that
4 privilege, the fair report privilege, has to prove is
5 an important inaccuracy. It doesn't matter whether
6 it's done with malice or not, does it?

7 MR. HARRIS: That's exactly right. The
8 actual malice as a term of art and as a
9 Constitutional --

10 JUDGE 3: Correct.

11 MR. HARRIS: -- principle goes to the
12 knowledge of the reporter, whether or not they had
13 actual knowledge they were reporting falsity or acted
14 with reckless disregard.

15 The actual Lewis case states, I think
16 correctly, that that's how you defeat a fair report
17 privilege, if you show that it wasn't an accurate
18 abridgment, if it wasn't an accurate summary. It
19 needs to be a fair and accurate depiction of what the
20 official action was or what occurred in the
21 proceeding.

22 JUDGE 3: So does the plaintiff here have
23 everything from which the report was made? In other
24 words, how do they gauge that the report is fair and
25 accurate? Do they have all these depositions and

1 other things that the report is claiming to be a fair
2 and accurate report of?

3 MR. HARRIS: Yes. We believe they do, Your
4 Honor. We have relied on the filings in the
5 Williamson County Court, both -- and we provided them
6 full deposition transcripts and provided the pleadings
7 and the documents that were attached to some of those
8 pleadings, that that's where the report came from that
9 was on the news story. It came from those pleadings.

10 JUDGE 1: Okay. And I guess for this
11 purpose of summary judgment then, you would have to
12 concede then that that's the complete universe of
13 where this reporting is coming from, right?

14 MR. HARRIS: The first story, and we've got
15 two stories, but the first story is coming from what's
16 been filed in the Williamson County Court.

17 And of course the Lewis case, that's one of
18 the things they say. If you pull in comments from
19 outside the record or you make your own editorial
20 comments and don't report what's accurate --

21 And that's what gives the protection to the
22 libeled plaintiff is that if he can show that, hey,
23 this wasn't a fair report at all, that's not an issue
24 down there. Or if it's not balanced and fair.

25 The Lewis case does show how you defeat the

1 privilege.

2 JUDGE 1: Okay. And the second story, that
3 is not fair report privilege. That's -- it's true is
4 what you're saying.

5 MR. HARRIS: It has an element. I think it
6 has a portion of it that is the fair report, but it's
7 mainly that there's not any dispute about the facts,
8 that the plaintiff himself has admitted the underlying
9 facts so that there's no false and defamatory
10 statement.

11 And the second part of it is the defamatory
12 nature, when you get into these characterizations of
13 someone being hyperbolic or speaking in great angst or
14 giving their opinion.

15 So it's not strictly a fair report privilege
16 on the second one.

17 JUDGE 1: And then what about -- the briefs
18 were striking in the sense that defense here has said,
19 okay. Well, there's two stories. Keep talking about
20 two stories.

21 But the plaintiffs are saying, well, it's
22 two stories plus the social media post saying, you
23 know, headline or whatever. "Must Watch These
24 Stories."

25 I mean how does that factor into the

1 calculus here?

2 MR. HARRIS: It comes in when -- plaintiff,
3 in their brief, spent a long time saying, hey, don't
4 decide this because some piece of this is going to
5 survive. And so we're going to come to actual malice
6 sooner or later.

7 It's incorrect to state that the social
8 media posts are not included in that. If you look at
9 our motion, it asks for all claims be dismissed, all
10 claims in their amended complaint.

11 If you look at our memorandum brief, we
12 specifically quote from the Twitter that they cited in
13 their amended complaint and say look. This, once
14 again, says allegations.

15 Our whole defense -- and this is not our
16 whole defense. Perhaps that's stated too broadly.
17 But our defense is what was reported as the
18 allegations that were being set forth in the
19 Williamson County case. And that's what the social
20 media said as well.

21 So our motion to dismiss is broad enough to
22 cover.

23 JUDGE 3: Okay. And so you're saying the
24 social media posts are then covered under the fair
25 report privilege also.

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1 MR. HARRIS: Yes. They're subject to the
2 same defenses of no false and defamatory statements
3 and fair --

4 JUDGE 3: I mean why it interests me is
5 obviously when this qualified privilege was first
6 developed, and it was 1871, Twitter was not even
7 thought of. And, you know, how can you be fair and
8 accurate in a Twitter post?

9 But anyway, I've taken too much of your
10 time. Go ahead, Mr. Harris.

11 MR. HARRIS: And our response, like I said,
12 is we have very much sought to dismiss all of their
13 claims, both the Twitter claims and these specific
14 news stories too.

15 Just briefly too, our position on the second
16 issue is this important news gatherer's privilege.
17 The only basis for The Court's decision not to say
18 that applied was they say we're relying -- we're
19 asserting a defense based upon the source of the
20 information.

21 And our main defense on that of course is if
22 you look at the two stories and the defenses, that we
23 very much are not relying upon a source. We're
24 relying upon the fair report privilege, and it's
25 immaterial, as long as those accurately quote what's

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1 in the record.

2 JUDGE 3: What is 208(B) aimed at?

3 MR. HARRIS: Excuse me.

4 JUDGE 3: What is 208(B) aimed at?

5 MR. HARRIS: I think it's aimed at the
6 position where a reporter -- and I'm about to exceed
7 my time, but --

8 JUDGE 3: That's okay. You can answer my
9 question.

10 MR. HARRIS: Okay. It's aimed at the
11 situation where a reporter would come in and say in
12 defense of a libel claim that this is true or that's
13 an example, but we're relying on these two sources.
14 They have told us that you did exactly what we
15 reported on. But when it comes to discovery, we're
16 not going to tell you who they are.

17 So it becomes important to know who the
18 sources are and what they said and the credibility of
19 the sources and all that so that you can't come in and
20 defend based on what the source has told you, but then
21 say no discovery on it.

22 That's not this case.

23 JUDGE 3: But here in this case, the sources
24 are known. They're the pleadings from the Williamson
25 County case.

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1 MR. HARRIS: Yes. Yes.

2 JUDGE 3: That's your position, right?

3 MR. HARRIS: Well, our position is we're not
4 relying on a source within the meaning --

5 JUDGE 3: Source. But the sources are
6 there. I mean you're not trying to deny --

7 MR. HARRIS: No, no. We're saying they
8 come --

9 JUDGE 3: Sources --

10 MR. HARRIS: -- from the Williamson
11 County -- we were saying the story is based upon the
12 Williamson County pleadings. And that's not relying
13 upon a source in the meaning of the exception of the
14 statute.

15 JUDGE 3: Okay. Thank you.

16 MR. ENKEMA: Good afternoon, Your Honors.
17 I'm John Enkema, and I represent the Nashville
18 District Attorney Glenn Funk, who is the plaintiff in
19 the lawsuit and the appellee in this proceeding.

20 Before I go into the merits of this appeal,
21 I think it is important to put this appeal in context,
22 particularly because it is an interlocutory appeal.
23 And I'm going to spend very, very little time on why
24 this lawsuit was filed, maybe less than 30 seconds.
25 And this is in our brief.

1 But the reason this lawsuit was filed is
2 that Channel 5 published or broadcast a piece on the
3 nightly news that started with the headline,
4 "Explosive Allegations Emerge from David Chase.
5 2 Million Requested to Make Case Go Away."

6 And then it cuts to a deposition of one of
7 the witnesses in that case, as a scene, Chase, quote,
8 "I did not get any impression about it involving Glenn
9 Funk in the way of a bribe."

10 Attorney then asks the question: "Why would
11 Bill Fletcher think that he would just get to keep the
12 2 million?"

13 "Chase: I don't know."

14 And then it cuts to the reporter on the
15 screen and says, "Tonight, explosive allegations
16 emerge from one of the most controversial domestic
17 violence cases in recent Nashville history. Last
18 year, the case against Nashville developer David Chase
19 went away after Nashville DA Glenn Funk agreed to drop
20 the charges."

21 Second reporter, "But now NewsChannel 5
22 Investigates has uncovered even more salacious
23 allegations surrounding that case, allegations of
24 extortion, possible bribery, even blackmail."

25 And then it goes into the piece that

1 Mr. Phil Williams is the reporter for.

2 JUDGE 3: Okay. What was inaccurate there?

3 MR. ENKEMA: So our position is that first
4 of all you have to watch the video which is in the
5 file. And if you watch the video, we contend that it
6 unequivocally sends the message to whoever's watching
7 it that Glenn Funk took a bribe.

8 And the other thing that's important to
9 point out is that Mr. Williams has published many
10 pieces. Now, he's a reporter. It's his job. But he
11 has published -- I don't know -- five times, 10 times
12 as many pieces about the district attorney than any
13 other reporter in Nashville. And so --

14 JUDGE 3: So?

15 MR. ENKEMA: So we do believe that there is
16 a basis for the actual malice element and --

17 JUDGE 3: Just because he's published more
18 pieces on the DA than anybody else? That shows
19 malice?

20 MR. ENKEMA: No. What shows malice -- first
21 of all, malice of course can be two things: a
22 knowledge of the untruth or reckless disregard.

23 JUDGE 3: So how does the number of pieces
24 that Mr. Williams has reported on the DA show malice?

25 MR. ENKEMA: Evidence of ill will. And in

1 that --

2 JUDGE 3: How is that evidence of ill will?

3 MR. ENKEMA: Well, if someone is constantly
4 reporting on someone, it shows they've got a vendetta
5 against them. Or at least a jury could conclude that.
6 You may not conclude that --

7 JUDGE 3: Maybe Mr. Funk is an interesting
8 person to report on.

9 MR. ENKEMA: Maybe. Or maybe Mr. Williams
10 has a vendetta against him. And that would be up for
11 the jury to decide. But we're not here --

12 JUDGE 3: Okay. We can debate on that
13 another time.

14 MR. ENKEMA: Sure. We're not here today,
15 but it is important.

16 Now, what's maybe as important is to
17 understand how this got to this court.

18 The defendant filed what they call a motion
19 to dismiss, which was clearly a motion for summary
20 judgment because it was supported by extraneous
21 affidavits, et cetera.

22 And so they then filed a motion to limit
23 discovery to only facts that would be directly
24 relevant to their motion to dismiss. Very important
25 point.

1 The judge denied that motion. Judge said
2 no. But the judge in the same order went on to say
3 but at least for right now, we're going to stage
4 discovery, and we're going to have the first stage of
5 discovery be limited to facts that are relevant to the
6 two stories. What he was cutting out is like punitive
7 damage discovery, discovery of other lawsuits, things
8 like that. He was basically saying we're going to
9 take discovery on stuff that's just directly relevant
10 to this lawsuit.

11 Well, of course because my client is a
12 public figure, one of the things that is directly
13 relevant in discovery is actual malice as defined by
14 the Supreme Court of the United States in New York
15 Times versus Sullivan.

16 JUDGE 3: How does that relate to their
17 motion?

18 MR. ENKEMA: Because as I understand it,
19 when you come to the Court of Appeals, you are
20 attacking an order. You're asking for an order to be
21 reversed.

22 Well, on the discovery -- this is a granting
23 of a motion to compel is what we're here on.

24 If it is discoverable through the previous
25 order, which it clearly is and they don't argue

1 otherwise, then why are you in here talking about
2 actual malice because it is discoverable under
3 Rule 26. It doesn't matter. Even if you rule with
4 them on actual malice, it is still discoverable under
5 Rule 26, with the exception that if they're right
6 about the shield law, then they would prevail on that
7 issue.

8 But they don't prevail on actual -- even if
9 you agree with them on actual malice, it's still
10 clearly discoverable under Rule 26.

11 It's also important to point out that the --
12 JUDGE 3: Because it's an element of your
13 claim.

14 MR. ENKEMA: Absolutely.

15 JUDGE 3: So you're saying the discovery --
16 the judge didn't abuse his discretion because you
17 asked for more discov -- you asked for discovery in
18 order to respond to their defense, right?

19 MR. ENKEMA: No.

20 JUDGE 3: No.

21 MR. ENKEMA: The judge denied that, and then
22 he ruled but we're going to stage discovery. And
23 we're going to limit discovery to essentially the
24 facts of this case, what the facts -- the quote is
25 "limit to the facts related to the two news stories."

1 It wasn't things directly relevant to the
2 motion to dismiss. That's what they wanted. Judge
3 denied that. The judge said but we're going to stage
4 discovery, and we're going to have discovery limited
5 to the facts related to the two news stories that
6 clearly relates to us being entitled to take discovery
7 on the element of our case, actual malice.

8 And the other side doesn't agree with what I
9 just said. What they do suggest is the judge should
10 have narrowed discovery to their motion, but you know
11 what? That isn't before This Court because they
12 didn't appeal that order. And it would clearly be a
13 discretionary call that would not be an abuse of
14 discretion anyways.

15 And so that's our --

16 JUDGE 1: So can we get back to the subject
17 matter of jurisdiction which you touched on sort of
18 briefly at the beginning, whether the shield law
19 allows this appeal directly of the order compelling
20 discovery?

21 MR. ENKEMA: On the shield law, the direct
22 appeal?

23 JUDGE 1: Right.

24 MR. ENKEMA: Yeah. Let me pull up the
25 shield law.

1 So the shield law has three sections.
2 Section A provides a broad grant of a shield.
3 Section B says that grant does not apply if you're
4 relying upon defense of a source. Section C provides
5 a completely different mechanism where the trial court
6 can hold a hearing and say the shield law applies, but
7 are there extraordinary circumstances where I'm going
8 to lift the shield. And that's not before This Court.

9 Section C is the only one of those three
10 sections that provides a direct appeal. So they're
11 attempting to appeal a ruling on section B. And
12 respectfully, section C is the only one that provides
13 an appeal and just simply is inapplicable.

14 That might have been cured -- and I'll let
15 Mr. Harris address this -- by a amendment of their
16 interlocutory appeal. That may be included within
17 their interlocutory appeal. That may not be directly
18 relevant.

19 JUDGE 1: Okay. So you're --

20 MR. ENKEMA: But our position is certainly
21 that the direct appeal on that issue was procedurally
22 defective.

23 JUDGE 1: Okay. But you're saying
24 potentially we've got subject matter juris -- all
25 included in the Rule 9 then.

1 MR. ENKEMA: I'm going to let Mr. Harris
2 address that because our position would be no, but
3 it's so complicated and there were amendments to
4 interlocutory appeal. Then the appeals were
5 consolidated.

6 Our position is the direct appeal was
7 procedurally improper.

8 JUDGE 1: Okay.

9 MR. ENKEMA: We filed a motion on that.
10 This Court denied that motion and found that it was
11 procedurally proper.

12 But I'll let Mr. Harris address that
13 because --

14 JUDGE 1: What I hear you saying, though, is
15 you're suggesting that perhaps this all came up in the
16 Rule 9, and we wouldn't have to even address that
17 issue.

18 MR. ENKEMA: I think that's correct.

19 JUDGE 1: Okay.

20 MR. ENKEMA: And, Your Honor, if I could
21 move to the substantive issue of whether actual malice
22 is part of the fair report privilege.

23 I see this incredibly simple. And I never
24 say that as a lawyer unless I mean it. There is a
25 1871 Supreme Court case that says, quote, "A bona fide

1 report of the proceedings in a court of justice in the
2 absence of express malice." Could not be any clearer.
3 That is part of the fair report.

4 JUDGE 3: What was malice in 1871?

5 MR. ENKEMA: Great question.

6 JUDGE 3: Thank you.

7 MR. ENKEMA: Here's why because they want to
8 suggest that somehow The New York Times versus
9 Sullivan case has any bearing whatsoever on the
10 progression of malice as used in the context of the
11 fair report privilege.

12 It doesn't. And that is going to be my
13 whole point before This Court. Express malice back
14 then, it meant something much more akin to ill will,
15 hatred, spite.

16 And so that's what you have in 1871. Again,
17 that's the Supreme Court. Now, that is an older case,
18 but of course, the next case that addresses it that's
19 very important is the Langford case, Langford versus
20 Vanderbilt, and that's the, again, Supreme Court of
21 Tennessee in 1956. In that case, The Court -- this is
22 the holding. No one can argue that this is not the
23 holding of this case.

24 Quote, "This Court concludes that the right
25 of newspapers to publish without liability for damages

1 does extend to mere contents of pleadings filed in
2 court, though no judicial action has been taken
3 thereon, provided the publication is a fair and
4 accurate statement of the contents of the pleadings
5 and made without malice." Could not be any clearer.
6 That's the Supreme Court of Tennessee, 1956.

7 JUDGE 3: So as long as a newspaper -- let's
8 take an abstract example -- reports something very
9 fair, totally accurate as to what was done in the
10 proceedings, but they just hate one of the parties'
11 guts, that hatred is enough to waive that privilege?

12 MR. ENKEMA: Yes. And that is up to the
13 jury.

14 JUDGE 3: Even though it was fair and
15 accurate.

16 MR. ENKEMA: Even though if it is a
17 verbatim. It is -- if you're --

18 JUDGE 3: How does that make sense?

19 MR. ENKEMA: It's not up to me to make the
20 sense, Your Honor. I mean that's --

21 JUDGE 3: Yeah. But it's up to me, and I
22 have to try to figure it out.

23 MR. ENKEMA: Okay. I'm going to say this
24 is -- respect, respect, respect. It's not up to you
25 because the Tennessee Supreme Court has already ruled,

1 and they've ruled unequivocally in 1956, and you can't
2 say --

3 JUDGE 3: Yeah, but that's been abandoned,
4 hasn't it?

5 MR. ENKEMA: No. And that's where I'm going
6 with all this.

7 JUDGE 3: I thought it was.

8 MR. ENKEMA: First of all, that's only
9 several years before New York Times versus Sullivan,
10 which was in 1964. We're talking about -- what?
11 Eight years later.

12 So let's keep going. Langford too, 1958,
13 recognizes that holding.

14 Lewis. Lewis is in 2007, one of the primary
15 cases that these -- the appellants rely upon. And
16 this is on page 283 -- excuse me -- 284 of Lewis.
17 When they start talking about the applicability of the
18 fair report privilege.

19 And they quote -- it says -- well, it says
20 Tennessee Supreme Court recognized the fair report
21 privilege in 1871, and they quote Saunders. And they
22 quote, "a bona fide report of the proceedings," blah,
23 blah, blah. And they say "in the absence of express
24 malice."

25 Several lines later, they cite Langford, not

1 for that specific proposition, but certainly cite it
2 and recognize it to still be good law.

3 JUDGE 1: Well, yeah. I think it was wise
4 for the Court of Appeals there not to overrule the
5 Tennessee Supreme Court. Normally -- I think that was
6 the first thing I was taught when I got up here.

7 MR. ENKEMA: That was my point was --

8 JUDGE 1: Let me ask you this question,
9 Mr. Enkema. Assuming we disagree with you on the
10 point about actual malice and the fair report
11 privilege, what additional discovery does your client
12 need then to determine whether or not it applies, for
13 example, to that first story? What discovery --

14 I mean Mr. Harris has said, well, Mr. Funk's
15 attorneys have the depositions and access to I guess
16 Mr. Chase. And what are you missing? What discovery
17 would you need then if actual malice wasn't in play?

18 MR. ENKEMA: Well, Mr. Harris, if I
19 understood him correctly, answered the question that
20 we already have everything the story is based on. And
21 I just respectfully disagree with Mr. Harris. That's
22 why we're here fighting about this. They have
23 objected to producing the information in their file.

24 JUDGE 1: So they haven't produced these
25 depositions for the court --

1 MR. ENKEMA: They have produced the
2 depositions, but they're taking the position that the
3 entire proceeding is what they are reporting on.
4 And --

5 JUDGE 3: Well, but it seemed like to me
6 that sort of puts you in the perfect spot, doesn't it?
7 If they haven't given you something and you can say,
8 well, look. This report contains something that
9 wasn't in what they gave us, they're outside the fair
10 report privilege, right?

11 MR. ENKEMA: Well, they'll argue to the
12 contrary. They'll say it's a fair and accurate
13 report.

14 JUDGE 3: Well, but under the Lewis holding,
15 though, they're not reporting on what was in the
16 proceeding then. If it's not in front of you, I mean,
17 and their report says something outside that universe
18 of documents, then you've got them, right?

19 MR. ENKEMA: But important point that there
20 is a large chunk of that lawsuit that is under seal
21 that we can't get. And we don't know whether they
22 have it because we do know there's been significant
23 leaks that have been the subject of contempt
24 proceedings in that lawsuit. So we can't go to the
25 court and get that file.

1 And we don't know. They may have
2 significant depositions, filings in that court, that
3 we simply cannot get, which if they had at the time
4 they published it and which are contrary to their
5 publications would be directly relevant not only to
6 whether it's fair and accurate, but obviously whether
7 it was done with malice.

8 And if I could finish one thought on the
9 history of the jurisprudence of the fair report
10 privilege in Tennessee, we get to Lewis in 2007, which
11 still recognizes the Saunders case from 1871, and then
12 we get to --

13 JUDGE 3: It recognizes Saunders exists.

14 MR. ENKEMA: Well, it cites it for the fair
15 report privilege and floats it as --

16 JUDGE 3: Yes.

17 MR. ENKEMA: -- the statement of the fair
18 report privilege.

19 And then in 2013, the Tennessee Supreme
20 Court in the Jones versus State case -- now it's not a
21 fair report privilege case, but it's a conditional
22 privilege case. And the fair report privilege is a
23 conditional privilege. And in that case, The Court
24 unequivocally says that the conditional privilege can
25 be overcome with actual malice or ill will.

1 And then finally, you have the Grant versus
2 Commercial appeal, which is the Court of Appeals,
3 2015, which unequivocally holds that one of the three
4 elements of the fair report privilege is, quote, "the
5 report must not be made with actual malice."

6 I do want to go back -- you've got a whole
7 jurisprudence going on from 1871 to 2015 which clearly
8 support that malice is an element of the fair report
9 privilege.

10 The only -- only -- case to the contrary
11 throughout those 150 years is the Eisenstein case.
12 The Eisenstein case, any footnote says malice used to
13 be required, but doesn't seem to be required anymore.

14 And then there's this dearth of citation.
15 No citation whatsoever. It doesn't point to any case
16 that, quote, "didn't require it anymore." It's just
17 this completely random statement without any support
18 whatsoever, and it has not been followed.

19 In fact, curiously enough, in the Grant
20 case, the Court of Appeals cites Eisenstein and Lewis
21 for the position that actual malice is.

22 Now, one of the questions that I was asked
23 earlier, which I do find to be a very difficult
24 question, is what is actual malice? And from my
25 reading of trying to read every single case in

1 Tennessee on this --

2 JUDGE 3: I think your time is up. Let's --
3 if you want to sum up for a moment.

4 MR. ENKEMA: Yes, Your Honor.

5 The sum-up would be that actual malice in
6 the context of meaning more ill will as defined by
7 Tennessee law is clearly an element as stated by the
8 Supreme Court in 1956 and is affirmed several times
9 after that. That's mandatory authority on This Court.
10 And respectfully, This Court would not even have the
11 authority to reject that authority.

12 And then on the shield law, they clearly
13 relied upon a source that clearly is an exception in
14 B. Therefore, the shield law simply does not apply.

15 JUDGE 3: They clearly relied on a -- what
16 do you mean by that?

17 MR. ENKEMA: Under section B, it says if you
18 rely upon a defense based on a source, then A simply
19 does not apply.

20 And when they assert the defense of the fair
21 report privilege, then that by definition is relying
22 upon the source of whatever they published. They
23 publish something, and they say, "Oh, no, no. That's
24 protected because our source is a public proceeding,
25 and that is what we are reporting on."

1 JUDGE 3: Okay.

2 MR. ENKEMA: Thank you, Your Honor.

3 JUDGE 3: Thank you.

4 Mr. Harris.

5 MR. HARRIS: Thank you, Your Honors. I wish
6 I had reserved a little more time because there's a
7 couple things to rebut. I'll have to rely on my brief
8 on that.

9 Actual malice is a specific Constitutional
10 requirement that came down from New York/Sullivan.
11 It's not interchangeable with common law malice.
12 Common law malice goes to ill will, hatred, spite.

13 JUDGE 3: Is that an element of the
14 privilege, or was that used just to defeat the
15 privilege?

16 MR. HARRIS: It's not an element, and it's
17 not to be used to defeat the privilege.

18 Now, there is a history, going back to 1871,
19 of common law malice being mentioned in connection
20 with the fair report privilege, and I'll get to that.
21 There is no history of actual malice being ever an
22 element of the fair report privilege in Tennessee.

23 And so there are two separate things.
24 Actual malice goes to knowledge of the reporter about
25 the falsity. Common law malice or express malice goes

1 to the ill will or hatred. Neither one of those fits,
2 and neither one of those should be a part of the fair
3 report privilege.

4 It goes to the Lewis case. We would be
5 happy with the Lewis case definition of this. The
6 Lewis case historically mentions that common law
7 malice in that 1871 case, but then Judge Koch in his
8 opinion goes down through and shows how you defeat the
9 privilege. And it's back to the fair and accurate,
10 and it's back to inserting any other comments that are
11 outside the record, which I think was asked about.

12 There's not going to be any comments outside
13 the record. That will be decided down at the lower
14 court level, if and when they ever file a response to
15 our motion to dismiss.

16 Mr. Enkema started out arguing the merits of
17 his defense to the motion to dismiss. That's not
18 what's here. He argued in the lower court that it was
19 relevant because of actual malice. He went back in
20 his argument and talked about the first motion we had
21 to stay discovery.

22 JUDGE 3: What about -- he says we can
23 discover actual malice anyway because that's going to
24 be an element of the case, and this discovery wasn't
25 limited to just matters relating to the motion to

1 compel.

2 MR. HARRIS: He's dropped back to the very
3 first order, which is not being appealed. We're
4 appealing the motion to compel at the very end.

5 And he told The Court at the January hearing
6 of that that he needed to discover actual malice
7 because it was an element of the fair report privilege
8 and that we would have to show that.

9 The confusion is that The Court did start
10 talking about, well, you're going to have to show that
11 anyhow -- he didn't say it that way. He went through
12 cases that talked about actual malice in the case in
13 chief.

14 But we don't get there because his case in
15 chief is not at issue on our motion to dismiss. Only
16 the actual malice as to the fair report privilege, and
17 it doesn't apply, and the libeled plaintiffs are
18 protected by what Lewis says.

19 And the modern view, and This Court said so
20 in Eisenstein, and it can't be dismissed as they've
21 tried to do. The Court analyzed --

22 JUDGE 1: He says it's wrong.

23 MR. HARRIS: Well, I think it's right, and
24 it's --

25 JUDGE 3: Well, you know, these crazy

1 judges. They sometimes say crazy things.

2 MR. HARRIS: But it's completely consistent
3 with Lewis. It's completely consistent with the
4 modern view in other jurisdictions that either actual
5 malice or common law malice does not fit with what's
6 being accomplished by the fair report privilege.

7 And if you'll look at Lewis, there's a
8 comment about the reason behind the fair report
9 privilege that the reporters should be entitled to
10 protection if they accurately and fairly report what
11 went on in a judicial proceeding.

12 And you don't --

13 JUDGE 3: So if it's accurate --

14 MR. HARRIS: If it's accurate.

15 JUDGE 3: If it's accurate, what relevance
16 would ill will have?

17 MR. HARRIS: None. None. If it's not
18 accurate, then the privilege doesn't exist. The
19 privilege is defeated.

20 If it is accurate, it doesn't matter if they
21 harbor ill will or hatred or spite if they accurately
22 report what went on in the proceeding. And that is
23 the modern view.

24 JUDGE 3: That's the goal, as I understand
25 it, as Lewis explains it. Lewis says the goal is the

1 media are the eyes and ears of the public, and they
2 have a right to know an accurate view -- an accurate
3 report of what was going on in this public forum.

4 So as long as it's accurate, in your view,
5 ill will, malice --

6 MR. HARRIS: Yes.

7 JUDGE 3: -- whatever, has no bearing.

8 MR. HARRIS: That's correct, Your Honor.

9 That is the more modern view. Like I said, there was
10 a history of common law malice coming through.

11 JUDGE 1: What about Mr. Enkema's complaint
12 that, well, you have -- leaving aside the actual
13 malice here or malice being a component of the
14 privilege, the defendants here have information from
15 that court case that they don't have access to because
16 it's under seal?

17 MR. HARRIS: Well, what he has argued in the
18 court below is they need everything that's in our
19 investigative file. They need to know everything,
20 every person we contacted. They need to know
21 everybody, everything that's in the file.

22 And we've said look. We've provided you
23 with what we're relying on, the full transcripts of
24 the depositions, the full pleadings.

25 They have gone down to Williamson County

1 twice to block an unsealing of that record. And if
2 they would participate with us, you know, maybe we
3 could get the full record, but we have --

4 JUDGE 1: So you're saying you've given the
5 plaintiff here all the trial court -- or that case's
6 pleadings and depositions that are in your possession.

7 MR. HARRIS: We've given what we have relied
8 on. And so we do not think, like I said, that there
9 needs to be any discovery into who you talk to, every
10 person you contacted, your entire file, wherever you
11 got it. Those are not at issue.

12 And I may have gone past my time.

13 JUDGE 3: Well, we went past with him too.
14 And, you know, sometimes you have to do that.

15 MR. HARRIS: Thank you, Your Honor.

16 JUDGE 3: Thank you, both. Very interesting
17 arguments. We appreciate your efforts here today, and
18 we'll try and come up with an answer in due course.
19 Thank you very much.

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C E R T I F I C A T E

I, Virginia Dodge, Registered Diplomate Reporter and Tennessee Licensed Court Reporter, do hereby certify that the foregoing transcription is true and accurate, to the best of my knowledge and ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

This 5th day of February, 2018.



Virginia Dodge
LCR No. 734, Exp: 6/30/19
RDR/CRR #835835

