CASE NO. M2017-0256-R11-CV

IN THE TENNESSEE SUPREME COURT

GLENN R. FUNK,

Plaintiff-Appellant,

v.

SCRIPPS MEDIA, INC. and PHIL WILLIAMS,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

NO.: 16C333

SUPPLEMENTAL BRIEF OF APPELLANT

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INTRODUCTION[1]

The Court of Appeals reversed an order of the Davidson County Circuit Court, which granted Plaintiff's motion to compel. Contrary to mandatory Supreme Court precedent, the Court of Appeals held the trial court abused its discretion because it based its decision on an incorrect conclusion of law—namely, that actual malice is relevant to the fair report privilege. Further, in a case of first impression, the Court of Appeals held that, although a defamation defendant relying upon the source of defamatory information as a defense waives the protection of Tennessee's shield law, the extent of the waiver is determined by the defendant itself. This interpretation is inconsistent with the plain language of the statute and is unworkable from a policy perspective.

Therefore, Plaintiff respectfully requests that this Court reverse the Court of Appeals and remand to the trial court for further proceedings.

[1] The substance of the Brief is substantially similar to Appellant's Rule 11 application, provided that Appellant has included herein a request that the Court remand to the trial court for further proceedings after reversing the Court of Appeals.

QUESTIONS PRESENTED

1. Whether actual malice is relevant to Tennessee's fair report privilege?

2. Whether Tennessee's Shield Law is applicable where a defendant in a defamation action relies upon the fair report privilege as a defense and, if so, to what extent?

FACTS

This defamation case arises from two news stories published by Defendants. (*See* Amended Compl., R. 11.) The first story ("First Story") made public portions of depositions given in a Williamson County lawsuit, and stated and implied that Plaintiff, in his role as Davidson County's District Attorney General, extorted money from a criminal defendant, solicited a bribe, and blackmailed a criminal defendant into dismissing a civil lawsuit. (*Id.* at Exs. A and D, R. 27 and 38.). One day later, Defendants published a second story that explicitly stated there was no factual basis for an allegation that Mr. Funk was involved with any bribe ("Second Story"). (*Id.* at Ex. D, R. 38.) Scripps Media, Inc. also published a tweet that stated, "BREAKING: Allegation of extortion, blackmail made against Nashville District Attorney, Glenn Funk. Details at 6 pm." (*Id.* ¶ 16, R. 16.) One of Scripps Media, Inc.'s employees tweeted, "DON'T MISS EXCLUSIVE I-Team report on David Chase. He talks. Bribery, blackmail and he calls out the DA. At 6!" (*Id.* ¶ 17, R. 16-17.)

In March of 2016, Defendants filed a motion for summary judgment (styled as a motion to dismiss), arguing (1) the First Story is protected by Tennessee's fair report privilege, and (2) the Second Story contains no false statements. (Defs.' Mot. to Dismiss, R. 41-42; Defs.' Mem. in Supp. of Mot. to Dismiss, R. 43-65.) Defendants then moved to stay all discovery pending the outcome of the motion for summary judgment, arguing that the motion would "dispose of all issues" in the case.[2] (Defs.' Mot. for Protective Order to Stay Discovery, R. 199-200.) The trial court denied Defendants' Motion for Protective Order, but ordered that discovery would be limited "to the facts related to the two (2) news stories cited in the Complaint." (Order Denying Defs.' Mot. for Protective Order to Stay Discovery, R. 484-87.)

[2] However, Defendants' motion does not address the social media posts or Plaintiff's defamation by implication claim. (*Id.*)

Subsequently, Defendants served responses to written discovery, objecting "to the extent" various requests sought information protected from disclosure by Tennessee's shield law, Tenn. Code Ann. § 24-1-208 ("Shield Law"). Plaintiff filed a motion to compel. (Pl.'s Mot. to Compel, R. 488.) The trial court granted the motion to compel, holding that actual malice is "a factor in the fair report privilege" and that the Shield Law did not apply because Defendants had asserted a defense based on the "source" of the information in the stories (that is, the fair report defense). (Order Granting Pl.'s Mot. to Compel, R. 1022; Transcript at 10-11, R. 1035-36.) The Court of Appeals reversed on both issues.

STANDARD OF REVIEW

The standard of review in this case is abuse of discretion. "'It is well settled that decisions with regard to pre-trial discovery matters rest within the sound discretion of the trial court' and 'will not be reversed on appeal unless a clear abuse of discretion is demonstrated.'" *Laseter v. Regan*, 481 S.W.3d 613, 625 (Tenn. Ct. App. 2014) (quoting *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992)). "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." *Id.* (quoting *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011)). "Consequently, when reviewing a discretionary decision by the trial court, 'the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision.'" *Id.*

ARGUMENT

I. The Court of Appeals' Decision is Directly Contrary to Mandatory Supreme Court Precedent.

The Court of Appeals held that "the [fair report] privilege cannot be defeated by a showing of actual malice . . . ." This 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.

"[T]he fair report privilege has traditionally protected 'newspapers which make reports of judicial proceedings to the public, in order that members of the public may be apprised of what takes place in the proceedings without having been present.'" *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 284 (Tenn. Ct. App. 2007). This Court recognized the privilege in 1871, explaining that "a bona fide report of the proceedings in a court of justice, in the absence of express malice, is not libel . . . ." *Saunders v. Baxter*, 53 Tenn. (6 Heisk.) 369, 381 (1871) (emphasis added).

In 1896, this Court affirmed that the absence of "express malice" is essential to the application of the privilege, holding, "It is true that in privileged communications express malice must be proved, and, when once proved, the privilege, unless absolute, is lost." *Mattson v. Albert*, 36 S.W. 1090, 1091 (Tenn. 1896).

Ten years later, this Court explained that the fair report privilege may be defeated "upon proof of express malice . . . ." *Am. Pub. Co. v. Gamble*, 90 S.W. 1005, 1009-10 (Tenn. 1905).

And again, in 1956, this Court held that "publication of matters contained in a filed pleading is privileged if the report is accurate and fair and free of malice . . . ." *Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 36 (Tenn. 1956) (emphasis added). Two years later, the Court

of Appeals held that the fair report privilege may be overcome upon a showing of "express malice." *Langford v. Vanderbilt Univ.*, 318 S.W.2d 568, 576 (Tenn. Ct. App. 1958).

In 1984, the Tennessee Court of Appeals explained the meaning of actual or "express" malice (which defeats the fair report privilege) as follows:

> There are two types of malice: (1) malice in law, and (2) malice in fact, or express malice.
>
> Malice in law, or legal malice, is a presumption of law and dispenses with the proof of malice when words which raise such presumption are shown to have been uttered. This form of malice is not necessarily inconsistent with an honest or even laudable purpose, and does not imply ill will, personal malice, hatred, or a purpose to injure. . . .
>
> Express malice is malice in fact, as distinguished from implied malice. . . . It is a positive desire and intention to annoy and injure another, and proof of mere negligence is insufficient as the basis for a finding of the existence thereof. It may, and in common acceptance does, denote that the defendant was actuated by ill will or personal spite, but many cases hold that in its legal significance such degree of personal hostility is not necessary, and that in many instances malice is shown by a wanton disregard of the rights and interests of the party injured. . . .
>
> Legal malice is not sufficient to defease a privilege. To defease a privilege, there must be express or actual malice.

Southeastern Mfg. & Indus. Supply v. Equifax, Equifax Servs., 1984 Tenn. App. LEXIS 3375, at *9-10 (Dec. 28, 1984) (emphasis added) (citing *Langford*, 287 S.W.2d 32). Thus, "actual malice" is synonymous with "express malice."[3]

[3] The actual malice which must be proven to defeat the privilege is not "actual malice" as that term was defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964), but rather "express malice." *See Southeastern Mfg*, 1984 Tenn. App. LEXIS 3375, at *10 ("Legal malice is not sufficient to defease a privilege. To defease a privilege, there must be express or actual malice. To defease a qualified privilege, express malice must be proved by a preponderance of the evidence. 'Where there is a qualified privilege, the material, although libelous per se, is not actionable unless malice is proved, and the burden is on the plaintiff to show the malicious intent. When a privilege has been granted, one must act with express malice in order to destroy that privilege. . . . The burden is upon the plaintiff to show express malice to destroy the privilege granted by the legislature.") (citations omitted) (citing *Langford*, 287 S.W.2d 32, and *Southern Ice Co. v. Black*, 189 S.W. 861 (Tenn. 1916)).

In 2007, the Court of Appeals quoted the following statement from *Saunders*: "[A] bona fide report of the proceedings in a court of justice, in the absence of express malice, is not libel . . . ." *Lewis*, 238 S.W.3d at 284.

However, in 2012, the Court of Appeals stated in an unsupported footnote, in dicta, that cases subsequent to *Saunders* do not require "malice". *Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, 389 S.W.3d 313, 313 n.8 (Tenn. Ct. App. 2012). This is the only Tennessee case that purports to overrule the long-standing rule that actual malice defeats qualified privileges like the fair report privilege. It is not clear how the court came to this conclusion. This footnote is a misstatement of the law.

In sum, since 1871, this Court has consistently held that the fair report privilege may be defeated upon a showing of actual or "express" malice. Nonetheless, the Courts of Appeals held as follows in this case:

> 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.) This holding is directly contrary to over 100 years of this Court's mandatory precedent. If the Court of Appeals' decision in this case is permitted to stand, it will only add confusion to this important issue that affects every fair report case.

II. The Court of Appeals' Interpretation of the Shield Law is Contrary to the Plain Language of the Statute and Allows a Defamation Defendant Itself to Define the Scope of Protection.

In granting Plaintiff's motion to compel, the trial court held that Defendants cannot rely on the Shield Law because they are asserting a defense based on the source of the information on which the First Story is based. The Court of Appeals reversed and held that the trial court abused its discretion in granting Plaintiff's motion as follows:

> We find 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. In most, if not all, cases, a news gatherer is going to rely on a "source of information" as the basis for his or her publication or broadcast. According to the trial court's ruling, any time a news gatherer defends a defamation claim by invoking the fair report privilege, the news gatherer loses the entire protection provided under section (a) of the Shield Law and must disclose every source collected, whether used in the story or not. We believe a better interpretation would be to allow a media defendant to assert the fair report privilege while also subjecting to disclosure only the sources the media defendant identifies as the basis for the story. . . .
>
> Other than the person or document(s) the news gatherer identifies as the source(s) of his or her publication or broadcast, however, section (a) of the Shield Law protects the news gatherer from having to produce any other information or documents from his or her investigative files.

(Opinion at 10) (emphasis added).

With respect to statutory interpretation, generally, this Court has explained as follows:

> Our duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature. *See Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000); *Freeman*, 27 S.W.2d at 911. "'Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.'" *Lipscomb*, 32 S.W.3d at 844 (quoting Hawks v. City of Westmoreland, 960 S.W.2d 10, 16 (Tenn. 1997)).
>
> When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application. *See id.*; *Carson Creek Vacation Resorts, Inc. v. State Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). Where an ambiguity exists, we must look to the entire statutory scheme and elsewhere to ascertain the legislative intent and purpose. *State v. Walls*, 62 S.W.3d 119, 121 (Tenn. 2001); *Freeman*, 27 S.W.3d at 911. The statute must be construed in its entirety, and it should be assumed that the legislature used each word purposely and that those words convey some intent and have a meaning and a purpose. *Tennessee Growers, Inc. v. King*, 682 S.W.2d 203, 205 (Tenn. 1984). The background, purpose, and general circumstances under which words are used in a statute must be considered, and it is improper to take a word or a few words from its context and, with them isolated, attempt to determine their meaning. *First Nat'l Bank of Memphis v. McCanless*, 186 Tenn. 1, 207 S.W.2d 1007, 1009-10 (Tenn. 1948).

Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004). "Further, the language of a statute cannot be considered in a vacuum, but 'should be construed, if practicable, so that its component parts are consistent and reasonable.'" *In re Estate of Tanner*, 295 S.W.3d 610, 614 (Tenn. 2009). "Any interpretation of the statute that 'would render one section of the act repugnant to another' should be avoided." *Id.*

Tenn. Code Ann. § 24-1-208(a) provides that a reporter cannot be required to disclose "any information or the source of any information procured for publication or broadcast." (emphasis added). Subsection (b) then states, "Subsection (a) shall 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 such information." *Id.* § 208(b) (emphasis added). Notably absent from subsection (b) is the phrase "procured for publication or broadcast." Construing subparts (a) and (b) together, the absence of this phrase in subpart (b) is significant because it indicates the waiver in (b) is at least as broad (or broader than) the privilege in subpart (a). Thus, the privilege in subpart (a) applies to "information or the source of any information procured for publication or broadcast," while the exception in (b) applies to the source of information regardless of whether it was "procured for publication or broadcast." *Id.* § 208(a)-(b).

With this structure in mind, the Court of Appeals' interpretation of the Shield Law is problematic for several reasons. First, allowing the media defendant to disclose "only the sources the media defendant identifies as the basis for the story" permits the media defendant itself to define the scope of the waiver under subpart (b). This is patently unfair to defamation plaintiffs and contrary to Tennessee's liberal discovery rules. *See, e.g.*, Tenn. R. Civ. P. 26.02. The legislature could have limited the waiver in subpart (b) to the source of defamatory information

solely to the extent it served as "the basis for the story at issue," but it did not. Instead, the statute provides "Subsection (a) shall 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 such [allegedly defamatory] information." Tenn. Code Ann. § 24-1-208(b).

Second, the Court of Appeals' holding ignores the plain language of the statute. Again, the absence of "procured for publication or broadcast" in subpart (b) indicates that the waiver is at least as broad as the privilege in subpart (a). *Id.* § 208(a)-(b). Therefore, if subpart (b) applies, a media defendant cannot cherry-pick documents and information for which it wants retain the privilege and disclose only that which it deems "the basis for the story." The waiver applies with respect to the source of any allegedly defamatory information . . . ." *Id.* § 208(b).

Third, the Court of Appeals' conclusion that "[i]n most, if not all, cases, a news gatherer is going to rely on a 'source of information' as the basis for his or her publication or broadcast" is a red herring and is not correct. The exception in subpart (b) applies when a defamation defendant relies upon the source of the information as a "defense," not when it merely relies on the source as the "basis" of the publication. There are many defenses to a defamation action that do not rely upon the source of the information, including truth, opinion, litigation privilege, and various First Amendment defenses. And even if the Court of Appeals was correct that the exception in subpart (b) swallows subpart (a), the legislature already made the policy decision in this regard.

Conclusion

Therefore, Plaintiff respectfully requests that this Court reverse the Court of Appeals and remand to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail and email upon:

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On this 13th day of April, 2018.

_____