IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

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

APPELLEES' BRIEF

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

GLENN R. FUNK,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	**No. M2017-00256-SC-R11-CV**
SCRIPPS MEDIA, INC., and	)	
PHIL WILLIAMS,	)	**Davidson County Circuit No. 16C-333**
	)	
Defendants/Appellees.	)	

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. **WHETHER ACTUAL MALICE IS AN ELEMENT OF A FAIR REPORT PRIVILEGE ASSERTED AS A DEFENSE TO DEFAMATION AND FALSE LIGHT CLAIMS.**

2. **WHETHER THE NEWSGATHERER'S PRIVILEGE CONTAINED IN TENNESSEE CODE ANNOTATED SECTION 24-1-208 APPLIES TO PROTECT THE INFORMATION PLAINTIFF SEEKS TO OBTAIN FROM THE DEFENDANT NEWS REPORTER AND NEWS ORGANIZATION.**

STATEMENT OF THE CASE

Plaintiff Glenn Funk has appealed to this Court from the Court of Appeals' decision which reversed the Order of the Circuit Court for Davidson County, Tennessee that granted his Motion to Compel broad discovery from Defendants Scripps Media, Inc. and Phil Williams. (Court of Appeals Opinion dated November 30, 2017 "hereinafter "Opinion.") The Circuit Court granted Plaintiff's Motion to Compel based upon its rulings that: (1) the discovery that Plaintiff sought was relevant because "actual malice" was an element of Defendants' fair report privilege defense; and (2) the newsgatherer's privilege contained in Tennessee Code Annotated § 24-1-208 did not apply because the Court believed the Defendants were asserting a defense based upon the "source of the information" within the meaning of the exception in that statute. (Feb. 13, 2017 Order, T.R. 1022-1046.)[1] The Court of Appeals reversed both of those rulings.

Plaintiff Glenn Funk, the District Attorney General for Davidson County, Tennessee, originally filed this action against Defendants Scripps Media and Phil Williams on February 4, 2016, alleging that a news story published by Defendants on February 3, 2016 (the night before) was defamatory and portrayed him in a false light. (Compl., T.R. 1-10.) Before Defendants' Answer was due, Plaintiff filed an Amended Complaint on February 26, 2016, which added claims that a news story broadcast on February 4, 2016 also was defamatory and portrayed him in a false light. (Am. Compl, T.R. 11-40.) The two news stories at issue reported on allegations made and testimony given in a civil action filed by David Chase in Williamson County, Tennessee. (Williams Aff., T.R. 165-98.)

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[1] The citation to the record on appeal as to pleadings, orders, etc. filed with the trial court will be cited as "T.R. __," with references to depositions cited as "____ Dep. at ___" and references to transcripts of hearing cited as "Tr. ___." The Circuit Court for Davidson County shall be referenced as the "trial court."

Mr. Funk's Amended Complaint in this case sought compensatory damages in excess of Fifty Million Dollars ($50,000,000) and punitive damages in excess of One Hundred Fifty Million Dollars ($150,000,000). (Am. Compl. at T.R. 24.)

Simultaneously with the filing of his Amended Complaint, Plaintiff Glenn Funk propounded a set of twenty-nine (29) interrogatories, thirty-three (33) document production requests, and nineteen (19) requests for admission to Defendant Scripps Media, Inc. (Ex. A to Def.'s Mot. for Protective Order, T.R. 213-38.) Plaintiff also submitted a set of twenty-seven (27) interrogatories, thirty-one (31) document requests, and twenty-three (23) requests for admission to Defendant Phil Williams. (Ex. B to Def.'s Mot. for Protective Order, T.R. 239-73.) The interrogatories sought to discover, *inter alia*, all the steps Defendants had taken in the investigation of the two news stories at issue, including all persons "communicated with." (T.R. 217, 243.) The document production requests sought to discover, *inter alia*, "each and every document created or reviewed in connection with the investigation" of the two news stories. (Doc. Req. Nos. 13 and 14 to Def. Scripps and Nos. 11 and 12 to Def. Williams, T.R. 229, 255.) The initial discovery sought was broader than just the two news stories at issue, containing requests that would include similar information on Defendants' prior news stories concerning Plaintiff Funk. (T.R. 213-218, 239-273.)

Defendants responded to Plaintiff's Amended Complaint by filing a Motion to Dismiss all of Plaintiff's claims pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure. (Def.'s Mot. to Dismiss, T.R. 41-42.) The Motion to Dismiss argued that the news stories reporting on the allegations from the Williamson County case were protected by the fair report privilege and that the news stories did not contain any false or defamatory statements concerning Plaintiff Glenn Funk. (*Id.*) Defendants' Motion to Dismiss was supported by a Memorandum in Support (T.R.

43-164) and accompanying exhibits and the Affidavit of Phil Williams with exhibits. (T.R. 165-98.) The exhibits to Mr. Williams' Affidavit included transcripts and a DVD of the news stories as broadcast. (*Id.*) The documents and testimony that Defendants relied upon from the Williamson County case were filed in support of their motion. Although still pending, the parties agree that motion will be treated as a motion for summary judgment and disposed of as provided in Rule 56 of the Tennessee Rules of Civil Procedure, pursuant to the direction in Rule 12.02 of those rules.

Defendants also filed a Motion for Protective Order to Stay Discovery (T.R. 199-200) and a Memorandum in Support (T.R. 201-73) asking the Court to stay the requested discovery until such time as the Court could rule on the Defendants' Motion to Dismiss. By order dated May 31, 2016, the Court denied Defendants' Motion for Protective Order. (Order, T.R. 484-88.) The Court's Order required Defendants to respond to those discovery requests related to the two news stories at issue, but specifically allowed Defendants to make any objections to those requests. (*Id.*) Defendants responded to the discovery requests by answering interrogatories and producing certain non-privileged documents. (Ex. 1 and 2 to Pl.'s Mot. to Compel, T.R. 491-555.) Defendants objected to interrogatories that sought information about all steps Defendants had taken in their investigation and all persons Defendants contacted in their investigation for the two news stories at issue and also objected to the document production requests that sought all documents reviewed or created in such investigation. (*Id.*)

On July 14, 2016, Plaintiff filed its Motion to Compel and to Amend Schedule, which sought an order compelling Defendants to respond to the discovery to which they had objected. (T.R. 488-555.) It also sought to delay hearing on the Defendants' Motion to Dismiss. (*Id.*) On August 8, 2016, Defendants filed their Memorandum in Opposition to Plaintiff's Motion to Compel the Disclosure of Privileged Information with Exhibits A, B, C, and D (T.R. 556-607),

supported by the Affidavit of Phil Williams. (T.R. 607-09.) Before that Motion to Compel was heard or decided, Plaintiff filed a separate Motion to Compel seeking to compel non-parties Brian Manookian and his law firm to comply with subpoenas for documents and deposition testimony. (T.R. 841-45.) Mr. Manookian was an attorney representing several defendants in the Williamson County lawsuit (styled *David Chase v. Chris Stewart, et al.*) who Plaintiff Funk asserted was the source of the information reported in the news stories. (T.R. 841.) That motion was granted (T.R. 857), and Mr. Manookian was deposed on October 21, 2016. The transcript of his deposition with exhibits 1-11 was filed with the trial court and has been included as part of the record on appeal in this case. In that deposition, Mr. Manookian confirmed that he had furnished pleadings, depositions, and other materials from the Williamson County case to media representatives, including Defendants. (Manookian Dep. at 20-25, 50-52, 66.)

After Mr. Manookian's deposition, the parties each filed supplemental briefs on the issues raised by Plaintiff's Motion to Compel. (Pl.'s Supp. Br. in Supp., T.R. 868-92; Def.'s Supp. Br. in Opp'n, T.R. 893-980). Defendants objected to the discovery on the grounds that the information sought was not relevant or necessary for the resolution of the issues raised in their Motion to Dismiss and that such information was privileged under the newsgatherer's privilege set forth in Tennessee Code Annotated § 24-1-208. (T.R. 893-980.) Plaintiff contended such information was relevant based upon his argument that Defendants must show the absence of "actual malice" to rely upon the fair report privilege. (T.R. 868-92.) Plaintiff also argued that the newsgatherer's privilege found in Tennessee Code Annotated § 24-1-208 was not applicable because he claimed Defendants were asserting a defense based upon the "source of the information" within the meaning of the exception to the privilege set forth in subsection (b) of that statute. (*Id.*)

A hearing was held on Plaintiff's Motion to Compel on January 13, 2017. At that hearing, the Court announced its findings of fact and conclusions of law from the bench and said that these were to be incorporated by reference in the order. (Jan. 13, 2017 Hr'g Tr. and excerpt titled "Judge's Ruling" attached to the Court's Order; T.R. 1022-46.) In making its ruling, the Court discussed the actual malice requirement for a defamation claim by a Plaintiff-public official and then concluded it was an element of the fair report privilege claim asserted by the Defendants. (*Id.*) The Court also ruled, without further explanation, that the Defendants "have raised a defense based upon the source" within the meaning of the exception in the newsgatherer's privilege statute and therefore the Defendants could not rely upon that privilege. (Jan. 13, 2017 Judge's Ruling at T.R. 1035.)

On January 31, 2017, Defendants filed a Motion for Interlocutory Appeal and a Memorandum in Support. (T.R. 983-87.) Defendants also filed a Notice of Appeal on the statutory privilege issue based upon the right of appeal contained in that statute. (T.R. 983-87.) Defendants subsequently filed an Amended Application for Interlocutory Appeal and Memorandum in Support and a new Notice of Appeal based upon the Court's subsequent entry of the Order Granting Plaintiff's Motion to Compel. (T.R. 1047-1106.) That Order expressly incorporated the transcript of the "Judge's Ruling" from the January 13, 2017 hearing which was attached thereto. (T.R. 1022-46.) This is the Order that Defendants appealed to the Court of Appeals.

On March 10, 2017, the trial court issued the Order Granting Defendants' Amended Application for Interlocutory Appeal. (T.R. 1137-42.) Defendants filed their Application for Permission to Appeal with the Court of Appeals pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. (T.R. 1143-44.) By order dated April 20, 2017, the Court of Appeals granted Defendants' application for interlocutory appeal and consolidated that appeal with the previously

filed direct appeal on the statutory privilege issue, which had been assigned No. M2017-00256-COA-R3-CV. (T.R. 1148-50.) The two issues for appeal that were raised by the trial court's Order Granting Plaintiff's Motion to Compel were: (1) whether "actual malice" is an element of a fair report privilege defense; and (2) whether the Defendants are asserting a defense based upon the "source of the information" within the meaning of the exception to the newsgatherer's privilege law.

Oral argument was held at the Court of Appeals on September 6, 2017. By order dated November 30, 2017, the Court of Appeals reversed the trial court's Order and specifically held that "actual malice was not a component of the fair report privilege" and thus Defendants' fair report privilege defense could not be defeated by Mr. Funk presenting evidence of "actual malice." Opinion at 8. The Opinion stated, "Defendants are not required to show an absence of actual malice in asserting the privilege." *Id.* The Court of Appeals also specifically reversed the ruling that the exception to the statutory newsgatherer's privilege applied to allow the broad discovery that Plaintiff sought in this case. *Id.* at 9-10.

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, Plaintiff filed an Application for Permission to Appeal the ruling of the Court of Appeals. Defendants filed an Answer to Plaintiff's Application. By order dated March 15, 2018, this Court granted Plaintiff's Application and ordered the parties to file briefs. On April 13, 2018, Plaintiff filed his Supplemental Brief (which was simply a re-filing of his Rule 11 Application). Defendants, as the Appellees in this Court, are submitting this brief in support of their arguments that this Court affirm the ruling of the Court of Appeals on both issues.

STATEMENT OF FACTS

Appellee/Defendant Scripps Media, Inc. ("Scripps") owns and operates television station NewsChannel 5, WTVF in Nashville, Tennessee. (T.R. 12.) Appellee/Defendant Phil Williams is the chief investigative news reporter for NewsChannel 5 and is employed by Scripps. (*Id.*)

Appellant/Plaintiff Glenn R. Funk is the District Attorney General for Davidson County, Tennessee. (T.R. 11.) He filed this lawsuit alleging that two news stories broadcast by NewsChannel 5 contained false and defamatory statements about him and were an invasion of his privacy by portraying him in a false light. (T.R. 11-40.)

The two news stories at issue reported on allegations that were being made in a civil lawsuit brought by developer David Chase in the Circuit Court for Williamson County, Tennessee. (T.R. 165-98.) The news stories did not state (as Plaintiff contends in the "Facts" section of his Supplemental Brief) that Plaintiff extorted money, solicited a bribe, or blackmailed a criminal defendant into dismissing a civil lawsuit. Rather, these stories reported on allegations made by others in Mr. Chase's Williamson County civil action. (T.R. 165-198; Exs. A-C to Williams Aff.)

Mr. Chase had previously been arrested and charged with domestic assault in Davidson County, Tennessee. (T.R. 44-45.) His criminal case received substantial publicity and widespread media coverage, including news stories about the possible misconduct of a Nashville judge, Casey Moreland, who approved Mr. Chase's early release from jail. (*Id.*)

The Davidson County District Attorney's office ultimately chose to dismiss all criminal charges against Mr. Chase and filed a Notice of Dismissal stating the reasons for the dismissal of the charges. (Ex. C to Pl.'s Am. Compl., T.R. 32-37.) This official statement said that the "ethical and legal obligations of the Office of District Attorney General require the State to dismiss the indictment" but made no mention of any deal or agreement between Mr. Chase and the District

Attorney's office. (*Id.*) In fact, Mr. Funk had made it a "condition precedent" to his dismissal of criminal charges that Mr. Chase agree to the dismissal of the civil lawsuit he had filed against the Metropolitan Government of Nashville, Davidson County, Tennessee and its police officers arising from his arrest. (Am. Compl. at ¶ 19.)

After the dismissal of the criminal charges against him in Davidson County, David Chase filed the civil action in Williamson County against the individuals whom he believed were responsible for those charges being brought against him. (T.R. 44, 66-92.) His causes of action against those defendants included malicious prosecution claims. (David Chase's Verified Second Am. Compl., Ex. A to Mem. in Supp. of Def.'s Mot. to Dismiss, T.R. 66-92.)

Discovery in that Williamson County civil case included the depositions of Plaintiff David Chase and his parents Dean and Sandy Chase, and the production of documents by those individuals. (Dean and Sandy Chase were not parties to that action, but were subpoenaed for depositions and document production by defendants.) (T.R. 66-92, 143.) Attorneys for certain defendants subpoenaed District Attorney General Funk for a deposition in that case. Mr. Funk refused and filed an Objection to Subpoena. (Ex. D to Def.'s Mem. in Supp. of Mot. to Dismiss, T.R. 132-40.) The attorney for those defendants then filed a Motion to Compel that gave a number of reasons that the deposition of Mr. Funk should be taken. (Ex. E to Def.'s Mem. in Supp. of Mot. to Dismiss, T.R. 141-58.) The Motion to Compel Mr. Funk's testimony cited to deposition testimony and documents previously produced by the Chases in that case. (*Id.*) The testimony and documents attached to the Motion to Compel indicated that an agreement had been made by Mr. Funk to drop the criminal charges against Mr. Chase in return for his dropping the civil case he had filed against Metropolitan Government of Nashville-Davidson County, Tennessee and its police officers. (*Id.*) The Motion to Compel Mr. Funk's testimony in the Williamson County case

also referenced what the Chase family believed was a possible "bribery solicitation," based upon statements that had been made by Mr. Bill Fletcher, the Chase's public relations consultant. *Id.*

On February 3, 2016, NewsChannel 5 broadcast a news story reporting on allegations being made in the Williamson County civil action brought by David Chase (the "First News Story").[2] (Williams Aff. and exhibits, T.R. 165-98.) The First News Story specifically said it was reporting on allegations made in the Williamson County case. (*Id.*) It included quotes from deposition testimony and pleadings filed in that case. (*Id.*) The news story did not report that Mr. Funk asked for or took a bribe. (*Id.*) In fact, the news story included testimony from Ms. Chase that she "did not get any impression about it involving Glenn Funk in the way of a bribe." (*Id.*) On February 4, 2016, the afternoon after the First News Story was broadcast, Plaintiff Glenn Funk filed this lawsuit against Defendants Scripps and Williams. (T.R. 1-10.)

On February 4, 2016, NewsChannel 5 broadcast a news story that also dealt with the allegations and issues in Mr. Chase's Williamson County civil case (the "Second News Story"). (Affidavit of Phil Williams and exhibits thereto, T.R. 165-98.) That news story reported on the agreement between Mr. Funk and Mr. Chase that Mr. Funk has characterized as a "release-dismissal" agreement and Mr. Chase has characterized as "blackmail." (*Id.*) On February 26, 2016, Plaintiff filed an Amended Complaint that added libel and false light-invasion of privacy claims against Defendants based upon the Second News Story. (T.R. 11-40.)

The discovery requests currently at issue were served simultaneously with service of the Amended Complaint. Plaintiff submitted broad sets of interrogatories and document production requests to each Defendant. (T.R. 213-73.) The discovery included, *inter alia*, requests for Defendants: (1) to describe every step in their investigation of the two news stories at issue; (2)

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[2] Other local media also published news stories that reported on these same allegations in the same timeframe. (Ex. C Williams Aff., T.R. 165-98.)

to identify all persons contacted or communicated with; and (3) to produce all documents received or created in connection with their investigation of the news stories. (*Id.*)

Rather than filing an Answer to the Amended Complaint, Defendants' initial pleading was a Motion to Dismiss seeking to dismiss all of Plaintiff's claims in this lawsuit. (T.R. 41-42.) Defendants' Motion to Dismiss relied upon the fair report privilege as a basis for dismissing the claims based upon the First News Story. (T.R. 41-164.) As to the Second News Story, Defendants relied upon the fair report privilege and upon the lack of any false or defamatory statements concerning Mr. Funk. (*Id.*) Defendants filed a Memorandum in Support of their Motion to Dismiss, which included among its exhibits the Verified Second Amended Complaint filed by David Chase in the Williamson County civil case (Ex. A thereto); Glenn Funk's Objection to Defendants' Subpoena (Ex. D thereto); Defendants' Motion to Compel Examination of Glenn Funk (Ex. E thereto) and other pleadings from the Williamson County case. (T.R. 43-164.) The Motion to Dismiss was also supported by the Affidavit of Phil Williams which included exhibits setting forth the transcripts and video of the news stories at issue as broadcast. (T.R. 165-98.) Defendants' Motion to Dismiss is still pending and has not been heard because of the discovery Plaintiff is seeking. Plaintiff has not yet filed a response to Defendants' motion.

At the time Defendants filed their Motion to Dismiss, Defendants also filed a Motion for Protective Order to Stay Discovery seeking to stay the requested discovery until the Court could rule on Defendants' Motion to Dismiss. (T.R. 199-200.) Defendants argued that the discovery Plaintiff sought was not relevant or necessary to the issues raised in the Motion to Dismiss and that responding to such discovery would raise privilege issues. (T.R. 199-273.) Defendants' motion to stay discovery was denied and Defendants were ordered to respond to the discovery related to the two news stories at issue. (T.R. 484-87.) The order allowed Defendants to raise

objections to the specific requests and provided for telephone conference hearings as a means to resolve the objections that it was understood Defendants would make. (*Id.*)

Defendants responded to the discovery requests, answering interrogatories and producing non-privileged documents. (Ex. 1 and 2 to Pl.'s Mot. to Compel, T.R. 488-555.) Defendants objected to interrogatories that sought information about all persons Defendants contacted during their investigation of the news stories and document production requests that sought all documents created or received in such investigation. (*Id.*) Plaintiff filed a Motion to Compel Defendants to answer the discovery requests that Defendants had objected to answering. (T.R. 488-555.)

Before the hearing on that Motion to Compel, Plaintiff's counsel took the deposition of attorney Brian Manookian, whom Plaintiff had identified as the likely source of the information Defendants received from the Williamson County case. (T.R. 844.) In that deposition, Mr. Manookian confirmed that he had furnished pleadings, depositions, and other materials to the news media, including Defendants. (Manookian Dep. at 20-25, 50-52, 66.)

In support of his Motion to Compel at the trial court, Plaintiff argued the discovery was relevant because a showing of "actual malice" would defeat the fair report privilege and that the newsgatherer's privilege was not applicable because Defendants were asserting a defense based upon the "source of the information" that was otherwise privileged. (Pl.'s Supp. Br. in Supp., T.R. 868-92.) At a hearing on January 13, 2017, the trial court granted Plaintiff's Motion to Compel and stated that the transcript of the portion of the hearing that announced his findings should be incorporated in the Order. (Jan. 13, 2017 Judge's Ruling, T.R. 1022-46.)

The February 13, 2017 Order granted Plaintiff's Motion to Compel and specifically incorporated the Court's rulings from the January 13 hearing that: (1) "actual malice" was an element of the fair report privilege defense; and (2) the Defendants were asserting a defense based

upon a source of the allegedly defamatory information so that the newsgatherer's privilege found in Tennessee Code Annotated § 24-1-208 would not apply. (T.R. 1022-46.) The Defendants appealed those two issues to the Court of Appeals and the Court of Appeals reversed the Circuit Court's rulings on both issues. Opinion at 5-11.

SUMMARY OF ARGUMENT

The Circuit Court for Davidson County, Tennessee improperly held that "actual malice" was an element of the fair report privilege asserted by Defendants Scripps Media and Phil Williams as a defense to Plaintiff Glenn Funk's claims. The Circuit Court also improperly held that Defendants were asserting a defense based upon "the source of information" within the meaning of the exception to the newsgatherer's privilege found in Tennessee Code Annotated § 24-1-208(b). The Court of Appeals properly reversed the trial court on both issues.

As to the Plaintiff's argument on the fair report privilege, the Court of Appeals stated:

> Recognizing that the fair report privilege has evolved over time, we conclude that under the current state of the law the privilege cannot be defeated by a showing of actual malice by the plaintiff and that the trial court erred when it ruled otherwise.

Opinion at 8.

As to Plaintiff's argument on the exception to the newsgatherer's privilege, the Court of Appeals found the trial court's construction of the subsection (b) exception would result in the exception "swallowing up the protection that subsection (a) provides to media defendants . . ." and held the trial court erred when it granted Mr. Funk's Motion to Compel what was privileged information. Opinion at 10.

(A) Actual malice is not an element of a fair report privilege defense.

Defendants rely upon the fair report privilege as a defense in this case and as a primary basis for dismissing Plaintiff's claims in their Motion to Dismiss. The fair report privilege allows the reporting on a public event, official action, or proceeding to be privileged from a libel claim as long as what is reported is a fair and accurate report of the action or proceeding. This privilege has long been recognized in Tennessee. While early Tennessee cases included lack of express (or common law) malice within their discussion of this privilege, subsequent Tennessee cases have followed the more modern rule and not included any type of malice as a requirement for asserting the privilege. This Court has never held that "actual malice" is an element of the fair report privilege asserted as a defense to a libel or false light case.

Plaintiff injected the "actual malice" issue into this stage of the case by claiming that a showing of actual malice would defeat a fair report privilege claim and that therefore he needed additional discovery "to explore the extent of the Defendants' actual malice . . ." to respond to Defendants' Motion to Dismiss. The concept of "actual malice" has no applicability or relevance to the assertion of a fair report privilege defense. It is not an element of such defense and never has been.

The concept of "actual malice" as a specific legal principle in a defamation action was first announced in 1964 in the United States Supreme Court landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1960). In that case, the Supreme Court held that a public official suing as a plaintiff in a libel action must, in addition to proving the other elements of a libel case, also prove the statements at issue were published with "actual malice." *Id.* at 279-80. The Supreme Court defined "actual malice" in a very specific way—that the defendant must have published the statements at issue with actual knowledge of their falsity or a reckless disregard for their truth. *Id.*

As an elected public official, Plaintiff Glenn Funk will have to prove "actual malice" as a constitutionally required element of both his libel and false light-invasion of privacy claims. This fact led to some confusion in the argument in the trial court, which is reflected in the transcript of the Judge's Ruling at the January 13, 2017 hearing that is attached and incorporated in the Order Granting Plaintiff's Motion to Compel. At that stage of the case, the issue on Plaintiff's discovery motion, and in Defendants' pending Motion to Dismiss, however, is Defendants' fair report privilege defense. The trial court confused the "actual malice" requirement that Plaintiff must prove for his causes of action (which is not yet at issue), with the requirements for a fair report privilege defense. As the Court of Appeals specifically held in this case, Defendants are not required to show an absence of actual malice to assert a fair report privilege claim. Opinion at 8.

The early Tennessee cases that Plaintiff has relied upon all refer to express (or common law) malice and were all decided before *New York Times v. Sullivan* laid down the constitutional requirement of "actual malice" in a public official's defamation claim in 1964. In his appeal to this Court, Plaintiff now expressly argues that common law "express malice" is the same thing as "actual malice." Pl.'s Suppl. Br. at 7. The authority cited for this incorrect assertion is language from one Court of Appeals' opinion that was discussing the distinction between express malice versus implied malice in the context of malicious prosecution claims. *Id.* The long quotation from that case that Plaintiff principally relies upon herein demonstrates that the type of malice being discussed in the cited case is the "ill will or personal spite" type of common law malice. *Id.* As courts have repeatedly stated, "actual malice" is different and should not be confused with common law malice, which deals with "personal ill will, hatred or spite." *E.g. Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 300 (Tenn. Ct. App. 2007)

Neither "actual malice" nor common law malice should be an element of a fair report privilege defense. In more recent decisions, the Tennessee Court of Appeals has analyzed and discussed that privilege without inclusion of "actual malice" or common law malice as a requirement. Judge Koch's opinion in *Lewis* contained a lengthy discussion of the history and requirements for asserting and for defeating a fair report privilege claim. *Lewis*, 238 S.W.3d at 284-287. Neither actual malice nor common law malice was included by the Court as an element of the defense or a way to lose this qualified privilege. *Id.* at 284. In *Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, 389 S.W.3d 313, 317 (Tenn. Ct. App. 2012) this Court analyzed a fair report privilege and applied its elements in upholding the assertion of such privilege. Neither actual malice nor common law malice was included in that opinion in the elements for such a defense. *Id.* Indeed, this Court stated at the end of its analysis, in a footnote, that, "It appears at one time the fair report privilege required an absence of malice . . . subsequent Tennessee cases do not require it." *Id.* at 323 n.8.

The proper analysis to be applied by Tennessee courts is that neither actual malice nor common law malice is an element of the fair report privilege defense. Adding either as an element is inconsistent with the purpose behind the fair report privilege. An individual or media outlet should be able to report on what happened or has been stated in a court proceeding or other official proceeding without fear of being subjected to a tort action if accurately reported statements contain defamatory or embarrassing statements. *Lewis*, 238 S.W.3d at 285.

The fair report privilege is a qualified privilege; but it is only divested or lost if the report of what happened or what was said at an official proceeding was not fairly or accurately portrayed. Neither actual malice, which focuses on the reporter's knowledge of the truth of the allegations reported on, nor common law malice, which focuses on the reporter's possible feelings about the

subjects of the report, is properly part of the inquiry into a fair report privilege defense. Discovery into what a reporter knew or thought about the underlying facts or his feelings about the Plaintiff is not relevant to any of the issues pending in Defendants' Motion to Dismiss.

The Court of Appeals correctly stated 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.

Opinion at 8, citing *Lewis*, 238 S.W.3d at 284. This Court should affirm the Court of Appeals ruling and should specifically state that neither lack of actual malice nor lack of common law malice is an element of a fair report privilege defense.

(B) The exception to the newsgatherer's privilege does not apply.

Tennessee Code Annotated § 24-1-208(a) provides for a privilege from disclosure for "any information or the source of any information" gathered for publication or broadcast. This statute has been referred to as the "shield law" and is the basis for Tennessee's statutory version of a newsgatherer's privilege. This is an important, strong privilege that is critical to Defendants and other news media members' ability to investigate and report on newsworthy events, including the actions of public officials.

The broad discovery requests that Plaintiff sought to compel in this case requested all of Defendants' contacts and investigative files regarding the two news stories at issue. This information was clearly within the definition of the statutory privilege as set forth in section (a) of the statute.

The trial court held that the exception in subsection (b) of the statute applied and would have allowed the discovery of this privileged information. The trial court ruled, without explanation, that the Defendants had "raised a defense based upon the source" within the meaning of that subsection.

The trial court erred in making this ruling. It gave no specific explanation for its finding on this point. A review of the pleadings and materials submitted in support of Defendants' Motion to Dismiss show they are not asserting a defense based on the "source of the information" at this stage of the proceeding and therefore the exception to the statutory privilege does not apply.

As to the First News Story, Defendants are relying upon the fair report privilege for reporting upon allegations made in a judicial proceeding. The defense based upon pleadings, depositions, and other documents that were filed in David Chase's civil lawsuit that was pending in Williamson County, Tennessee. Defendants are not asserting a defense based upon the "source of the information" within the meaning of the exception to the privilege.

As to the Second News Story, Defendants also rely upon the lack of a false and defamatory statement concerning Plaintiff. Defendants rely upon Plaintiff's admissions that he required David Chase to dismiss his civil action against Metropolitan Government as a "condition precedent" to the dismissal of the criminal charges against him. Defendants seek to dismiss Plaintiff's claims on the Second News Story because Mr. Chase's characterizations of the undisputed facts cannot be considered defamatory as a matter of law.

Plaintiff, in his Supplemental Brief to this Court, has not argued by reference to any facts in this case that Defendants are in fact asserting such a defense, but rather seeks to rely upon statutory construction arguments that would essentially do away with the privilege in a defamation lawsuit against a news reporter. Plaintiff's arguments are not consistent with the plain and natural

meaning of the statutory scheme and are wholly inconsistent with the purpose of providing these important protections. The Court of Appeals held that "the trial court's construction of subsection (b) of the statute results in the exemption's swallowing up the protection that subsection (a) provides to media defendants whenever disclosure of a source is sought." Opinion at 10.

The exception to the privilege does not apply because Defendants are not asserting a defense based upon the source of such information. This Court should affirm the reversal of the trial court's ruling on this issue.

ARGUMENT

I. "ACTUAL MALICE" IS NOT AN ELEMENT OF A FAIR REPORT PRIVILEGE DEFENSE.

Defendants' pending Motion to Dismiss relies upon the fair report privilege in seeking dismissal of Plaintiff's claims. (T.R. 41-164.) Plaintiff injected "actual malice" into this early stage of the proceeding by arguing that the discovery he sought from Defendants was relevant and necessary because "the fair report privilege may be defeated by a showing of actual malice." (T.R. 414-15, 871.) He argued that he needed this discovery to "explore the extent of the Defendants' actual malice." (Jan. 13,20-17 Hr'g Tr. at 11; Pl.'s Suppl. Mem. in Supp., T.R. 868-892.) The trial court in its Order Granting Plaintiff's Motion to Compel accepted Plaintiff's argument and ruled that "actual malice" was an element of the fair report privilege. (T.R. 1035-36.) The Court of Appeals properly reversed the trial court's ruling on this point and held that under Tennessee law, "actual malice" is not an element of, or a way to defeat, a fair report privilege defense. Opinion at 8.

The fair report privilege has long been recognized in Tennessee. Judge Koch's opinion in *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270 (Tenn. Ct. Ap. 2007) contained a lengthy discussion about the privilege's history, purpose and elements. In that opinion, the Court of Appeals stated that "[t]he Tennessee Supreme Court recognized the fair report privilege in 1871." *Lewis*, 238 S.W.3d at 284 (citing *Saunders v. Baxter*, 53 Tenn. (6 Heisk) 369, 381 (1871)). The *Lewis* opinion quoted that nineteenth century case as stating: "A bona fide report of the proceedings in a court of justice, in the absence of express malice, is not libel, though the publication may be injurious to the character of an individual." *Id.* at 284 (emphasis in original).

The *Lewis* opinion in 2007 stated that "Tennessee's version of the fair report privilege in its current form closely, though not exactly, mirrors the scope of the privilege found in RESTATEMENT (SECOND) OF TORTS, § 611 at 297 (1977)." *Id.* at 285. That section of the RESTATEMENT (SECOND) defines the privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

RESTATEMENT (SECOND) OF TORTS, § 611 (1977). This is consistent with the way the privilege has been defined in Tennessee. *Lewis*, 238 S.W.3d at 284-85. The effect of the fair report privilege has been described as follows:

> 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 subjected to a tort action for fair and accurate reports, even if these reports contain defamatory or embarrassing statements by government employees.

Id. at 285.

Defendants' pending Motion to Dismiss relies upon the fair report privilege as they claim the news stories at issue were fair and accurate reports of testimony and pleadings in David Chase's Williamson County lawsuit. (T.R. 41-164.) Defendants objected to Plaintiff's requested discovery that seeks all of the Defendants' investigative efforts and files on the grounds that such information is not relevant to their assertion of the fair report privilege as a defense.

Plaintiff put the "actual malice" issue before the Court by arguing that the broad discovery is relevant because "the fair report privilege may be defeated by a showing of actual malice" and he "must be allowed to explore the extent of the Defendants' actual malice . . ." to respond to Defendant's Motion to Dismiss. (Jan 13, 2017 Hr'g Tr. at 11; Pl.'s Supp. Mem. in Supp., T.R. 868-892.) The trial court erred in accepting Plaintiff's argument that Defendants must prove the absence of actual malice in order to rely upon the fair report privilege. (Jan. 13, 2017 Judge's Ruling, T.R. 1022-86.) This was not a correct statement of the law in Tennessee.

In 1964 the United States Supreme Court first announced "actual malice" as a constitutionally mandated requirement in defamation actions brought by public officials in the landmark case of *New York Times v. Sullivan*, 276 U.S. 254 (1964). In that case, the Supreme Court held for the first time that the First Amendment to the United States Constitution required that a public official bringing a defamation action must prove that defendants made the false and defamatory statements with "actual malice." *Id.* at 279-280. In that Opinion, the Supreme Court defined "actual malice" in the following very specific way: 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." *Id.* (Emphasis added.) This definition of "actual malice" is obviously followed in Tennessee in defamation and false light-invasion of privacy cases. *E.g.*, *Press, Inc. v.*

Verran, 569 S.W.2d 435 (Tenn. 1978); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001).

In its ruling on Plaintiff's Motion to Compel, the trial court in this case discussed the fact that because Plaintiff Glenn Funk is a public official, he will have to prove "actual malice" as part of his claims. (Jan. 13, 2017 Judge's Ruling at T.R. 1031-32, 1035-36.) Certainly, if Plaintiff's case progresses past the motion to dismiss or summary judgment stage, Plaintiff will have to prove actual malice as an element of his claims and will have to do so by clear and convincing evidence. *See New York Times*, 376 U.S. at 285-86; *Verran*, 569 S.W.2d at 439-40.

The trial court, however, confused this requirement of actual malice that may later be at issue in Plaintiff's case-in-chief with the issues raised in Defendants' current Motion to Dismiss. (Jan. 13, 2017 Judge's Ruling at T.R. 1031-32, 1035-36.) The proper focus at this early stage of the case is whether actual malice has any application to the fair report privilege which Defendants raised as a defense and as a primary reason to grant their Motion to Dismiss. While "actual malice" is most certainly an element of Plaintiff's claims against Defendants, it is not properly an element for the assertion of the fair report privilege by Defendants as a defense.

In his Supplemental Brief, Plaintiff argues that the Court of Appeals ruling is "directly contrary to more than 100 years of Tennessee Supreme Court precedent which holds that the fair report privilege may be defeated upon a showing of actual or 'express malice.'" Pl.'s Suppl. Br. at 6. In making that argument, all the cases Plaintiff relies upon were decided prior to 1964 and all were discussing express or common law malice. *Id.* 6-7 citing *inter alia Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 36 (Tenn. 1956); *American Publishing Co. v. Gamble*, 90 S.W. 1005 (Tenn. 1905); *Saunders*, 53 Tenn. (6 Heisk) at 381; (Jan. 13, 2017 Hr'g Tr. at 15; T.R. 868-893, 1108-

1115.) These cases refer to express malice but not "actual malice," as that term is used in defamation and false light cases.

As previously noted, it was not until 1964 that the United States Supreme Court adopted "actual malice" and then defined it in a very specific way—a statement made with actual knowledge of its falsity or reckless disregard of whether it was true or not. *New York Times*, 376 U.S. at 279-280. "Actual malice" is much different from express or common law malice. In *Lewis*, the Court specifically stated: "The concept of 'actual malice' as embodied in *New York Times v. Sullivan* shouldn't be confused with the concept of 'malice' that connotes personal ill will, hatred or spite." 238 S.W.3d at 300 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991)) (emphasis added). The United States Supreme Court has stated that "the phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 668 fn.8 (1989).

In the trial court, Plaintiff argued "actual malice" was an element of Defendants' fair report privilege defense but relied upon a number of cases that dealt with common law malice. (Jan. 13, 2017 Hr'g Tr. at 15; Pl.'s Supp. Mem. in Supp., T.R. 868-893; Resp. to Def.'s Am. App. for Interlocutory Appeal, T.R. 1108-1115.) At the Plaintiff's urging, the trial court held "actual malice" was an element and used the *New York Times* definition of that concept in its ruling. (Jan. 13, 2017 Judge's Ruling at 1035, cited in Opinion at 3.)

Plaintiff has now made an adjustment in his argument on his appeal. In his filings in this Court, Plaintiff for the first time expressly argues that "'actual malice' is synonymous with 'express malice.'" Pl.'s Suppl. Br. at 7. The support offered by Plaintiff for this demonstrably incorrect statement is a long block quotation from the 1984 case of *Southeastern Mfg. & Industrial Supply v. Equifax*, 1984 Tenn. App. LEXIS 3375 (Tenn. Ct. App. Dec. 28, 1984). *Id.*

In that case, the "malice" at issue was the use of that word in a statute relating to insurance reports in possible arson cases. Id. at *9, citing Tenn. Code Ann. § 53-2415. The portion of that opinion quoted in Plaintiff's Supplemental Brief relates to that court discussing whether the trial court had erred in dismissing the plaintiff's malicious prosecution claims. *Id.* at 9-12. In that discussion, the Court notes the difference between "legal malice" (some type of implied or imputed malice) versus "express malice" or "malice in fact." *Id.* A review of Plaintiff's quote from that opinion demonstrates that the type of malice being discussed in connection with the malicious prosecution claim is the "ill will or personal spite" type of express (common law) malice and not "actual malice" that applies to defamation cases. This is even more clear from the sentence that Plaintiff left out of his long block quotation, which stated that "Various definitions of the term [express malice] have been enunciated, the most common being that it means a wrongful act, done intentionally or with evil intent, without just cause or excuse." *Id.* at *9. This case found no ill will or improper motive on defendants' part and found that plaintiff's claim for malicious prosecution was barred by the provisions of Tennessee Code Annotated § 53-2415. *Id.* at *11. This case provides no support for Plaintiff's argument herein.[3]

"Actual malice" is demonstrably not the same legal concept as common law or express malice. The terms are not interchangeable or synonymous. Plaintiff's arguments about "more than 100 years of Tennessee Supreme Court precedent" have no application to the concept of "actual malice" that applies in a defamation or false-light invasion of privacy action.

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[3] For the first time in the briefing of this issue, Plaintiff relegates *New York Times v. Sullivan* to a footnote and now states that his position is not based upon that type of "actual malice." Pl.'s Suppl. Br. at 7 fn.2. For support of such argument, Plaintiff again simply cites the case of *Southeastern Mfg. & Industrial Supply, supra.* In his prior briefing and arguments, Plaintiff has cited the *New York Times* case and relied upon its definition of "actual malice" as part of his arguments. *E.g.* Appellee's Brief in the Court of Appeals at 16.

As previously noted, the *Lewis* opinion contained a lengthy discussion about the history, purpose and scope of the fair report privilege in Tennessee. *Lewis*, 283 S.W.3d at 284-285. The opinion in *Lewis* specifically discussed the manner in which the fair report privilege could be lost or would not apply. *Id.* Proving malice or actual malice was not set forth in the discussion in *Lewis* as a way to defeat the fair report privilege. *Id.*[4]

The *Lewis* opinion cited with approval the RESTATEMENT (SECOND) OF TORTS whose definition of the fair report privilege is quoted previously herein at page 18. That definition also does not include absence of malice or actual malice as an element of the fair report privilege. RESTATEMENT (SECOND) OF TORTS, § 611, cited herein in full, *supra* at 18.

There are no reported Tennessee cases that have actually applied "actual malice" to a fair report privilege case. There is one case from the Court of Appeals for the Western Section that simply listed "actual malice" in its list of elements for a fair report privilege, but did not actually apply that element to the facts of that case. *Grant v. Commercial Appeal*, 2015 WL 5772524, at *6 (Tenn. Ct. App. Sept. 18, 2015). In that case, the Court determined that the report the defendant newspaper had relied upon was not actually a report on official action and therefore the Court said it "need not" consider any other requirements. *Id.* at *7. That opinion cited the *Lewis* case as its support for listing of the elements of a fair report privilege. *Id.* at *6. The *Lewis* opinion however did not contain any statement that actual malice is an element of the fair report privilege. *Lewis*, 238 S.W.3d at 284-87; Opinion at 8. ("It appears that the "Grant Court misconstrued *Lewis* because the *Lewis* Court did not mention actual malice as part of is discussion of the fair report

[4] The *Lewis* Court's ruling on the fair report privilege related to the scope of the privilege and held the police reports that the court believed Defendants were relying upon were not official actions to which the privilege could apply. The only discussion of "actual malice" in the *Lewis* opinion was in connection with the requirement that plaintiff must prove it as an element of his libel and false light claims and failed to do so.

privilege.") *Id.* The *Grant* case's listing of "actual malice" as an element of the fair report privilege is inconsistent with current Tennessee case law and as the Court of Appeals found in this case was simply incorrect. Opinion at 8.

Another line of cases that Plaintiff has previously argued would support the inclusion of actual malice as an element of a fair report privilege defense dealt with other qualified privileges and not with the fair report privilege. Plaintiff cited cases that talked generally about how other qualified privileges might be defeated by a showing of malice or ill-will—*i.e.*, common law malice. (Pl.'s Resp. to Def.'s Mot. for Protective Order to Stay Discovery at T.R. 415; Pl.'s Suppl. Mem. in Supp. at T.R. 871.)

Defendants have acknowledged, at least since their Memorandum in Support of their Motion to Dismiss, that the fair report privilege is a qualified privilege. (T.R. 43-164.) The way to defeat this particular privilege however is different from other qualified privileges that may be defeated or overcome by a showing of common law malice or other means specific to those other privileges.

The *Lewis* opinion discussed how the fair report privilege could be lost or overcome. *Lewis*, 238 S.W.3d at 284-97. In that case the Court stated "the report must be a fair and accurate summation and must display balance and neutrality. *Id.* at 284. The Court also stated that "even a report of a judicial proceeding will not be shielded by the privilege if it contains any false statement of fact regarding what occurred during the proceedings, any garbled or one-sided account of the proceeding, or any defamatory observation or comments." *Id.* at 284. There was no mention of actual malice or common law malice in the *Lewis* opinion's discussion of the ways to defeat the fair report privilege used as a defense.

The current state of the law in Tennessee on this issue was reflected in the Court of Appeals' 2012 opinion in *Eisenstein v. WTVF-TV, NewsChannel 5 Network, LLC*, 389 S.W.3d 313 (Tenn. Ct. App. 2012). The Court's opinion in that case relied heavily upon the *Lewis v. NewsChannel 5 Network* case for its statement about the fair report privilege. 389 S.W.2d at 323. In its opinion upholding a privilege claim as to statements made in a deposition, the Court of Appeals stated:

> It appears that at one time the fair report privilege required an absence of malice. In *Saunders v. Baxter*, 53 Tenn. 369, 381 (1871), the Tennessee Supreme Court stated that 'A bona fide report of the proceedings in a court of justice in the absence of express malice, is not libel though the publication may be injurious to the character of an individual. Although this requirement seems to exist in some states (citation omitted), subsequent Tennessee cases do not require it.

Id. at 323 n.8 (emphasis added.)

Throughout the briefing and argument in this case, Plaintiff has tried to dismiss this clear statement of the law as dicta or by pointing out that the statement was contained in a footnote. (*E.g.* Jan. 13, 2017 Hr'g Tr. at 16-17; Resp. to Def.'s Am. App. for Interlocutory Appeal, T.R. 1108-1115.) Such an argument is wholly without merit or legal significance. The Court did place the statement in a footnote, but the footnote followed the discussion of the actual elements of the fair report privilege and their applicability to the facts of that case. *Eisenstein*, 389 S.W.3d at 323. It appears the statement about malice was placed in a footnote precisely because it was not an element of that claim and did not have to be further analyzed or discussed for the privilege to apply. *Id.* It was a correct statement of the current state of the law in Tennessee.

The Court of Appeals in this case held that under the current state of the law in Tennessee the fair report privilege cannot be defeated by a showing of actual malice. Opinion at 8. The Court stated, "If the defendants can show that 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 upon the fair report privilege as a defense to Mr. Funk's defamation claims." Opinion at 8, citing *Lewis*, 238 S.W.3d at 284.

The Court of Appeals' Opinion in this case correctly stated that "Neither *Lewis, Eisenstein,* nor comment a to the Restatement supports Mr. Funk's position that actual malice is an element of the fair report privilege . . ." Opinion at 7. Defendants recognize that there has not yet been a specific pronouncement of this Court on this point. Defendants respectfully submit that this case presents the opportunity for this Court to make that statement as to actual malice and the fair report privilege, and also as to the common law malice which Plaintiff is now more specifically arguing.

Courts in other jurisdictions that have considered whether either actual malice or common law malice is an element of a fair report privilege defense have reached the conclusion that neither actual malice nor common law malice is properly an element of or a way to defeat the fair report privilege. For example, the New Jersey Supreme Court discussed the "modern view" at length, stating that "it is clear that as long as the publisher fully, fairly and accurately reports the contents of a public proceeding, he has done what is necessary and is immune from a suit for defamation based on false statements made, not by him, but by the participants in the proceedings." *Salzano v. New Jersey Media Group, Inc.*, 993 A.2d 778, 798 (N.J. 2010). In *Salzano*, the New Jersey Supreme Court rejected any requirement that the fair report privilege could be defeated by actual malice or common law malice. *Id.* at 797-98 (quoting Kathryn D. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L.Rev. 469, 541-42 (1979) ("The interests served by the report privilege could not be protected adequately if the publisher's view of the validity of the statement reported were allowed to form the basis of civil liability.")). That opinion relied upon case law from other jurisdictions and commentators

and adopted the rule that "as long as the report is fair and accurate, both the publication's truth and the publisher's knowledge of its truth or motivation for publishing are irrelevant." *Id.* at 797 (citing numerous authorities). (Emphasis added.)

In *Rosenberg v. Helinski*, 616 A.2d 866 (Md. Ct. App. 1992), the Court discussed the difference between the fair report privilege and other qualified or conditional privileges. The Court acknowledged that early cases suggested the absence of malice was one element of the privilege but that "[t]he modern view regards the reporting of judicial proceedings as protected by a so-called special privilege that is, while not absolute, somewhat broader than other conditional privileges." *Id.* at 866 (citing RESTATEMENT (SECOND) OF TORTS § 611, comment a (1977)). The Court stated that "[u]nder the modern view, the privilege exists even if the reporter of the defamatory statements made in court believes or knows them to be false; the privilege is abused only if the report fails the test of fairness and accuracy." *Id.* (Emphasis added.)

The Supreme Court of Arkansas discussed the fact that in the original Restatement of Torts, the fair report privilege could be lost if published with malice. *See Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116, 120-21 (Ark. 2011). The Court noted that "[t]he modern view, codified in the Second Restatement, removes the malice requirement so that the privilege is lost only by a 'showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgement.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 611, comment b and citing case law from other jurisdictions) (emphasis added).

The Supreme Court of Illinois has held "that the fair report privilege overcomes allegations of either common law malice or actual malice." *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 843 (Ill. 1997). In support of that holding, the *Solaia* Court quoted comment a to § 611 of the Restatement:

> The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings. . . . The privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding.

RESTATEMENT (SECOND) OF TORTS § 611, comment a, at 297-98 (1997); *Solaia*, 852 N.E.2d at 843 ("The fair report privilege in section 611 permits a defendant to publish a report of an official proceeding even though the defendant knows the report contains a false and defamatory statement.").[5]

Under this "modern rule," neither common law malice which would focus on the publisher's motivation, nor actual malice which would focus on the publisher's knowledge of the truth of the underlying allegations, are part of the inquiry by the Court when the fair report privilege defense is asserted. The other jurisdictions that have held that neither common law malice nor actual malice is relevant to the fair report privilege have held that the way to defeat the privilege is to show that the reports are not a fair and accurate account of the proceeding or official action. The *Lewis* and *Eisenstein* cases support the proposition that this is the law in Tennessee.

The fair report privilege is vitally important to the news media's ability to report on what happens in court proceedings or to report on other official actions. Requiring Defendants to prove a lack of actual malice or lack of common law malice in order to rely upon a fair report privilege defense does not fit with recognizing a privilege for reporting what goes on in judicial proceedings. The fair report privilege is important because it allows reporters to report on allegations or

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[5] There will be no proof in this action that Defendants knew of any falsity in what was reported. It will also be shown that the news story's report was an accurate account of what was at issue in the Williamson County case.

testimony made in judicial proceedings without the fear of being subjected to a tort action for fair and accurate reports of those proceedings. *Lewis*, 238 S.W.3d at 285.

Neither actual malice, which would focus on the reporter's knowledge of the truth of the allegations reported on, nor common law malice, which would focus on the reporter's possible motives or feelings about the subjects reported on, should be at issue on the Defendants' Motion to Dismiss or the Defendants' assertion of the fair report privilege defense at any other subsequent stage of this case.

This issue transcends this particular discovery dispute in several ways. First, this would also be an important issue for these Defendants in subsequent stages of this case, such as any later summary judgment motions, proof at trial, and charging a jury. Second, it is also vitally important for the news media and the public that the issue be resolved correctly so that the applicability of this important privilege is not improperly undermined or limited. This Court should definitively rule that a fair report privilege cannot be defeated by the showing of actual malice or common law malice and lack thereof is not an element of a fair report privilege.

II. THE EXCEPTION TO THE NEWSGATHERER'S PRIVILEGE IN TENNESSEE CODE ANNOTATED SECTION 24-1-208(b) DOES NOT APPLY TO ALLOW PLAINTIFF'S REQUESTED DISCOVERY.

Defendants also relied upon the newsgatherer's privilege found in Tennessee Code Annotated § 24-1-208 to object to Plaintiff's broad discovery requests seeking an identification of all their investigative efforts and production of all their investigative files. The Court of Appeals correctly ruled that the trial court had erred in its interpretation that the exception to the privilege found in subsection (b) of that statute applied to allow the requested discovery. Opinion at 9. The Court of Appeals looked at the "plain meaning of the words used" in the statute and concluded that the trial court's construction of the statute would result in the exception in subsection (b)

"swallowing up the protection that subsection (a) provides to media defendants." *Id.* at 9-10. The Court of Appeals' ruling on this issue was correct and should be affirmed.

The broad discovery that Plaintiff sought by his Motion to Compel asked Defendants to identify every person with whom each Defendant communicated, to describe all their investigative efforts, and to produce all documents obtained or reviewed in their investigation of the two news stories at issue. (T.R. 217, 243, 299, 255.) As previously discussed, Defendants objected on the grounds that the discovery sought was not relevant to any issues raised by the Motion to Dismiss and also objected on the grounds that the information sought was privileged from production under Tennessee Code Annotated § 24-1-208. (T.R. 491-555.)

This statute, which is often referred to as the "shield law," creates a statutory privilege in subsection (a) that protects newsgathering by persons employed by the news media and is defined as follows:

> A person engaged in gathering information for publication or broadcast connected with or employed by the news media . . . shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose . . . any information or the source of any information procured for publication or broadcast.

Tenn. Code Ann. § 24-1-208(a) (emphasis added). Tennessee's statute protects both any information and the source of any information gathered in the process of news gathering. *Id.* The discovery that Plaintiff seeks from the defendant reporter and defendant news organization clearly falls within the definition of this important statutory privilege.

The trial court's basis for rejecting Defendants' privilege claim and allowing this discovery was the exception found in subsection (b) of the statute. This exception provides that the privilege created in subsection (a),

> [S]hall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil

> action for defamation asserts a defense based on the source of the information.

Tenn. Code Ann. § 24-1-208(b) (emphasis added). In ruling upon Plaintiff's Motion to Compel, the trial court found, without any specific explanation, that "defendants have raised a defense based upon the source." (Jan. 13, 2017 Judge's Ruling at T.R. 1035.)

That trial court's ruling was in error because Defendants are not asserting a defense based upon "the source of the information" at this time and therefore the subsection (b) exception to the shield law's protection does not apply. Defendants' pending Motion to Dismiss seeks dismissal of all claims arising from the First News Story based upon the fair report privilege defense which protects fair and accurate reporting of a judicial proceeding. (T.R. 41-164.) For that defense, Defendants are relying upon the pleadings, deposition testimony and documents produced and filed in the Williamson County lawsuit filed by David Chase. (*Id.*) The documents and testimony relied upon were filed herein with the Defendants' Memorandum in Support of the Motion to Dismiss. (*Id.*)

The news stories at issue make clear that they are reporting on "allegations" made and testimony given in the Williamson County case. (Ex. to Williams Aff., T.R. 165-98.) A comparison between the testimony and documents from that case with what was reported in the news stories establishes the basis for the fair report privilege defense and requires dismissal of Plaintiff's claims. Defendants' fair report privilege defense is not based upon some unidentified source that Plaintiff needs to discover.[6]

As to the Second News Story at issue, Defendants' Motion to Dismiss also relies upon the lack of a false and defamatory statement concerning Plaintiff Glenn Funk. (T.R. 41-164.) The

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[6] As previously noted, Plaintiff has already taken the deposition of attorney Brian Manookian, who admitted he provided the documents from the Williamson County case to Defendant Phil Williams and other members of the local news media. (Manookian Dep. at 20-25, 50-52, 66.)

facts reported in the Second News Story are admittedly true and are not in dispute. There are, however, differences of opinion between Plaintiff and David Chase regarding the proper characterization or label for Plaintiff's action that required Mr. Chase to release his civil claims against the Metropolitan Government of Nashville, Davidson County, Tennessee ("Metro") in order to obtain dismissal of the criminal charges against him. (*Id.*) Plaintiff has admitted in his public statement and again in his Amended Complaint filed herein that Mr. Chase was required to dismiss his civil case against Metro as a "condition precedent" to the District Attorney's dismissal of the pending criminal charges against him. (Am. Compl. at ¶ 19 and Ex. B., T.R. 17, 31.) (*Id.*) Thus, these facts as reported in that news story are not in dispute.

Plaintiff claims the false and defamatory statement in the Second News Story is Mr. Chase's characterization of that agreement as "blackmail." (Am. Compl. at ¶ 27, T.R. 19.) Defendants' Memorandum in Support of the Motion to Dismiss relied upon well-established Tennessee common law and also upon the United States Supreme Court opinion in *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970) that specifically held that the use of the word "blackmail" to characterize the plaintiff's negotiating tactics could not, as a matter of law, be considered defamatory. (Mem. in Supp. of Mot. to Dismiss at T.R. 61-63.) For their defense to Plaintiff's claims on this news story, Defendants rely upon Plaintiff's admissions of these facts. Their defense is not based upon some unidentified source, but rather the application of the law to these undisputed facts.

The exception to the newsgatherer's privilege does not apply in this case because Defendants are <u>not</u> asserting a defense to Plaintiff's claims on either news story that is based upon the "source of the information" at this time. It is immaterial to the resolution of Defendants' Motion to Dismiss from whom Defendants received the court documents they relied upon. The

fair report privilege applies because they are reporting on what was contained in those documents, not something that the source of the information told them. It is also immaterial whom Defendants may have communicated with on the Second News Story or what is in their investigative files, since the asserted defense is based upon Plaintiff's admissions of the truth of the facts reported and the fact that Mr. Chase's characterization of those events is not defamatory as a matter of law. The exception in subsection (b) of the privilege statute is clearly not applicable and cannot provide a proper basis for Defendants to lose the protection of this important privilege.

Plaintiff has not attempted in his Application for Permission to Appeal or the restatement of his arguments in his Supplemental Brief to give this Court a factual predicate as to how the Defendants are asserting a defense based upon the "source of the information." Pl.'s Application at 7-9; Pl.'s Suppl. Br. at 8-11. Instead, Plaintiff has offered a number of statutory construction arguments which, in addition to failing to support his position, would violate the statutory construction maxims quoted in his own Supplemental Brief.

Plaintiff does not directly counter the Court of Appeals' statement that his interpretation of the statute would cause the exception in subpart (b) to swallow the privilege granted in subpart (a) except to say that if that is so, it was a "policy decision" already made by the legislature. *Id.* at 11. Plaintiff also makes the strange argument that the fact that the phrase "procured for publication or broadcast" is used in the grant of the privilege in subsection (a) but "notably absent" from subsection (b) means the exception in subsection (b) "is at least as broad (or broader than) the privilege in subsection (a)." *Id.* It is not clear how an exception to a rule can ever be broader than the rule itself, but this argument further reinforces the Court of Appeals' conclusion that by Plaintiff's interpretation the exception would swallow the rule.

Such arguments could hardly be said to be "the natural and ordinary meaning of the language used" or attempting "to ascertain and give effect to the intention and purpose of the legislature." *Id* at 9, citing *inter alia Lipscomb v. Doe*, 32 S.W. 3d 840, 844 (Tenn. 2000). The effect of such arguments would mean that the exception is so broad there is no newsgatherer's privilege at all in a defamation action. The key phrase of the exception that it only applies when a defendant "asserts a defense based upon the source of the information" would effectively be written out of the statute.

Plaintiff has also argued that the Court of Appeals' opinion would allow a defamation defendant to define the scope of the exception under subsection (b) and that such a ruling is "patently unfair" and "contrary to Tennessee liberal discovery rules."[7] *Id.* at 10. That argument is based upon the Court of Appeals using the phrase "basis of the story" for sources that have to be disclosed. *Id.* at 10; Opinion at 10. As Plaintiff pointed out elsewhere in his Supplemental Brief, the exception applies when a defendant asserts a defense based upon the source of the information rather than whether it is the basis for a story. *Id.* at 11.

It is the grant of the privilege in subsection (a) of the statute that defines the scope of the privilege. The privilege applies to the information that Defendants seek to protect from Plaintiff's broad requests. The exception found in subsection (b) only applies in a defamation action where the defendant "asserts a defense based upon the source of the information." Tenn. Code Ann. § 24-1-208(b). (Emphasis added.) By the language of the statute, the proper focus for inquiry is thus whether the exception to the privilege applies at all, which is determined by whether Defendants have asserted a defense in a defamation lawsuit based upon "the source of the information." Tenn. Code Ann. § 24-1-208(b). In this case, the defenses raised by Defendants in

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[7] Rule 26.02 cited by Plaintiff expressly provides that privileged material is not discoverable.

their pending Motion to Dismiss are not based upon the source of any protected information. Rather, Defendants rely upon disclosed documents and testimony from another case, filed with the Motion to Dismiss, and Plaintiff's admissions for their sources for their defenses.

Plaintiff has argued in prior briefings in this case that the documents from the Williamson County case themselves should be considered the "source" that Defendants have relied upon so that the privilege no longer applies. (Appellee's Brief in the Court of Appeals at 27-30; Pl.'s Suppl. Mem. in Supp. at T.R. 874). Plaintiff's counsel argued that the word "source" in the Tennessee shield law is not limited to a person who may have provided the information but also the materials themselves. (*Id.*) At the hearing in the trial court, Plaintiff's counsel argued that "Source means what is the basis for your contention that you published a story that is protected by the fair report privilege . . . the source being the depositions, the text messages, the e-mails, whatever else they had. Those would be the source." (Jan. 13, 2017 Hr'g Tr. at 277; T.R. 1098.) This overly broad definition for "source" advanced by Plaintiff's counsel is contrary to the plain meaning and commonly understood definition of the word "source."

If Plaintiff again argues for the expansive and illogical definition of "source" to include the pleadings, deposition testimony and documents filed in a judicial proceeding, it would also be contrary to the way that term is used in the statute itself. In subsection (a) that grants the privilege, the legislature made the important distinction that both the "information" and the "source of the information" are protected. Tenn. Code Ann. § 24-1-208(a). If, as Plaintiff has argued, the information itself was considered as a "source," it would be superfluous and unnecessary to differentiate between those two terms by listing them separately as subsection (a) does. It is another rule of statutory construction that statutes should be construed to preclude any part thereof

from being "inoperative, superfluous, void or insignificant." *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975).

The argument that "source" includes the information itself also does not fit with the language of the exception in subsection (b) which is limited to a case in which a defense is asserted based upon the "source of the information." Tenn. Code Ann. § 24-1-208(b). If, as Plaintiff argues, "source" was broad enough to include the information itself, the additional words "of the information" would be redundant, superfluous and unnecessary. It should also be noted that unlike subsection (a) which lists the "source of the information" and the "information" separately as privileged, subsection (b) in defining the exception to the rule just uses the term, "source of the information."

Plaintiff was unable to cite any legal authority cited for the overly broad and illogical construction of the word "source" to also mean the documents and other information a reporter might obtain in his investigation. Such an unjustifiable stretching of the words of the statute would mean that the exception to the privilege would apply to every defamation case wherein the fair report privilege defense was raised. Plaintiff's broad interpretation of this exception would mean that the newsgatherer's privilege would be lost to reporters raising most, if not all, other defenses in a defamation action.

There are no Tennessee cases that interpret the exception to the privilege in the Tennessee statute. Opinion at 9. Cases from Rhode Island are at least illustrative of the type of cases when the privilege would not apply. That state has adopted a shield law that contains essentially the same exception, "where the defendant in a civil action for defamation, asserts a defense based upon the source of the information." Rhode Island Gen. Laws 1956, § 9-19. 1-3(b)(1). In *Capuno v. Outlet Co.*, 579 A.2d 469 (R.I. 1990), the defendant in a libel suit pleaded as a defense its good

faith reliance upon an allegedly reliable but confidential source. The Rhode Island Supreme Court found that the exception applied because that constituted asserting a defense based upon the source of the information. In a subsequent case, the Rhode Island Supreme Court in a defamation case against the Providence Journal newspaper remanded the case for determination of "whether the Journal is asserting as a defense that it had a good faith belief in the truthfulness and accuracy of the information it published and to ascertain what if any portion of that information was obtained from its unnamed confidential sources." *Guilano v. Providence Journal Company*, 704 A.2d 220, 221 (R.I. 1997). The Court stated that "If the Journal is asserting such a defense and is relying upon these unidentified sources – as opposed to other, revealed sources of the same information – to justify its belief in the truthfulness of its reporting, then it cannot invoke the newsman's privilege to shield those sources." (Emphasis added.)

Those cases illustrate the type of factual situation where the exception would apply – where a defamation defendant relies upon a confidential source as the basis of its defense to Plaintiff's claim, but then refuses to permit disclosure of who that source is. That is not the case in Mr. Funk's case.

The Court of Appeals' opinion on this issue in this case is consistent with and supports the important purpose of this statutory privilege. Defendants' ability to protect their sources and prevent disclosure of their investigative files is crucially important to protect their ability to investigate and report on newsworthy events, including the conduct of public officials. The important interest in protecting such information from discovery has been explained by the United States Third Circuit Court of Appeals as follows:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the

> journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.

Riley v. City of Chester, 612 F.2d 708, 714 (3rd Cir. 1979) (citations omitted). "Such protection is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain." *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society.")). In *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981), the Court commented that "[u]nless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Id.* Indeed, a news reporter who discloses the identity of confidential sources will no doubt soon be unable to obtain information from potential sources in the future. (Williams Aff., T.R. 607-09.)

There is a legitimate concern that lawsuits may be filed against the news media simply to discover the sources for reports that plaintiffs find objectionable. *See, e.g.*, *Southwell v. Southern Poverty Law Ctr.*, 949 F. Supp. 1303, 1313 (W.D. Mich. 1996) ("Under such a regime, even plaintiffs who suspected their ultimate case would fail on the merits, could bring lawsuits simply as a harassment device to pester publishers and try to discover who was leaking the information they found damaging."); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) ("As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition."). The broad set of discovery requests that Plaintiff served with his Amended Complaint in this case contain numerous requests aimed at discovering the individuals who were sources of information for news stories at issue as well as

sources for news stories that Defendants published about Plaintiff since he took office. (T.R. 213-218, 239-273.)

If this Court adopts the broad interpretation of the statutory exception that Plaintiff has argued, the protection for privileged information would be greatly weakened. A reporter's investigation and any documents obtained in such investigation would almost inevitably become discoverable after the filing of a defamation lawsuit.

The privilege granted by statute is stated in clear and unambiguous language. *Austin v. Memphis Publishing Co.*, 655 S.W.2d 146, 149 (Tenn. 1983). The statute should be interpreted by the plain meaning of the words used and the purpose of the statute, in this case the protection of sources and information gathered for broadcast or publication. In this case, the Court of Appeals stated, "The text of the statute is of primary importance and the words must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." Opinion at 9 (citing *Friedmann v. Marshall County, Tennessee*, 471 S.W.3d 427, 433 (Tenn. Ct. App. 2015)) (quoting *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012)).

The Tennessee Legislature enacted this important privilege that protects both the newsgatherer's sources and information.[8] The exception to that protection only applies in limited circumstances which do not apply here. This Court should affirm the Court of Appeals' ruling that the exception to the newsgatherer's privilege does not apply to permit the discovery of the privileged information sought by Plaintiff's Motion to Compel.

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[8] At least thirty-eight other states and the District of Columbia have enacted some form of shield law providing journalists with protection against forced disclosure of their sources and information. D. Greenwald, 2 Testimonial Privileges § 86 (3d Ed.) (2015).

III. STANDARD OF REVIEW

The trial court's decision that "actual malice" is an element of the fair report privilege and its interpretation of the newsgatherer's privilege statute are issues of law which Defendants contend should be reviewed *de novo* with no presumption of correctness. *See e.g. In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009) (applying *de novo* review to statutory construction issues); *Smith v. Reed*, 944. S.W. 2d 623, 624 (Tenn. Ct. App. 1996) (applying *de novo* review to fair report privilege because "[t]he question of whether a publication is privileged is a question of law to be determined by the Court").

Plaintiff's Supplemental Brief states that the standard of review in this case is abuse of discretion. Pl.'s Supp. Br. at 5. The Court of Appeals' Opinion specifically stated it was applying an abuse of discretion standard. Opinion at 4-5. The Opinion pointed out that "A court abuses its discretion when it 'strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision.'" Opinion at 4, citing *inter alia, Lee v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). In a case cited in Plaintiff's Supplemental Brief, the Court stated, "An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence or relies on reasoning that causes an injustice." Pl.'s Suppl. Br. at 5, citing *inter alia Laseter v. Regan*, 481 S.W.3d 613, 625 (Tenn. Ct. App. 2014) (emphasis added).

The trial court's ruling on the Plaintiff's Motion to Compel was based upon two incorrect legal conclusions. The trial court granted the motion based upon its incorrect legal conclusion that "actual malice" was an element of the fair report privilege and its incorrect interpretation of the

shield law that the statutory exception applied to prevent Defendants from asserting the newsgatherer's privilege granted in that statute.

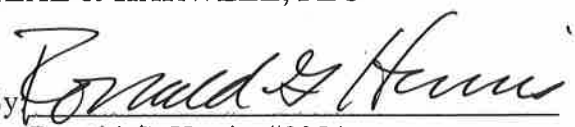
Under either standard of review, the Court of Appeals' Opinion properly ruled upon the legal issues raised by Defendants' appeal. The result should be the same whichever standard was used – the trial court's rulings should have been, and were properly, reversed.

CONCLUSION

In this case, the Court of Appeals held that "actual malice" is not an element of the fair report privilege defense and properly reversed the trial court's ruling on that issue. The Court of Appeals also properly reversed the trial court's ruling that Defendants were asserting a defense based upon "the source of the information" within the meaning of the exception to the newsgatherer's privilege statute. The newsgatherer's privilege should fully apply to the discovery at issue in this case. Defendants respectfully ask that this Court affirm both of these rulings by the Court of Appeals and remand the case to the trial court to proceed in accordance with this Court's order.

Respectfully submitted,

NEAL & HARWELL, PLC

By 

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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 11th day of May, 2018.

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