IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

THOMAS NATHAN LOFTIS, SR.,	)	
	)	
Plaintiff-Appellant,	)	M2017-01502-COA-R3-CV
	)	
v.	)	Davidson County Circuit Court
	)	Case No. 17C-295
	)	
RANDY RAYBURN,	)	Judge Kelvin Jones
	)	
Defendant-Appellee.	)	

BRIEF OF DEFENDANT-APPELLEE AND CROSS-APPELLANT RANDY RAYBURN

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III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to Tenn. R. App. P. 27(b), Mr. Rayburn submits his own competing statement of the issues. Mr. Rayburn also advances three additional claims as Cross-Appellant pursuant to Tenn. R. App. P. 3(h) and 13(a).

Mr. Rayburn's Issues as Defendant-Appellee

1. Whether the Trial Court ruled on Mr. Loftis's claims for defamation by implication or innuendo and false light;

2. Whether the Trial Court correctly dismissed Mr. Loftis's claims for defamation by implication or innuendo and false light on the bases: (1) "that the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning," and (2) "that they do not give rise to liability as a matter of law."

3. Whether the Trial Court's Order dismissing Mr. Loftis's Amended Complaint can also be affirmed on any of several additional grounds;

4. Whether the Trial Court extraordinarily abused its discretion by permitting a transcript of the evidence or proceedings to be filed or by ordering Mr. Loftis to bear the costs of preparing it.

Mr. Rayburn's Additional Issues as Cross-Appellant

5. Whether Mr. Rayburn is entitled to attorney's fees under Tenn. Code Ann. § 29-20-113;

6. Whether Mr. Rayburn is entitled to attorney's fees for defending against a meritless claim for sanctions; and

7. Whether Mr. Loftis' appeal is frivolous within the meaning of Tenn. Code Ann. § 27-1-122.

IV. STATEMENT REGARDING RECORD CITATIONS

Mr. Rayburn's brief uses the following designations when citing to the record:

1. Citations to the technical record are abbreviated as "R. at (page number)."

2. The transcript of the Parties' hearing on Mr. Rayburn's Motion to Dismiss is cited as "Transcript at p. (page number) (line number)."

3. Mr. Loftis's Brief is cited as "Appellant's Brief at (page number)."

Record citations and caselaw citations are footnoted throughout Mr. Rayburn's brief, except where including a citation in the body of the brief improves clarity.

V. APPLICABLE STANDARDS OF REVIEW

The following standards of review govern this appeal:

1. The Trial Court's Order dismissing Mr. Loftis's Amended Complaint for failure to state a claim is reviewable de novo with no presumption of correctness.[1]

2. The Trial Court's Order permitting a transcript of the Parties' hearing on Mr. Rayburn's Motion to Dismiss to be included in the record is reviewable for extraordinary abuse of discretion.[2]

3. The Trial Court's Order requiring Mr. Loftis to assume the expense of the transcript's preparation is reviewable for clear abuse of discretion.[3]

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[1] *The Metro. Gov't of Nashville v. The Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 754 (Tenn. 2015) ("On appeal, a trial court's decision to dismiss a [complaint] for failure to state a claim creates a question of law which we review de novo with no presumption of correctness.").

[2] *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993) ("While Rule 24(e) grants an appellate court authority to direct that a supplemental record be certified and transmitted, absent extraordinary circumstances, an appellate court does not have the authority to refuse to consider matters that are determined by the trial court judge to be appropriately includable in the record."); *State v. Housler*, 167 S.W.3d 294, 296 (Tenn. 2005) (holding that appellate courts "accord[] deference to the trial court's decision as to which matters are properly includable in the record, thereby avoiding additional litigation on that subject alone."); *Artrip v. Crilley*, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985) ("The Trial Court is the final arbiter of the transcript or statement of the proceedings.").

[3] *Perdue v. Green Branch Min. Co.*, 837 S.W.2d 56, 60 (Tenn. 1992) ("appellate courts are generally disinclined to interfere with a trial court's decision in assessing costs unless there is a clear abuse of discretion.").

VI. INTRODUCTION

On February 3, 2017, Mr. Thomas Loftis—the former director of a publicly funded community college program—filed a $1.5 million defamation and false light lawsuit against the supposed source of an accurate but gently critical news story published by the *Tennessean*. The entirety of Mr. Loftis's complaint concerned statements that were neither made by nor attributed to the Defendant, Mr. Randy Rayburn. In fact, at no point in the article was Mr. Rayburn even quoted. Further, nearly all of the objectively innocuous statements referenced in the article did not mention Mr. Loftis, were incapable of conveying any defamatory meaning or inference as a matter of law, and could not seriously be considered "highly offensive" by any reasonable person. Critically, Mr. Loftis also pleaded that the only statements in the article that did mention him were accurate—rendering this lawsuit "possibly unprecedented" in its frivolousness.[4] After finding that the statements that Mr. Loftis had sued over were incapable of conveying any defamatory meaning and could not give rise to liability as a matter of law, the Trial Court dismissed Mr. Loftis's Amended Complaint for failure to state a claim.[5]

Even for a defamation lawsuit, Mr. Loftis's complaint was unusually frivolous, and it was widely mocked as a result.[6] Despite its frivolousness, however,

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[4] R. at 266.
[5] R. at 275, ¶¶ 4-5.
[6] *See, e.g.*, Tim Cushing, *Judge Dumps Stupid Libel Suit Featuring A Man Suing A Third Party For Things A Journalist Said*, TECHDIRT (Jul. 21, 2017), https://www.techdirt.com/articles/20170712/12090337774/judge-dumps-stupid-libel-suit-featuring-man-suing-third-party-things-journalist-said.shtml; David L. Hudson, Jr., *Unusual Defamation Suit Targets Source of News Story*, THE NEWSEUM INSTITUTE'S FIRST AMENDMENT CENTER (Aug. 5, 2017), http://www.newseuminstitute.org/2017/08/05/unusual-defamation-suit-targets-source-of-story-2/.

the implications that the instant lawsuit will carry if its dismissal is not forcefully affirmed by this Court are anything but. Simply put: forcing the supposed source of a news story to defend against a $1.5 million lawsuit for the transgression of being *mentioned* alongside coverage that a hypersensitive plaintiff considers unflattering poses serious and severe risks to the viability of newsgathering in Tennessee. Consequently, if allowed to move forward, this lawsuit would threaten both free speech and the public's willingness to engage with journalists at all.

Further still, allowing Mr. Loftis's hurt feelings about a lawful termination decision made by a public college foundation's Board of Trustees to be recast as a defamation and false light lawsuit against a single public official in his individual capacity impairs two recognized public policy interests of the State of Tennessee. First, it undermines public officials' "flexibility to make important decisions free from fear that they will have to defend themselves from lawsuits."[7] Second, it frustrates Tennessee's public policy that "[u]ninhibited communication with the public about governmental affairs is essential and must be protected."[8] Thus, to safeguard these interests, and because Mr. Loftis's lawsuit failed to satisfy all—or even most—of the elements of either cause of action that he advanced, the Trial Court's Order dismissing his lawsuit for failure to state a claim should be affirmed.

VII. SUMMARY OF ARGUMENT

The Trial Court considered both of Mr. Loftis's claims and correctly

[7] *Jones v. State*, 426 S.W.3d 50, 56 (Tenn. 2013).
[8] *Id.*

dismissed them on two separate bases: (1) because "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning," and (2) because the statements at issue "do not give rise to liability as a matter of law."[9] Mr. Loftis now appeals the Trial Court's dismissal, insisting—without citation—that the claims that he raised were never considered.[10] Mr. Loftis further contends that with respect to his false light claim, he was entitled to a specific finding as to whether the statements in the article were "highly offensive to a reasonable person."[11] Lastly, Mr. Loftis insists that the Trial Court erred both by allowing the transcript of the Parties' hearing on Mr. Rayburn's Motion to Dismiss to be included in the record and by requiring Mr. Loftis to bear the expense of preparing it. For the following reasons, however, all of these claims are without merit.

First, Mr. Loftis has failed to provide even a single citation to the record in support of his central argument in this appeal: that the Trial Court failed to rule on his two theories of relief.[12] By rule, this failure results in waiver.

Second, the Trial Court's Order unmistakably indicates that it *did* consider both of Mr. Loftis's claims.[13] Accordingly, in addition to being waived, Mr. Loftis's argument that the Trial Court failed to rule on his claims is also meritless.

Third, the Trial Court correctly dismissed Mr. Loftis's claims on the bases that the statements at issue were incapable of conveying a defamatory meaning

[9] R. at 275, ¶¶ 4-5.
[10] *See* Appellant's Brief at 10.
[11] Appellant's Brief at 10.
[12] Appellant's Brief, p. 10.
[13] R. at 274-75.

and could not give rise to liability as a matter of law.[14]

Fourth, the Trial Court's Order dismissing Mr. Loftis's false light claim can be affirmed based on any of more than half a dozen additional grounds.

Fifth and finally, the Trial Court acted well within its discretion when it determined "that the transcript of proceedings is necessary to convey a complete account of what transpired at the hearing" and ordered Mr. Loftis to pay for it.[15]

Separately, Mr. Rayburn seeks his own relief from this Court as Cross-Appellant on three issues. Specifically, Mr. Rayburn avers that: (1) he is entitled to attorney's fees under Tenn. Code Ann. § 29-20-113; (2) he is entitled to attorney's fees for defending against a meritless (and waived) claim for sanctions; and (3) he is entitled to attorney's fees because Mr. Loftis's appeal is frivolous.

VIII. STATEMENT OF FACTS

On February 3, 2017, the Plaintiff, Mr. Thomas Loftis, Sr., filed a $1.5 million lawsuit against Defendant Randy Rayburn over statements contained in an article written by *Tennessean* reporter Jim Myers and published by the *Tennessean* on March 2, 2016.[16] The article itself reflects that Mr. Rayburn did not write it.[17] The article further reflects that Mr. Rayburn was not even quoted in it.[18]

Mr. Loftis's lawsuit specifically alleged that the *Tennessean* article defamed

[14] R. at 275.
[15] R. at 285.
[16] R. at 1-12.
[17] R. at 11-12.
[18] R. at 11-12.

him by implication and placed him in a false light.[19] In particular, he claimed that Mr. Rayburn owed him an eye-popping $1.5 million in damages due to the *Tennessean*'s publication of the following five objectively innocuous statements:

> **Statement #1**. "Rayburn recognized [the need for qualified line cooks in Nashville] every day in his kitchens at the old Sunset Grill, Midtown Cafe and Cabana, so he decided to do something about it by dedicating himself to helping build the culinary arts program at what used to be called Nashville Tech."[20]
>
> **Statement #2**. "Rayburn will tell you [that helping build the culinary arts program at Nashville Tech] hasn't been easy."[21]
>
> **Statement #3**. "When [Rayburn] enlisted the help of local restaurateurs and chefs to offer feedback on the program and the quality of its graduates, the reports he got back weren't flattering. The program was simply turning out unqualified students."[22]
>
> **Statements #4-#5**. "[**#4**] Myers then wrote: 'they started by cleaning house from the top by removing director Tom Loftis. It was a politically inexpedient move last year since Loftis was the brother-in-law of Bill Freeman who was running for mayor at the time. [**#5**] If the election had gone a different way, it might have affected funding for the school.'"[23]

Critically, with the exception of Statement #4, none of these statements even referenced Mr. Loftis. Additionally, with the exception of Statement #5—which concerns a non-party—Mr. Loftis did not even allege that the above statements were false. In fact, to the contrary, Mr. Loftis himself pleaded that they were ***true***.[24]

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[19] R. at 6.
[20] R. at 74, ¶ 14.
[21] R. at 75, ¶ 15.
[22] *Id*.
[23] *Id*. at ¶ 17.
[24] *See* R. 165, ¶ 6 (pleading that "in October, 2014, Dean Karen Stevenson and the director from the Southeast campus claimed to have been contacted by local chefs with concerns regarding the qualifications of program graduates."); ¶ 8 (pleading that "[i]n March 2015, Plaintiff was informed that a decision had been made not to renew his contract at the conclusion of the academic year.").

After being served with Mr. Loftis's Complaint, Mr. Rayburn moved to dismiss it in part on the basis that "even Mr. Loftis does not attribute the allegedly offending statements to Mr. Rayburn. Instead, he complains repeatedly that they were made by 'The Tennessean,' by 'the article,' or by 'Jim Myers,' 'Mr. Myers,' or 'Myers' instead."[25] In response, Mr. Loftis filed an Amended Complaint that added the new allegation that Mr. Rayburn had communicated the statements at issue.[26]

After Mr. Loftis filed his Amended Complaint, Mr. Rayburn again moved to dismiss it based on eight continuing deficiencies.[27] Mr. Rayburn also sought attorney's fees pursuant to Tenn. Code Ann. § 29-20-113 because had been sued for statements alleged to have been made in his official capacity as a member of the Board of Trustees of the Nashville State Community College Foundation.[28]

Following extensive briefing, the Trial Court heard oral argument on Mr. Rayburn's Motion to Dismiss at Mr. Loftis's request.[29] Thereafter, the Trial Court issued a written Order that expressly addressed both of Mr. Loftis's theories of relief.[30] Finding Mr. Loftis's complaint to be deficient even as amended, the Trial Court dismissed Mr. Loftis's Amended Complaint for failure to state a claim on the bases that: (1) "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning," and (2) "they do not give rise to liability as a

[25] R. at 25.
[26] R. at 74.
[27] R. at 176-77.
[28] R. at 215.
[29] Mr. Rayburn wanted to waive oral argument on his Motion to Dismiss in order to expedite the resolution of the case, which had been delayed repeatedly. *See* R. at 243-44.
[30] R. at 274-75.

matter of law."[31] The Trial Court also assessed costs against Mr. Loftis, but it did not address Mr. Rayburn's claim for fees under Tenn. Code Ann. § 29-20-113.[32]

After the Trial Court entered its Order dismissing Mr. Loftis's Amended Complaint, Mr. Loftis filed a notice of appeal.[33] Mr. Loftis also filed an additional notice that no transcript of the hearing on Mr. Rayburn's Motion to Dismiss would be filed.[34] In response, Mr. Rayburn filed a timely notice pursuant to Tenn. R. App. P. 24(d) that a transcript of the evidence or proceedings was to be filed.[35] Given that Mr. Loftis was both the losing party and the party who had insisted upon oral argument,[36] Mr. Rayburn also applied for an order requiring Mr. Loftis to assume the expense of preparing the transcript pursuant to Tenn. R. App. P. 24(d).[37]

After considering the Parties' competing notices, the Trial Court made a specific finding that "the transcript of proceedings is necessary to convey a complete account of what transpired at the hearing."[38] The Trial Court also exercised its discretion under Tenn. R. App. P. 24(d) to require "the plaintiff/appellant [to] assume the expense" of preparing the transcript.[39]

After the Trial Court entered its Order permitting a transcript of the hearing on Mr. Rayburn's Motion to Dismiss to be filed, Mr. Loftis filed a "Motion to Alter,

[31] R. at 275, ¶¶ 4-5.
[32] *Id.*
[33] R. at 277-78
[34] R. at 279.
[35] R. at 281-84.
[36] R. at 243-44.
[37] R. at 283.
[38] R. at 285.
[39] R. at 286.

Amend and to Set Aside" the order.[40] In his motion, Mr. Loftis insisted that "there is nothing to be prepared and nothing to be filed" and that "the court apparently did not recall the circumstances" of the Parties' hearing.[41] Mr. Loftis did not serve Mr. Rayburn's attorneys with a copy of his motion.[42] However, Mr. Rayburn's counsel discovered the motion and responded to it.[43]

Citing extensive precedent from this Court, Mr. Rayburn opposed Mr. Loftis's Motion to Alter, Amend and to Set Aside on several bases, including that: (1) Tenn. R. App. P. 24 "expressly contemplates the filing of a transcript of proceedings";[44] (2) this Court has held repeatedly that positions adopted by counsel during oral argument can be construed as judicial admissions;[45] and (3) "statements of counsel are also relied upon by [this Court] in its opinions for a multitude of other reasons" that help facilitate appellate review.[46] Following a hearing on Mr. Loftis's Motion to Alter, Amend, and to Set Aside, the Trial Court denied Mr. Loftis's motion as being "without merit."[47] The instant appeal followed.

IX. ARGUMENT

All of Mr. Loftis's claims are meritless. The record reflects unmistakably that the Trial Court ruled on both of Mr. Loftis' causes of action. Mr. Loftis's allegations also failed to satisfy threshold elements of either tort for multiple reasons,

[40] R. at 287.
[41] R. at 287.
[42] R. at 289.
[43] R. at 289.
[44] R. at 289-290.
[45] R. at 290-91, n. 1.
[46] R. at 290, n. 2.
[47] R. at 303.

including several reasons that Mr. Rayburn noted but that the Trial Court found it unnecessary to address. Nor was there any error at all in the Trial Court's Order permitting Mr. Rayburn to file a transcript of the Parties' hearing and compelling Mr. Loftis to pay for it. As such, the Trial Court's judgment should be affirmed.

A. THE TRIAL COURT CONSIDERED BOTH OF MR. LOFTIS'S CAUSES OF ACTION AND CORRECTLY DISMISSED THEM BECAUSE THEY FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Mr. Loftis advances just a single argument on appeal with respect to his defamation by implication claim: that the Trial Court "failed to rule" on it.[48] As such, Mr. Loftis does not argue that the Trial Court disposed of his defamation by implication claim *incorrectly*.[49] Instead, he contends that the Trial Court failed to consider his defamation by implication claim (and his false light claim) *at all*.[50] With respect to his false light claim, Mr. Loftis also insists that he was entitled to a specific finding regarding whether "Mr. Loftis, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved" by the objectively innocuous statements contained in the *Tennessean*'s article.[51] For the reasons that follow, however, Mr. Loftis is wrong in every regard.

First, Mr. Loftis's brief fails to provide even a single citation to the record to support his argument that the Trial Court failed to consider the two theories of

[48] *See* Appellant's Brief, p. 10.
[49] The heading on page seven of Mr. Loftis's brief also references defamation by implication or innuendo. *See* Appellant's Brief, p. 7. However, the discussion that follows is exclusively dedicated to false light. *See id.* at 7-10.
[50] *See* Appellant's Brief, p. 10.
[51] See Appellant's Brief, p. 10.

relief that his complaint advanced.[52] Accordingly, this argument is waived.

Second, the record reflects unmistakably that the Trial Court did rule on both of his claims, both of which the Trial Court's Order referenced repeatedly.[53]

Third, since defamation by implication is a subset of the tort of defamation that carries all of its elements, the Trial Court correctly dismissed Mr. Loftis's defamation by implication claim on the basis that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning."[54]

Fourth, no reasonable person could find that the objectively innocuous statements upon which this lawsuit is based were highly offensive. As a result, the Trial Court correctly concluded that the statements in the *Tennessean*'s article could not give rise to liability as a matter of law.

Fifth, given the overlapping nature of defamation and false light claims, the Trial Court's determination that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning"[55] required that his false light claim be dismissed as well.

1. Mr. Loftis waived his argument that the Trial Court "failed to rule" on his claims by failing to support it with citations to the record.

Mr. Loftis's central claim in this appeal is that the Trial Court "failed to rule" on the two causes of action set forth in his Amended Complaint.[56] He specifically characterizes this issue as: "Whether the final order of the trial court should be set

[52] *See* Appellant's Brief, p. 10.
[53] R. at 274-75.
[54] R. at 275, ¶ 4.
[55] R. at 275, ¶ 4.
[56] *See* Appellant's Brief at p. 10, p. 6.

aside for failure to rule upon the only two theories advanced by Mr. Loftis?"[57]

The portion of Mr. Loftis's brief that advances this claim is presented in his brief's Argument section on the bottom of page 10.[58] Helpfully, this section is titled: "**THE TRIAL COURT FAILED TO RULE ON PLAINTIFF'S CLAIM.**" *Id*. Less helpfully, however, this section does not include even a single citation to the record to support the argument raised.[59]

Based on multiple rules[60] and countless decisions[61] of this Court, Mr. Loftis's failure to support his argument with even a single record citation necessarily results in its waiver. Accordingly, this argument is waived.

2. The Trial Court unmistakably ruled on Mr. Loftis's claims.

Ultimately, Mr. Loftis's failure to include a record citation to support his claim that the Trial Court "failed to rule" on his two theories of relief is

[57] See Appellant's Brief, p. 7.
[58] See Appellant's Brief, p. 10.
[59] See Appellant's Brief, p. 10.
[60] *See* Rules of the Tennessee Court of Appeals 6(b) ("No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded."); Tenn. R. App. P. 27(a)(7)(A) ("The brief of the appellant shall contain . . . . citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on").
[61] *See Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000) ("Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue."); *Commerce Union Bank, Brentwood, Tennessee v. Bush*, 512 S.W.3d 217, 224 (Tenn. Ct. App. 2016), *appeal denied* (Nov. 16, 2016) ("It is not the duty of this court to verify unsupported allegations or search the record for facts in support of an appellant's poorly-argued issues."); *Long v. Long*, 957 S.W.2d 825, 828 (Tenn. Ct. App. 1997) ("This court has held on several occasions that where a party in its brief on appeal has advanced certain arguments or has set forth what he or she alleged to be facts without any citation to the record, this court is not under a duty to minutely search the record to verify these unsupported allegations."); *Riggs v. Riggs*, 945 S.W.2d 723, 727 (Tenn. Ct. App. 1996) ("In order to reverse [a] finding, evidence is necessary to show the error in the finding. Such evidence is not cited, and this Court is not under a duty to search the record for uncited evidence."); *Lineberry v. Locke*, No. M1999-02169COA-R3-CV, 2000 WL 1050627, at *3 (Tenn. Ct. App. July 31, 2000) ("This Court is not required to search the record to find the proof relied on to support a party's contentions. Therefore, we will not address these issues, as we assume that the appellant has waived them.").

unsurprising. Presumably, this omission is explained by the fact that a citation to the Trial Court's actual Order immediately exposes the argument as meritless.[62]

Looking to the Trial Court's actual Order, the Order's first paragraph specifically referenced both of Mr. Loftis's theories of relief, noting that "Mr. Loftis has filed claims for **false light invasion of privacy** and **defamation by implication or innuendo** based on statements contained in a newspaper article attached to his Amended Complaint that was written by Jim Myers and published by the *Tennessean*."[63]

Next, Paragraph 3 of the Trial Court's Order recited the legal standards that govern both defamation and false light claims, and it correctly noted that "there is significant and substantial overlap between false light and defamation."[64]

Thereafter, Paragraph 4 of the Trial Court's Order applied the law to the facts of Mr. Loftis's Amended Complaint.[65] After so doing, the Court held that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning and that they do not give rise to liability as a matter of law."[66]

As a result, Paragraph 5 of the Trial Court's Order dismissed "[t]he Plaintiff's Amended Complaint, **and each cause of action therein**, . . . with prejudice for

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[62] R. at 274-75.
[63] R. at 274, ¶ 1 (emphases added).
[64] *See* R. at 275, ¶ 3. Mr. Loftis complains that this standard was recited "without explanation." *See* Appellant's Brief, p. 6. However, the standard at issue is quoted directly from *Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, 389 S.W.3d 313, 318, n. 5 (Tenn. Ct. App. 2012)—a case that was cited in both of the parties' briefs. *See id.* ("it has been observed that there is significant and substantial overlap between false light and defamation.") (quotation omitted). The Trial Court's Order also expressly indicates that it was based on "full consideration of the Parties' pleadings filed in this matter, the exhibits contained therein, the arguments of counsel and the applicable law." R. at 274.
[65] R. at 275, ¶ 4.
[66] R. at 275, ¶ 4.

failure to state a claim upon which relief can be granted.[67]

Thus, the Trial Court's Order unmistakably indicates that the Trial Court did not "fail to rule" on Mr. Loftis's claims.[68]

3. The Trial Court considered and correctly dismissed Mr. Loftis's claim for defamation by implication or innuendo on the basis that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning."

To state a claim for defamation, it is hornbook law that a statement must be "capable of being understood as defamatory."[69] Whether a statement is capable of conveying a defamatory meaning presents a threshold question of law to be decided by a court.[70] Consequently, if a statement is not capable of conveying a defamatory meaning, then it must be dismissed for failure to state a claim.

Here, the Trial Court dismissed Mr. Loftis's defamation by implication claim on the specific basis that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning" as a matter of law.[71] Even so, Mr. Loftis posits that the Trial Court failed to consider his claim for defamation by implication or innuendo.[72] This argument, too, is utterly without merit.

In arguing that the Trial Court "failed to rule" on his defamation by

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[67] R. at 275, ¶ 5 (emphasis added).
[68] Appellant's Brief, p. 10.
[69] *Shamblin v. Martinez*, No. M2010-00974-COA-R3CV, 2011 WL 1420896, at *5 (Tenn. Ct. App. Apr. 13, 2011).
[70] *See Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978) ("The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is 'capable of being so understood is a question of law to be determined by the court.'"). *See also Brown v. Mapco Exp., Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012) ("The issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance"); *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000) ("[T]he preliminary question of whether a statement 'is capable of conveying a defamatory meaning' presents a question of law.").
[71] R. at 275, ¶ 4.
[72] *See* Appellant's Brief, p. 10.

implication claim, Mr. Loftis appears to believe that the tort of defamation by implication has elements that differ from those of standard defamation claims.[73] Mr. Loftis is mistaken. To the contrary, the tort of defamation by implication or innuendo is a subset of defamation that carries all of its elements. *See Grant v. Commercial Appeal*, No. W2015-00208-COA-R3-CV, 2015 WL 5772524, at *12 (Tenn. Ct. App. Sept. 18, 2015) ("For defamation by implication, a plaintiff must prove all elements of defamation . . . .") (quotation omitted). Thus, the threshold requirement that a statement be "capable of conveying a defamatory meaning" applies to claims for defamation by implication as well. *Id*. As such, the Trial Court's specific holding that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning" fully determined Mr. Loftis's claim for defamation by implication and required that this claim be dismissed.[74]

The Trial Court's holding that the statements in the article were incapable of conveying a defamatory meaning was also correct. None of the statements in the article can reasonably be construed as carrying an element of "disgrace."[75] Further, all of the statements at issue were commentary on true and disclosed published facts, which independently precluded the statements from being actionable.[76] Mr. Loftis's defamation by implication claim was properly dismissed as a result.

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[73] *See* Appellant's Brief, p. 10.
[74] R. at 275, ¶ 4.
[75] "For a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.'" *Brown*, 393 S.W.3d at 708.
[76] *See, e.g.*, *Weidlich v. Rung*, No. M2017-00045-COA-R3-CV, 2017 WL 4862068, at *6 (Tenn. Ct. App. Oct. 26, 2017) ("Rung's written statement was her comment upon true and published facts, the photo, and as such was not actionable even though 'stated in strong or abusive terms.'").

4. The Trial Court considered and correctly dismissed Mr. Loftis's claim for false light invasion of privacy on the basis that the statements in the article "do not give rise to liability as a matter of law."

Mr. Loftis's false light claim fares no better. Beyond the critical element of "falsity"—which Mr. Loftis's lawsuit does not even allege—another threshold element of any false light claim is that a statement must be "highly offensive to a reasonable person" in order to be actionable. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 646 (Tenn. 2001). This requirement similarly functions as a gatekeeper against frivolous lawsuits. In fact, our Supreme Court has held that it is specifically designed to foreclose precisely the type of "needless litigation" at issue in this case. *Id.* (holding that "needless litigation is foreclosed by Section 652E (a) of the *Restatement (Second) of Torts* which imposes liability for false light only if the publicity is highly offensive to a reasonable person.").

The Trial Court correctly dismissed Mr. Loftis's false light claim on the basis that the statements in the article "do not give rise to liability as a matter of law."[77] Arguing that this determination was erroneous, however, Mr. Loftis insists that the statements at issue would indeed be highly offensive to a reasonable person. In support of this contention, Mr. Loftis contends that "[t]he unmistakable suggestion" of the article was that:

> (1) Line cooks in Nashville were unqualified; (2) All of these persons graduated from Nashville State; (3) All of them were unqualified because of some implied incompetence on the part of Mr. Loftis; (4) Rayburn's reputation in the culinary community was at risk; and (5) Therefore, it was necessary to "clean house" by removing the man

[77] R. at 275.

depicted as personally responsible for the perceived deficiencies."[78]

Mr. Loftis is wrong, and significantly so. Despite the supposedly "unmistakable" suggestions that Mr. Loftis divines from the objectively innocuous statements contained in the article, the fantastical conclusions that Mr. Loftis purports to draw from the article appear nowhere in it. This deficiency is also outcome-determinative, because longstanding precedent establishes that Mr. Loftis's own interpretations of the statements at issue carry no weight of any kind. Instead, as this Court has instructed repeatedly, "courts 'must look to the words themselves and are not bound by the plaintiff's interpretation of them.'"[79] Thus, where, as here, "the words do not reasonably have the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation."[80]

Critically, none of the implications that Mr. Loftis purports to find in the article can survive an objective reading of the article itself, which barely mentions Mr. Loftis, never once accuses him of incompetence, and certainly does not blame him for the shortcomings of "all restaurant employees" in Nashville.[81] As a result, Mr. Loftis' objectively unreasonable reading of the article must be disregarded in favor of "the [actual] words themselves."[82] The Trial Court's dismissal of Mr. Loftis' false light claim was appropriate as a result.

Further, even if the Article ***had*** implied what Mr. Loftis claims it did (and it

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[78] Appellant's Brief, p. 4.
[79] *Brown*, 393 S.W.3d at 709 (quoting *Stones River Motors, Inc. v. Mid-S. Pub. Co.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983)).
[80] *Stones River Motors, Inc.*, 651 S.W.2d at 719.
[81] Appellant's Brief, p. 5.
[82] *Brown*, 393 S.W.3d at 709.

did not), none of Mr. Loftis's imagined implications can be deemed "highly offensive to a reasonable person" *even as he has characterized them*. Assuming, for the sake of argument, that the article had stated that all line cooks in Nashville were unqualified Nashville State graduates (it doesn't), and assuming further that the article then went on to suggest—as Mr. Loftis claims—"that all restaurant employees were incompetent because Nashville State students were poorly trained because of Tom Loftis"[83] (it didn't), the article *still* would not be "highly offensive" to a reasonable person, because stating that someone is bad at their job is a non-actionable statement of opinion. Further, hypothetical predictions about future events that did not transpire can never be actionable, either.

Almost the entirety of Mr. Loftis's lawsuit is premised upon his belief that suggesting that someone is "incompetent" at their job—which the article does not even do—is illegal. It isn't. To the contrary, after evaluating precisely the claim that Mr. Loftis raises in this case, court after court has held without qualification that calling someone "incompetent" is a non-actionable statement of opinion.[84]

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[83] Appellant's Brief, p. 5.

[84] *See, e.g., Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 876 (Tex. App. 2014) ("**a statement expressly calling someone incompetent is a nonactionable statement of opinion.**"); *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 520 (1998) ("'**[F]ired because of incompetence' is nonactionable opinion.** First, the statement does not have a precise and readily understood meaning. Regardless of the fact that 'incompetent' is an easily understood term, its broad scope renders it lacking the necessary detail for it to have a precise and readily understood meaning. There are numerous reasons why one might conclude that another is incompetent; one person's idea of when one reaches the threshold of incompetence will vary from the next person's."); *Einhorn v. LaChance*, 823 S.W.2d 405, 412 (Tex. App. 1992) ("**References to appellants as incompetent . . . are assertions of pure opinion.** These terms of derision, considered in context and in light of the EMS debate are not capable of proof one way or the other. Therefore, as to each of these statements, the absolute constitutional privilege applies."); *Ollman v. Evans*, 750 F.2d 970, 981 (D.C. Cir. 1984) (favorably citing precedent that "concluded that **the term 'incompetent' as applied to a judge was too vague to support a claim of libel.**"); *Robertson v. Sw. Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 903 (Tex. App. 2006) ("**a statement implying a coworker is incompetent is not a statement of fact, but rather a nonactionable opinion.**").

Consequently, any claim premised upon Mr. Loftis's supposedly implied "incompetence" cannot lawfully form the basis for liability.[85]

Mr. Loftis's claim that the statement "[i]f the election had gone a different way, it might have affected funding for the school" fails as well, for several reasons.

First, this statement indisputably concerns Mr. Loftis's brother-in-law Bill Freeman, who is not a party to this case.[86] It does not concern Mr. Loftis.

Second, public records reflect that Metro does fund Nashville State.[87] Further, the article merely stated that Nashville State's funding "might have" been affected if Bill Freeman had become Mayor.[88] Thus, even if Metro "did not" fund Nashville State, it still would not follow that Metro could not do so in the future.

Third, predictive commentary about a hypothetical future event that did not transpire—in this case, what "*might*" have happened, as Mr. Loftis puts it, "*should* Mr. Freeman become Mayor"[89]—is never actionable, either.[90] Thus, this statement

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[85] *Id.*
[86] *See* R. at 173.
[87] *See, e.g.*, R. at 40 (noting a planned $2 million Metro grant to Nashville State and support for the College's Antioch and Madison campuses from Mayor Karl Dean and Mayor Megan Barry). *See also* R. at 201 and accompanying note 20.
[88] *See* R. at 173.
[89] *See* R. at 103.
[90] *See, e.g., Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-CV-00106-LRH-PA, 2010 WL 4386957, at *3 (D. Nev. Oct. 29, 2010) (**"[Defendant's] statements are predictions of the future that could not be proven true or false at the time the statements were made. Therefore, these statements are not defamatory.** Accordingly, the court will grant [the defendant's] motion to dismiss as to these allegations of defamation."); *Pillar Panama, S.A. v. DeLape*, No. CIV.A. H-07-1922, 2008 WL 1777237, at *2 (S.D. Tex. Apr. 16, 2008) ("Observations and guesses about another's intentions are not facts; a listener knows that the speaker is speculating, making reliance unreasonable. **They are also statements about future potential, making them not facts but predictions.**"); *Ulichny v. Merton Cmty. Sch. Dist.*, 93 F. Supp. 2d 1011, 1036 (E.D. Wis. 2000), *aff'd*, 249 F.3d 686 (7th Cir. 2001) ("[T]he **predictions regarding what the Board might do in the future with respect to Ulichny's job duties were—as predictions—nothing more than opinions.** They did not communicate a false statement of present fact."); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 120 (D. Mass. 2010) ("**Because Orr's statement is unambiguously an expression of opinion about a future event, he cannot be held liable for defamation as to this statement.**"); *Uline, Inc. v. JIT Packaging, Inc.*, 437 F. Supp. 2d 793, 803 (N.D. Ill. 2006) (holding that **"a prediction of future events**

also cannot form the basis for a defamation or false light claim as a matter of law.

5. Given the "significant and substantial overlap between false light and defamation," the Trial Court's finding that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning" necessarily determined that the statements were not "highly offensive."

Mr. Loftis makes the additional argument that he was entitled to a specific finding as to whether "Mr. Loftis, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved" by the statements in the *Tennessean*'s article.[91] Given the Trial Court's aforementioned determination that the statements in the article were incapable of conveying a defamatory meaning as a matter of law, however, Mr. Loftis is mistaken.

"In recognition of the kinship between defamation and false light, the Tennessee Supreme Court has defined the contours of the tort of false light with reference to the Tennessee law on defamation." *Gallagher v. E.W. Scripps Co.*, No. 08-2153-STA, 2009 WL 1505649, at *7 (W.D. Tenn. May 28, 2009). "Therefore, like defamation, the Court must make the preliminary determination about whether a defendant made discrete presentations of information in a fashion which rendered the publication susceptible to inferences casting the plaintiff in a [legally actionable] false light." *Id.*

With respect to the requisite degree of harm that a statement must be

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can neither be true nor false," and "is therefore not actionable as defamation"); *Rockgate Mgmt. Co. v. CGU Ins./PG Ins. Co. of N.Y.*, 88 P.3d 798, 806 (Kan. 2004) ("Unlike a statement of fact, a purely hypothetical statement may be incapable of proof of truth or falsity without probing the mind of the communicator."); *Caplan v. Winslett*, 218 A.D.2d 148, 151 (N.Y. 1996) (same).

[91] Appellant's Brief, p. 10.

capable of producing in order to be actionable, defamation and false light claims are subject to a materially indistinguishable inquiry. As a result, the relevant analysis is appropriately—and routinely—conflated. *See, e.g., Harris v. Gaylord Entm't Co.*, No. M2013-00689-COA-R3CV, 2013 WL 6762372, at *6, *6 n. 3 (Tenn. Ct. App. Dec. 19, 2013) ("Statements alleged to be defamatory or to place another in a false light must harm the reputation of the complaining party to be actionable. . . . Courts may determine as a matter of law whether a statement is defamatory or place another in a false light because in each instance the standard is that of the 'reasonable person.'"); *Gallagher*, 2009 WL 1505649, at *7 ("like defamation, the Court must make the preliminary determination about whether a defendant made discrete presentations of information in a fashion which rendered the publication susceptible to inferences casting the plaintiff in a false light."); *Eisenstein*, 389 S.W.3d at 318, n. 5 (holding that "there is significant and substantial overlap between false light and defamation," and indicating that the "distinction blurs . . . in jurisdictions . . . where courts recognize defamation by implication.") (quotations omitted); *Seaton v. TripAdvisor, LLC*, No. 3:11-CV-549, 2012 WL 3637394, at *3 (E.D. Tenn. Aug. 22, 2012), *aff'd*, 728 F.3d 592 (6th Cir. 2013) (noting the "kinship between defamation and false light"); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 511 (6th Cir. 2015) ("The parties assume that the dismissal of the remainder of plaintiffs' claims rises and falls with the dismissal of their defamation claims. Absent argument to the contrary, we accept the parties' view of the issues.").

Thus, the Trial Court's finding that "the statements contained in the *Tennessean* article are not capable of conveying a defamatory meaning"[92] necessarily precluded a finding that the statements were capable of conveying a meaning that was "highly offensive to a reasonable person."[93] Simply put: A plaintiff cannot save a statement that is "incapable of conveying a defamatory meaning" as a matter of law from being dismissed by positing that the claim is nonetheless "highly offensive."[94] Although defamation claims and false light claims do not overlap *entirely*—only "significant[ly] and substantial[ly]"—there is no daylight between them regarding the requisite reputational injury.[95] Mr. Loftis's false light claim was properly dismissed as a result.

B. THE TRIAL COURT'S ORDER DISMISSING MR. LOFTIS'S FALSE LIGHT CLAIM CAN BE AFFIRMED ON SEVERAL ADDITIONAL GROUNDS.

This Court may also affirm the Trial Court's Order dismissing Mr. Loftis's false light claim on a wealth of additional grounds, all of which independently compel dismissal. *See State v. Hester*, 324 S.W.3d 1, 21 n. 9 (Tenn. 2010) ("This Court may affirm a judgment on different grounds than those relied upon by the lower courts when the lower courts have reached the correct result."); *Hopkins v. Hopkins*, 572 S.W.2d 639, 641 (Tenn. 1978) ("this Court will affirm a decree of the trial court correct in result, though rendered upon different, incomplete or

[92] R. at 275, ¶ 4
[93] *West*, 53 S.W.3d at 643–44.
[94] *West*, 53 S.W.3d at 643–44; *Eisenstein*, 389 S.W.3d at 318, n. 5.
[95] *Id. See also Gallagher*, 2009 WL 1505649, at *7. *Cf. Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) ("[a] party may not skirt the requirements of defamation law by pleading another, related cause of action.").

erroneous grounds."). Further, because Mr. Loftis does not advance an argument that his defamation by implication claim was dismissed incorrectly—only that it was never considered at all—this section emphasizes the additional grounds available to affirm the dismissal of Mr. Loftis's false light claim specifically.

1. Mr. Loftis's false light claim is time-barred.

As clarified by his counsel during oral argument, Mr. Loftis's false light claim is premised upon supposedly tortious "words told to" a *Tennessean* reporter by Mr. Rayburn.[96] As such, the applicable statute of limitations was six months. *Cawood v. Booth*, No. E2007-02537-COA-R3-CV, 2008 WL 4998408, at *4 (Tenn. Ct. App. Nov. 25, 2008) ("if the actionable tort involves words, the statute of limitations is six (6) months"). Because Mr. Loftis's Complaint was filed at least eleven (11) months after the statements at issue were alleged to have been made, however, his false light claim is time barred.

Tennessee law establishes that: "in a lawsuit involving invasion of privacy, if the actionable tort involves words, the statute of limitations is six (6) months, and if the actionable tort involves print, writing, pictures, etc. then the statute of limitations is one (1) year." *Cawood*, 2008 WL 4998408, at *4. Both this Court and the Tennessee Supreme Court have reaffirmed this holding repeatedly.[97]

[96] Transcript, p. 22, lines 17-19.

[97] *See, e.g., West*, 53 S.W.3d at 648 ("false light claims are subject to the statutes of limitation that apply to libel and slander, as stated in Tenn. Code Ann. §§ 28–3–103 and 28–3–104(a)(1), depending on the form of the publicity, whether in spoken or fixed form."); *Daniel v. Taylor*, No. E2008-01248-COA-R3-CV, 2009 WL 774428, at *4 (Tenn. Ct. App. Mar. 25, 2009) ("Plaintiff's slander and false light invasion of privacy claims both have a six month statute of limitations."). *See also* Tenn. Code Ann. § 28-3-103 ("Actions for slanderous words spoken shall be commenced within six (6) months after the words are uttered."); *Ali v.*

Accordingly, to determine whether a six-month limitations period or a one-year limitations period applied to Mr. Loftis's false light claim, the relevant inquiry is whether the statements at issue were spoken words or published in fixed form. *Id.*

Initially, based on his characterization of his claims in his briefing, Mr. Loftis appeared to be arguing that at least some of the statements that he had sued over were literally authored by Mr. Rayburn despite being written under Jim Myers' byline and published by the *Tennessean*.[98] Although Mr. Rayburn did not author the article at issue and moved for dismissal on that basis,[99] if that had been Mr. Loftis's theory of the case, then the one-year statute of limitations that governs written words would have applied to Mr. Loftis's false light claim. *Id.*

During oral argument on the Defendant's Motion to Dismiss Mr. Loftis's Amended Complaint, however, Mr. Loftis's counsel helpfully clarified his actual theory of the case, stating: "[W]e've alleged in this complaint that the words that are here such as this are Mr. Rayburn's ***words told to Mr. Myers*** and published by him. For our purposes today, that's an assumed fact."[100]

Thus, as clarified by his own counsel, Mr. Loftis's false light claim was subject to the six-month statute of limitations that applies to false light claims that "involve[] words." *Cawood*, 2008 WL 4998408, at *4 ("if the actionable tort

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Moore, 984 S.W.2d 224, 227 (Tenn. Ct. App. 1998) ("The statute of limitations for slander is only six months and the discovery rule does not apply.").

[98] *See, e.g.*, R. at 104 (citing paragraphs 14 and 15 of Mr. Loftis's Amended Complaint, which state that the statements described were written by "Myers," in support of the argument that "Defendant says he did not communicate the statements complained of, the FAC alleges that the [sic] did."). *See also* R. at 120 (arguing, in response to Mr. Rayburn's claim that he did not author or publish the statements in the article, that "the First Amended Complaint says that he did and for purposes of this Motion, that is a fact.").

[99] *See* R. at 188-90.

[100] Transcript, p. 22, lines 17-19.

involves words, the statute of limitations is six (6) months"). Critically, the allegation that the statements were communicated to a newspaper also has no bearing on the applicable limitations period. *See Barbee v. Wal-Mart Stores, Inc.*, No. W2003-00017-COA-R3CV, 2004 WL 239763, at *4 (Tenn. Ct. App. Feb. 9, 2004) ("The alleged publicity of Barbee and Lee for the tort of false light by the Defendants to the newspaper would have been spoken and is subsequently barred by the six month statute of limitation, which applies for slander cases.").

Mr. Loftis's Amended Complaint does not indicate on what date the "words told to Mr. Myers"[101] were supposedly spoken.[102] However, the latest possible date that they could have been spoken would be the day that the *Tennessean* article was published—March 2, 2016.[103] Mr. Loftis's lawsuit, however, was not filed until February 3, 2017—more than eleven (11) months later.[104] Accordingly, the statute of limitations that governed Mr. Loftis's false light claim had elapsed by the time that Mr. Loftis's lawsuit was filed. His false light claim is time-barred as a result.

2. Mr. Loftis's false light claim failed to establish the requisite publicity.

Mr. Loftis's clarification that: "[W]e've alleged in this complaint that the words that are here such as this are Mr. Rayburn's words told to Mr. Myers"[105] also compels dismissal of Mr. Loftis's false light claim for another reason: his inability to establish the requisite element of "publicity."

[101] Transcript, p. 22, lines 17-19.
[102] R. at 164-75.
[103] *See* R. at 172.
[104] *See* R. at 1.
[105] Transcript, p. 22, lines 17-19.

"Publicity" is the first element of a false light claim. *See Seaton*, 2012 WL 3637394, at *3 ("To establish a prima facie case of the related tort of false light invasion of privacy in Tennessee, the plaintiff must establish the following elements: (1) publicity") (quoting *West*, 53 S.W.3d at 643–44). Critically, the standard for establishing the "publicity" necessary to sustain a false light claim is also substantially more onerous than the "publication" standard that governs defamation claims. As explained in *Secured Fin. Sols., LLC v. Winer*, No. M-2009-00885-COA-R3-CV, 2010 WL 334644, at *4 (Tenn. Ct. App. Jan. 28, 2010):

> Comment a to Section 652E of the RESTATEMENT (SECOND) OF TORTS refers back to Comment a to Section 652D, which states:
>
> > "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
> >
> > Thus it is not an invasion of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.
>
> This court has previously relied upon this definition of "publicity" to find that the communication of information regarding the plaintiff's hospitalization to his employer did not constitute an invasion of privacy under § 652D of the RESTATEMENT (SECOND) OF TORTS (concerning publicity given to private life) because disclosure to one person or a small group was not sufficient to sustain an action.

Id. (citing *Major v. Charter Lakeside Hosp., Inc.*, No. 42, 30011, 1990 WL 125538, at *5 (Tenn. Ct. App. Aug.31, 1990)).

Thus, unlike a defamation claim, for a false light claim to be actionable, a plaintiff "must plead and prove that the matter was 'widely publicized'"; "'[d]isclosure to just a few persons is not sufficient.'" *Brown*, 393 S.W.3d at 707 (quoting 1 Rights of Publicity and Privacy § 5:114 (2d ed.)). Based on this heightened standard, in case after case, Tennessee courts have unsparingly dismissed false light claims for failing to satisfy the "publicity" requirement.[106]

As noted in the preceding section, Mr. Loftis initially appeared to be alleging that Mr. Rayburn had literally authored some of the statements in the article, which were then published to the *Tennessean*'s readership.[107] Mr. Rayburn again acknowledges that if this had actually been Mr. Loftis's theory of the case, then this

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[106] *See, e.g., Brown*, 393 S.W.3d at 707 ("it is undisputed that the statements at issue by the Mapco employees were made, at most, in the presence of 'several' unidentified customers who came in and out of the store during the incident. As a matter of law, this is not sufficient to meet the 'publicity' requirement for a claim of false light in the public eye."); *Secured Fin. Sols*, 2010 WL 334644, at *4 ("In the present case, Vazirini bases his claim of false light invasion of privacy on Winer's sending the e-mail in question to one person (and possibly also making a similar oral communication to another person). Such communication fails, as a matter [of] law, to satisfy the 'publicity' requirement of the tort of false light invasion of privacy."); *Brown v. Christian Bros. Univ.*, 428 S.W.3d 38, 53 (Tenn. Ct. App. 2013) ("based upon the fact that the statements at issue in this case were made only to Ms. Sharp, we conclude, as a matter of law, that the evidence is not sufficient to meet the "publicity" requirement for a claim of false light invasion of privacy."); *Davis v. Covenant Presbyterian Church*, No. M2013-02273-COA-R3CV, 2014 WL 2895898, at *5 (Tenn. Ct. App. June 23, 2014) ("it is not an invasion of privacy to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. Therefore, we affirm the trial court's dismissal of the claim for false light invasion of privacy because the allegations are not sufficient to meet the "publicity" requirement for this cause of action.") (quotation omitted); *L-S Indus., Inc. v. Matlack*, 641 F. Supp. 2d 680, 688 (E.D. Tenn. 2009) ("Even a communication to a small group is insufficient to demonstrate publicity within the definition of the Restatement."); *Thornburgh v. Christy*, No. 2:09-CV-141, 2010 WL 1257984, at *14 (E.D. Tenn. Mar. 26, 2010) ("The element of publicity is not met if the communication is to a single person or even to a small group of persons."); *West v. Genuine Parts Co.*, No. 3:11-CV-252, 2011 WL 4356361, at *4 (E.D. Tenn. Sept. 16, 2011) ("Publication within the meaning of the tort of false light invasion of privacy requires communication to more than a single person or even a small group of persons. In light of the foregoing, the Court will also dismiss plaintiff's claim for false light invasion of privacy.") (quotation omitted).

[107] *See supra* note 98.

allegation—although false—would have satisfied the requisite publicity requirement. As clarified by Mr. Loftis's counsel during oral argument, however, it is now clear that his claims were instead premised upon the allegation that "Mr. Rayburn's words" were merely "told to" Jim Myers.[108] Because communicating a statement to one person does not establish the "publicity" necessary to sustain a false light claim, however, more than half a dozen recent cases instruct that Mr. Loftis failed to state a claim for false light invasion of privacy as a matter of law.[109]

3. All of Mr. Rayburn's additional claims for dismissal were valid.

The Trial Court dismissed Mr. Loftis's Amended Complaint based on one of eight separate claims for dismissal that Mr. Rayburn raised in his Motion to Dismiss. This holding pretermitted the need to address any of Mr. Rayburn's other claims for dismissal. For the reasons that follow, however, all of Mr. Rayburn's additional claims independently compelled dismissal as well. Further, as a matter of preference, this Court may affirm the Trial Court's Order on any of these alternative grounds, even if it agrees entirely with the Trial Court's judgment. *See, e.g.*, *Seaton*, 728 F.3d at 601 ("Although this was not the rationale used by the district court, we may affirm the district court's judgment on any basis supported by the record. This is not to say that the district court's rationale was wrong. To the contrary, we agree with the district court that Seaton cannot prove falsity, an element of false-light invasion of privacy, because Grand Resort's placement on

[108] Transcript, p. 22, lines 17-19.
[109] *See supra* note 106.

TripAdvisor's list constitutes protected opinion.").

a. Mr. Rayburn did not communicate the statements at issue.

To avoid dismissal, Mr. Loftis was required to "allege and prove that the defaming party"—not someone else—"communicated a false or defamatory statement concerning [him]."[110] Here, however, the *Tennessean* article upon which this lawsuit was based did not quote Mr. Rayburn, nor did it attribute any statement to him. In fact, even Mr. Loftis's own Amended Complaint did not attribute the offending statements to Mr. Rayburn. To the contrary, it repeatedly attributed the statements at issue to "The Tennessean," "the article," "Jim Myers, "Mr. Myers," or "Myers" instead.[111] Dismissal is appropriate as a result.

b. Four of the five statements complained of did not concern Mr. Loftis.

Another threshold requirement of any defamation or false light claim is that an allegedly tortious statement must "refer[] to the plaintiff," rather than referring to somebody else.[112] As our Court of Appeals explained in *Steele v. Ritz*:

> As an essential element of a cause of action for defamation, the plaintiffs must prove a false and defamatory statement *concerning another*. Otherwise stated at common law, one of the required elements of proof was the "colloquium," a showing that the language was directed to or concerning *the charging party*. The burden of proving this element of the cause of action is

[110] *Steele v. Ritz*, No. W2008-02125-COA-R3-CV, 2009 WL 4825183, at *2 (Tenn. Ct. App. Dec. 16, 2009).
[111] *See, e.g.*, R. at 166, ¶ 12 (stating that "The Tennessean published an article . . . under the byline of Jim Myers."); *id.* at ¶ 13 (stating that "Mr. Myers" is the person who "wrote" the statement at issue, and attributing subsequent statements to "[t]he article"); *id.* at ¶ 14 (noting that the referenced statement was made "according to Myers"); R. at 167, ¶ 17 (noting that "Myers then wrote" the statements designated above as Statements #4-#5); R. at 168, ¶ 19 (stating that "[t]he article inexplicably referred to" the statements designated above as Statements #4-#5).
[112] *See* 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 7.02 (2016 ed.).

on the plaintiff.[113]

Statements #1-#3 do not refer to Mr. Loftis at all. Nor do they imply any reference to him in any way. In fact, Mr. Loftis had not even been *mentioned* in the article when these statements were made, evidencing the reality that no reasonable reader would or even could construe them as having concerned him.

Statement #5—the only statement that Mr. Loftis actually alleged was false—also did not refer to Mr. Loftis. Instead, the subject of this statement was his brother-in-law, Bill Freeman, who is not a party to this action. Mr. Freeman is not a minor, and Mr. Loftis cannot file suit on his brother-in-law's behalf. As a consequence, Mr. Loftis failed to state a claim based on this statement, either.

c. The statements complained of are incapable of being proven false.

"Regardless of which party must ultimately prove falsity, any defamation plaintiff must allege it." *Clark*, 617 F. App'x at 509. "In this unusual case," however, Mr. Loftis "failed to do so." *Id.* Consequently, in addition to failing to satisfy the requisite element of falsity, the statements at issue necessarily could not have been made with reckless disregard for their falsity, either.

With respect to Statement #1, Mr. Loftis's Amended Complaint does not dispute that "Rayburn recognized [the need for qualified line cooks in Nashville] every day in his kitchens at the old Sunset Grill, Midtown Cafe and Cabana," or that Mr. Rayburn "decided to do something about it by dedicating himself to

[113] *Steele*, 2009 WL 4825183, at *3 (partial emphasis added) (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 717).

helping build the culinary arts program at what used to be called Nashville Tech."[114] Instead, Mr. Loftis merely complained that these words constituted "self-aggrandizement."[115] Because he fails to allege that Statement #1 was false, however, this omission subjects the claim to dismissal. *Clark*, 617 F. App'x at 509.

With respect to Statement #2—that "Rayburn will tell you [that helping build the culinary arts program at Nashville Tech] hasn't been easy"[116]—Mr. Loftis' Amended Complaint is similarly devoid of any claim or implication of falsity. Nor is this innocent statement of opinion capable of being proven false. Thus, for the same reason, this omission subjects Mr. Loftis's claim to dismissal as well. *Id.*

As for Statement #3—that "when [Rayburn] enlisted the help of local restaurateurs and chefs to offer feedback on the program and the quality of its graduates, the reports he got back weren't flattering"[117]—the basis for Mr. Loftis's claim was even less supportable. Rather than alleging that this statement was false, Mr. Loftis instead pleaded that it was ***true***.[118] Mr. Loftis plainly cannot premise a false light claim upon a statement that he agrees was accurate.

Statement #4 fails for the same reason. It begins by stating that a "dissatisfied cadre of chefs . . . started by cleaning house from the top by removing director Tom Loftis."[119] Yet again, though, Mr. Loftis not only did not ***dispute*** this

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[114] R. at 166, ¶ 14.
[115] *Id.*
[116] R. at 167, ¶ 15.
[117] R. at 167, ¶ 15.
[118] R. at 165, ¶ 6 (pleading that "In October, 2014, Dean Karen Stevenson and the director from the Southeast campus claimed to have been contacted by local chefs with concerns regarding the qualifications of program graduates").
[119] R. at 167, ¶ 17.

statement—he affirmatively pleaded that it was *true*.[120] Mr. Loftis also did not allege that his termination was not "politically inexpedient"—another plainly protected opinion that is similarly incapable of being proven false. Accordingly, Mr. Loftis cannot premise any claim of liability upon this statement, either.

Finally, with respect to Statement #5—that "[i]f the election had gone a different way, it might have affected funding for the school"—the Plaintiff's Amended Complaint does, for once, allege falsity.[121] As detailed in preceding sections, however, this statement has several independent problems. Among them: it concerns Mr. Loftis' brother-in-law, not him; Metro *does* fund Nashville State; and hypothetical predictions about future events are never actionable.[122]

d. The statements complained of could not have injured Mr. Loftis because they had long been in the public domain.

To state a claim for false light invasion of privacy, a statement must also cause an injury. *West*, 53 S.W.3d at 648. Here however, the statements in the article could not have injured Mr. Loftis, for two reasons. *First*, no person of ordinary intelligence would interpret the article in the way that his attorneys have construed it—rendering any supposed injury caused by the article imaginary. *Aegis Scis. Corp.*, 2013 WL 175807, at *6 (holding that a statement must "be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances."). *Second*, no matter how liberally Mr. Loftis's Amended

[120] R. at 165, ¶ 8 ("In March 2015, Plaintiff was informed that a decision had been made not to renew his contract at the conclusion of the academic year. As a consequence, Plaintiff chose to resign.").
[121] R. at 168, ¶ 20.
[122] *See supra* p. 29, note 87, & note 90.

Complaint is construed, his supposed injuries cannot even theoretically be attributed to the article, because its contents concerned matters that were in the public domain long before the article was published. Statements #1-#3, for example (which do not concern Mr. Loftis at all), and Statement #4 (referencing Mr. Loftis's termination) all concerned prior matters of longstanding public record. Mr. Loftis himself concedes as much, noting that "Tennessean reporter Jim Myers [was] present" at the public meeting in February 2015 following which Mr. Loftis was terminated.[123] With respect to Statement #4, Mr. Loftis further acknowledges that he "chose to resign" himself.[124] As for Statement #5, Mr. Loftis does not specify how a statement that concerned his brother-in-law could have affected *his own* reputation.[125] Consequently, whatever injuries Mr. Loftis has experienced, they cannot realistically be attributed to the article.

e. Mr. Rayburn is immune from this lawsuit.

Mr. Rayburn is also immune from this lawsuit, which arises out of statements made in his capacity as a public official. As a Trustee of a public college foundation that is under the purview of the Tennessee Board of Regents, Mr. Rayburn is a public official with respect to his activities on behalf of Nashville State Community College. Notably, Mr. Loftis adopted this position himself before filing the instant lawsuit, stating in a letter to the Board of Regents that:

> "The circumstances and context of these remarks **strongly suggest that [Mr. Rayburn] was speaking on behalf of the college,**

[123] R. at 165, ¶ 7.
[124] R. at 165, ¶ 8.
[125] R. at 167, ¶ 17.

and he served on the Board at the time[.]"[126]

In this regard, Mr. Loftis was correct. As such, Mr. Rayburn is entitled to absolute or qualified immunity for alleged discussions of public proceedings aimed—as Mr. Loftis's own Amended Complaint describes it—at providing the public with "an update on the status of the [publicly funded] program."[127]

In *Jones v. State*, 426 S.W.3d 50, 56 (Tenn. 2013), the Tennessee Supreme Court "adopt[ed] the position taken by the Restatement (Second) of Torts that cabinet-level executive officers are entitled to an absolute privilege from defamation claims arising out of comments made within the scope of their official duties." *Id.* This holding was based on the Court's conclusion that "[u]ninhibited communication with the public about governmental affairs is essential and must be protected," and that "officials must have the flexibility to make important decisions free from fear that they will have to defend themselves from lawsuits." *Id.* Both of those public policy interests apply with equal force in the instant case.

Under the Second Restatement, lower-level public officials are also "clothed with a conditional privilege in making a defamatory communication required or permitted in the performance of [their] official duties."). *Thomas v. Nicholson*, No. CIV. 51/1984, 1985 WL 1177632, at *2 (V.I. Sept. 20, 1985). Further, Tennessee law confers additional immunity for allegedly defamatory statements in a variety of other contexts involving the public interest. *See, e.g., Lambdin Funeral Serv.,*

[126] R. at 224.
[127] R. at 165, ¶ 7.

Inc. v. Griffith, 559 S.W.2d 791, 792 (Tenn. 1978) ("[I]t is generally recognized that statements made in the course of a judicial proceeding that are relevant and pertinent to the issues involved are absolutely privileged and cannot be the predicate for liability in an action for libel, slander, or invasion of privacy. This absolute privilege holds true even in those situations where the statements are made maliciously and corruptly. It also holds true in administrative proceedings before boards or commissions. . . .") (internal citations omitted); *Funk v. Scripps Media, Inc.*, No. M201700256COAR3CV, 2017 WL 5952914, at *4 (Tenn. Ct. App. Nov. 30, 2017) ("The law recognizes that there are some occasions on which there ought to be no liability for defamation because the interests of the public, or (exceptionally) those of the individual who originates the defamation, outweigh the plaintiff's right to his reputation. Such occasions are said to be 'privileged.'") (quotation omitted). Consequently, given that the instant lawsuit arises out of statements allegedly made by a public official about Mr. Loftis's termination from a publicly funded college program, Mr. Rayburn was absolutely—or, in the alternative, qualifiedly—privileged to discuss the matter.

f. The statute of limitations has expired with respect to the statements at issue pursuant to the single publication rule.

Mr. Loftis's lawsuit is also time-barred due to the single publication rule. "Under the single publication rule, any mass communication that is made at approximately one time . . . is construed as a single publication of the statements it contains, thereby giving rise to only one cause of action as of the moment of

initial publication, no matter how many copies are later distributed."[128] Under the single publication rule, the statute of limitations "accrues at the time of the original publication, and that the statute of limitations runs from that date."[129]

Tennessee has expressly adopted the single publication rule.[130] Further, although our Supreme Court has only had occasion to do so for mass print communications such as "a book, newspaper, or magazine" to date,[131] the essential reasoning that underlies the single publication rule applies to any mass communication.[132] As a result, courts interpreting Tennessee law have extended the single publication rule to other mass communications as well.[133]

The single publication rule applies to the instant case because, as Mr. Loftis's own Amended Complaint acknowledges, nearly all of the statements that he claims are tortious reached the public domain long before the article was published.[134] As such, even if a one-year statute of limitations applied to Mr. Loftis's lawsuit, the single publication rule would still bar his claims.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING A TRANSCRIPT OF THE EVIDENCE OR PROCEEDINGS TO BE FILED OR BY ORDERING MR. LOFTIS TO BEAR THE COSTS OF PREPARING IT.

After the Trial Court entered its Order dismissing Mr. Loftis's lawsuit, Mr.

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[128] *Clark*, 617 F. App'x at 502–03 (citing *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 193–94 (Tenn. 1973), and Restatement (Second) of Torts § 577A, cmt. c (1977)).
[129] *Applewhite*, 495 S.W.2d at 193.
[130] *See id.* at 194.
[131] *Id.*
[132] *See Clark*, 617 F. App'x at 503.
[133] *Id.*
[134] *See, e.g., See* R. 165, ¶ 6 (stating that the complaints about program graduates were first aired "[i]n October 2014"); Plaintiff's Amended Complaint, ¶ 7 (describing a public meeting that took place "[i]n February 2015"); Plaintiff's Amended Complaint, ¶ 8 (noting that "[i]n March, 2015, Plaintiff was informed that a decision had been made not to renew his contract . . .").

Loftis filed a notice that no transcript would be filed pursuant to Tenn. R. App. P. 24(d).[135] In response, and pursuant to the same Rule, Mr. Rayburn filed a notice that a transcript ***was*** to be filed.[136] Mr. Rayburn also applied for an order requiring Mr. Loftis to assume the expense of the transcript's preparation, which Tenn. R. App. P. 24(d) expressly permits.[137] Although he was not required to do so, in his notice, Mr. Rayburn also presented several reasons why he believed that "a record of the proceedings held on July 10, 2017 is essential for appellate review."[138]

Upon review of the Parties' competing notices, the Trial Court "determined that the transcript of proceedings is necessary to convey a complete account of what transpired at the hearing."[139] Pursuant to Tenn. R. App. P. 24(d), the Trial Court also exercised its discretion to order Mr. Loftis to assume the expense of the transcript's preparation[140]—an Order that Mr. Loftis did not comply with and still has not complied with today. Thereafter, Mr. Loftis filed a Motion to Alter, Amend, or to Set Aside the Trial Court's Order, which the Trial Court concluded was "without merit" after holding a hearing on the matter.[141]

Mr. Loftis asserts that the Trial Court erred by permitting a transcript to be

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[135] R. at 279-80.
[136] R. at 281-84. Tenn. R. App. P. 24(d) provides that: "If the appellee deems a transcript or statement of the evidence or proceedings to be necessary, the appellee shall, within 15 days after service of the appellant's notice, file with the clerk of the trial court and serve upon the appellant a notice that a transcript or statement is to be filed.").
[137] *Id.* ("The appellee shall prepare the transcript or statement at the appellee's own expense **or apply to the trial court for an order requiring the appellant to assume the expense.**") (emphasis added).
[138] R. at 282.
[139] R. at 285.
[140] R. at 286.
[141] R. at 303.

filed and instructing Mr. Loftis to bear the costs of its preparation.[142] The apparent basis for Mr. Loftis's claim is that "the order which the court was asked to set aside made no mention of 'proceedings.'"[143] *But see* R. at 285 ("the court has determined that **the transcript of proceedings** is necessary to convey a complete account of what transpired at the hearing.") (emphasis added). Mr. Loftis also insists—without citation—that no statement made by counsel during the Parties' oral argument can be construed as a judicial admission,[144] and as a result, that the transcript cannot be said to contain "evidence." *But see Belew v. Gilmer*, No. 01-A-019010CV00365, 1991 WL 45396, at *6 (Tenn. Ct. App. Apr. 5, 1991) ("a statement of counsel in pleadings or stipulation or orally in court is generally regarded as a conclusive, judicial admission"); *Garland v. Seaboard Coastline R. Co.*, 658 S.W.2d 528, 531 (Tenn. 1983) ("at the hearing on defendant's motion to dismiss, counsel for defendant expressly acknowledged in open court that Wilson was the 'chief agent' in charge of defendant's activities in Washington County. Such admission is binding on the defendant in this Court."). All of Mr. Loftis's claims regarding the Court's order on the parties' transcript are without merit.

Mr. Loftis's brief fails to identify the standard of review that applies to his claims regarding the Parties' transcript. *See* Tenn. R. App. P. 27(a)(7)(B) ("The brief of the appellant shall contain . . . for each issue, a concise statement of the applicable standard of review"). The applicable standard, however, is whether the

[142] Appellant's Brief, p. 11.
[143] Appellant's Brief, p. at 11.
[144] Appellant's Brief, p. 12.

Trial Court extraordinarily abused its discretion. *See Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993) ("While Rule 24(e) grants an appellate court authority to direct that a supplemental record be certified and transmitted, absent extraordinary circumstances, an appellate court does not have the authority to refuse to consider matters that are determined by the trial court judge to be appropriately includable in the record."). Of note, this highly deferential standard is intended to foreclose precisely the sort of needless litigation over the content of the record that Mr. Loftis initiated, attempted to amend, and now appeals. *See id.* (noting "the policy of avoiding technicality and expediting a just resolution on the merits by according deference to the trial court's decision on which matters are properly includable in the record, thereby avoiding additional litigation on that subject alone."); *State v. Housler*, 167 S.W.3d 294, 296 (Tenn. 2005) (same). *See also Artrip v. Crilley*, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985) ("The Trial Court is the final arbiter of the transcript or statement of the proceedings.").

The Trial Court did not extraordinarily abuse its discretion or commit any error at all in either permitting a transcript to be filed or compelling Mr. Loftis to pay for the costs of preparation. Several reasons support this essential conclusion.

First, Mr. Loftis's insistence that "the order which the court was asked to set aside made no mention of 'proceedings'"[145] is demonstrably false. The Trial Court's Order quite clearly did mention "proceedings." *See* R. at 285 ("the court has determined that the transcript of proceedings is necessary to convey a complete

[145] Appellant's Brief, p. 11.

account of what transpired at the hearing."). In fact, the need to convey a complete account of the proceedings was the entire basis for the Trial Court's Order. *See id.* Accordingly, Mr. Loftis's insistence to the contrary is without merit.

Second, as Mr. Loftis acknowledges in his briefing, Mr. Rayburn was entitled to file the transcript at issue *regardless* of whether or not he had a specific reason for doing so, and he did not require permission to do it. *See* Appellant's Brief, p. 11 ("The Appellee was entitled to file such a transcript at its own expense, in any event."). *See also* Tenn. R. App. P. 24(h) ("Nothing in this rule shall be construed as prohibiting any party from preparing and filing with the clerk of the trial court a transcript or statement of the evidence or proceedings at any time prior to entry of an appealable judgment or order."). As such, it is inconceivable that the Trial Court could have abused its discretion by permitting the transcript to be filed.

Third, even if the Trial Court's Order permitting a transcript to be filed had been premised on the need for a transcript of the evidence alone, the Order would still have been proper. Mr. Loftis's Amended Complaint and subsequent filings were, in many respects, difficult to parse. As a result, his oral argument clarified his position on several critical factual allegations set forth in his Amended Complaint, and it was certainly proper to include those clarifications in the record. As noted in preceding sections, for example, Mr. Rayburn initially understood Mr. Loftis to have alleged that Mr. Rayburn had literally authored some of the statements in the article, rather than having told them to a single person.[146]

[146] *See supra* note 98.

Consequently, Mr. Loftis's clarification during oral argument that his Amended Complaint was actually premised upon "Mr. Rayburn's words *told to* Mr. Myers"[147] reframed the evidence as alleged in a way that affected both the statute of limitations that applied to Mr. Loftis's false light claim and the accompanying publicity requirement.[148] Mr. Rayburn also understood Mr. Loftis's counsel to have argued that his lawsuit was premised upon statements made by Mr. Rayburn in his capacity "as the voice of the school, as the board,"[149] which affects both Mr. Rayburn's claim for immunity and his claim for attorney's fees. With this context in mind, and because this Court has held repeatedly that positions adopted by counsel during oral argument are not merely evidence but *conclusive* evidence,[150] including a transcript of the evidence was entirely appropriate.

Fourth, with respect to the assessment of costs, Tenn. R. App. P. 24(d) expressly permitted Mr. Rayburn to "apply to the trial court for an order requiring the appellant to assume the expense," which is precisely what he did.[151] Thereafter, Rule 24(d) expressly afforded the Trial Court the authority to order Mr. Loftis to bear the costs of the transcript's preparation, which is precisely what it did.[152] The Trial Court's exercise of authority expressly provided by Rule 24(d) was not error.

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[147] Transcript, p. 22, lines 17-19 (emphasis added).
[148] *See* supra pp. 22-27.
[149] Transcript at p. 25, line 18.
[150] *See Below*, 1991 WL 45396, at *6 ("a statement of counsel in pleadings or stipulation or orally in court is generally regarded as a conclusive, judicial admission"); *Garland*, 658 S.W.2d at 531 ("at the hearing on defendant's motion to dismiss, counsel for defendant expressly acknowledged in open court that Wilson was the 'chief agent' in charge of defendant's activities in Washington County. Such admission is binding on the defendant in this Court.").
[151] R. at 281-83.
[152] R. at 286.

Fifth, Mr. Loftis fails to articulate any reason why he—as the losing party, as the party who had insisted (over Mr. Rayburn's objection) upon the oral argument that was to be transcribed,[153] and as the party responsible for initiating the instant appeal[154]—should not have been required to assume the expense of the transcript's preparation. Instead, Mr. Loftis merely insists that Trial Court's order in this regard was "absurd and should not be tolerated by this court."[155]

Mr. Loftis is wrong. The Trial Court's Order assessing the costs of transcript preparation to Mr. Loftis is reviewable only for clear abuse of discretion,[156] and its Order was not "absurd," much less "intolerable."[157] The Trial Court strictly complied with Tenn. R. App. P. 24(d), which expressly afforded it discretion to assess the costs of preparation to Mr. Loftis. The Trial Court also exercised that discretion based on a specific finding that a transcript was necessary "to convey a complete account of what transpired at the hearing."[158] As such, no error or abuse of discretion occurred at all. Accordingly, this contention is without merit as well.

X. ADDITIONAL CLAIMS OF CROSS-APPELLANT

1. Mr. Rayburn is entitled to attorney's fees under Tenn. Code Ann. § 29-20-113.

Mr. Loftis's lawsuit was premised upon statements supposedly made by Mr. Rayburn in his capacity as a member of the Board of Trustees of the Nashville State

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[153] Mr. Rayburn wanted to waive oral argument on his Motion to Dismiss in order to expedite a ruling on his Motion to Dismiss, which had been delayed repeatedly. *See* R. at 243-44.
[154] R. at 277-78.
[155] *See* Appellant's Brief, p. 12.
[156] *Perdue v. Green Branch Min. Co.*, 837 S.W.2d 56, 60 (Tenn. 1992) ("appellate courts are generally disinclined to interfere with a trial court's decision in assessing costs unless there is a clear abuse of discretion.").
[157] *See* Appellant's Brief, p. 12.
[158] R. at 285.

Community College Foundation.[159] The statements at issue were also alleged to have concerned discussion of a public proceeding regarding Mr. Loftis's termination.[160] Accordingly, Mr. Rayburn sought an award of attorney's fees and costs pursuant to Tenn. Code Ann. § 29-20-113,[161] which provides that:

> (a) Notwithstanding § 20-12-119(c)(5)(A), if a claim is filed with a Tennessee or federal court, . . . against an employee of the state or of a governmental entity of the state in the person's individual capacity, and the claim arises from actions or omissions of the employee acting in an official capacity or under color of law, and that employee prevails in the proceeding as provided in this section, then the court or other judicial body on motion **shall award reasonable attorneys' fees and costs incurred by the employee in defending the claim filed against the employee**.
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> * * * *
>
> (d) Attorneys' fees and costs shall be paid to the state, or a governmental entity of the state, if either the state or the governmental entity represents, or retains and agrees to pay for counsel to represent, the employee sued in an individual capacity. **If the state has not made such agreement, the attorneys' fees and costs shall be paid to the employee, or to counsel representing the employee.** Attorneys' fees shall be calculated at a reasonable rate paid to attorneys of similar experience in private practice in the county where the proceeding is initiated.[162]

The Trial Court dismissed both claims in Mr. Loftis's Amended Complaint with prejudice.[163] As such, there is no doubt that Mr. Rayburn "prevail[ed]" as contemplated by Tenn. Code Ann. § 29-20-113(a). Accordingly, to determine whether Mr. Rayburn was entitled to a fee award, the only question is whether this

[159] R. at 224.
[160] R. at 165, ¶¶ 7-8;
[161] *See* R. at 213; R. at 215; R. at 255; R. at 269.
[162] Tenn. Code Ann. § 29-20-113(a) & (d) (emphases added).
[163] R. at 274-75.

lawsuit was filed "against an employee of the state or of a governmental entity of the state in the person's individual capacity, and the claim arises from actions or omissions of the employee acting in an official capacity or under color of law." *Id.*

Here, the following uncontroverted facts tended to prove that the requirements of Tenn. Code Ann. § 29-20-113(a) were satisfied:

> 1. Mr. Loftis admitted that Nashville State Community College is "a State of Tennessee institution under the control of the Tennessee Board of Regents";[164]
>
> 2. The Nashville State Community College Foundation is a public "state university and community college" non-profit entity established pursuant to Tenn. Code Ann. § 49-7-107;[165]
>
> 3. Mr. Rayburn is a public official with respect to his activities as a Trustee of the Nashville State Community College Foundation;[166]
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> 4. Mr. Rayburn's fiduciary duty as a member of a public entity's Board of Trustees was to serve "the public trust."[167]
>
> 5. As a public employee, Mr. Loftis's employment at Nashville State Community College was a matter of public record;[168]
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> 6. Mr. Loftis argued that his Amended Complaint was premised upon statements made by Mr. Rayburn in his capacity "as the voice of the school, as the board";[169]
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> 7. Before initiating his lawsuit, Mr. Loftis adopted the position that: "The

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[164] R. at 103.
[165] R. at 221.
[166] R. at 210.
[167] R. at 221.
[168] R. at 166, ¶ 10 (indicating that Mr. Loftis's personnel file was a matter of public record).
[169] Transcript at p. 25, line 18. Mr. Loftis contends that this statement was "immaterial to . . . any question raised in this appeal." *See* Appellant's Brief, p. 12. Because Mr. Rayburn has raised several of his own issues as Cross-Appellant, however, Mr. Loftis is mistaken. Mr. Loftis also discounts this statement as "colloquy with the court, in response to a question, [that] merely referred to language within the offending article in answer to the question." *Id.* This is precisely the point. Mr. Loftis himself has characterized Mr. Rayburn's statements in the article as having been made in Mr. Rayburn's capacity as an official of Nashville State Community College. As such, Mr. Rayburn is entitled to claim both immunity and a fee award as a result of having been sued unsuccessfully for statements made in his capacity as a public official.

> circumstances and context of [Mr. Rayburn's] remarks strongly suggest that **he was speaking on behalf of the college, and he served on the Board at the time. . . .**"[170] And:
>
> 8. The stated purpose of Mr. Loftis's lawsuit was to coerce government action that afforded Mr. Loftis a formal "expression of gratitude" from Nashville State Community College.[171]

The Trial Court did not adjudicate Mr. Rayburn's claim for attorney's fees,[172] presumably because other fee-shifting statutes provide for such adjudication only after the appellate process has been exhausted.[173] In contrast, however, Tenn. Code Ann. § 29-20-113 does not require litigants to wait until the conclusion of the appellate process before seeking fees, and our Supreme Court has held repeatedly that such distinctions are meaningful.[174]

Because the facts pertaining to this issue were developed and were not controverted, this Court is empowered to rule on Mr. Rayburn's claim for fees itself even though the Trial Court did not.[175] Mr. Rayburn should be awarded fees under Tenn. Code Ann. § 29-20-113 as a result. In the alternative, however, this Court

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[170] R. at 224 (emphasis added).
[171] R. at 225. *See also* Transcript, p. 14, lines 17-18 ("the letter that I wrote . . . was an attempt to avoid this").
[172] R. at 274-75.
[173] *See, e.g.*, Tenn. Code Ann. § 20-12-119(3) ("An award of costs pursuant to this subsection (c) shall be made only after all appeals of the issue of the granting of the motion to dismiss have been exhausted and if the final outcome is the granting of the motion to dismiss.").
[174] *See, e.g.*, *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991) ("[I]t is a rule of statutory construction which is well recognized by our courts, that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned."). *See also Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 560 (Tenn. 2013) ("legislative silence in this particular context offers a strong suggestion that the legislature intended Tenn. Code Ann. §§ 29–26–121 and –122 to function differently.").
[175] *See, e.g.*, *In re Maddox P.*, No. M2016-00569-COA-R3-JV, 2017 WL 168452, at *5 (Tenn. Ct. App. Jan. 17, 2017) ("In our view, the record on appeal, containing among other things transcripts of the hearings, is developed sufficiently such that we may proceed with appellate review."); *State v. Herron*, 461 S.W.3d 890, 911 (Tenn. 2015) ("The record on appeal is otherwise sufficiently developed to allow for meaningful appellate review."); *Mitchell v. Kindred Healthcare Operating, Inc.*, 349 S.W.3d 492, 498 (Tenn. Ct. App. 2008) (ruling on issue that the Trial Court failed to address because "the factual record is sufficiently developed for our review.").

should remand this matter to the Trial Court with instructions to consider Mr. Rayburn's claim for attorney's fees under Tenn. Code Ann. § 29-20-113.

2. Mr. Rayburn is entitled to attorney's fees for defending against a meritless claim for sanctions.

Mr. Loftis cavalierly tosses a comically meritless claim for sanctions into his brief that was never raised in the Trial Court. Allegations of misconduct should not be leveled without substantial basis, however, and here, there is absolutely no basis for sanctions at all. Consequently, Mr. Rayburn should be compensated for having to defend against this spurious claim. *See* Tenn. R. Civ. P. 11.03 ("the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.").

Mr. Loftis's claim for sanctions is without merit for three main reasons:

First, Mr. Loftis did not raise any claim for sanctions in the Trial Court.[176] Accordingly, by rule, it cannot be raised for the first time on appeal.[177]

Second, there is a strict procedure for seeking sanctions under Rule 11, which Mr. Loftis did not even attempt to follow either in the Trial Court (where the claim was never raised) or in this Court (where the claim has not been supported). The procedures set forth in Rule 11.03 are clear, unambiguous, and mandatory. *See*

[176] *See* R. at 287-88; R. at 300-02.

[177] *See Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 146 (Tenn. 2017) ("litigants must raise their objections in the trial court or forego the opportunity to argue them on appeal."); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983) ("questions not raised in the trial court will not be entertained on appeal"); *In re Taylor B.W.*, 397 S.W.3d 105, 114 (Tenn. 2013) ("It has long been the rule that this Court will not address questions not raised in the trial court."); *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991) ("issues not raised in the trial court cannot be raised for the first time on appeal").

Mitrano v. Houser, 240 S.W.3d 854, 862 (Tenn. Ct. App. 2007) ("The procedures set forth in Rule 11.03 are clearly and unambiguously written, and are couched in mandatory terms. . . . Attorneys and litigants should be able to place their expectation and reliance upon the fact that Rule 11 means what it says, and that a party will not be sanctioned unless his or her opponent has followed the procedure for requesting sanctions as set forth in the rule."). Consequently, Mr. Loftis's failure to comply with Rule 11 precludes an award of sanctions as well. *See id.*

Third, Mr. Loftis's claim for sanctions is substantively meritless. Mr. Rayburn strictly complied with Tenn. R. App. P. 24(d) in both seeking a transcript and applying to the Trial Court for an order compelling Mr. Loftis to pay for it.[178] Because filing a transcript was essential to protect Mr. Rayburn's legitimate interests in this appeal, seeking the transcript was, in fact, his counsel's duty.[179] Further, in order to raise claims based on any part of the Parties' hearing, this Court has held that Mr. Rayburn was obligated to prepare the record of what transpired.[180] Following this Court's instructions is not sanctionable.

3. Mr. Loftis's appeal is frivolous.

Tenn. Code Ann. § 27-1-122 provides that:

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[178] *See supra* pp. 38-41.

[179] *See* Preamble to the Rules of Professional Conduct, #10 (noting include a "lawyer's obligation zealously to protect and pursue a client's legitimate interests").

[180] *See State v. Dennis*, No. M2005-00178-CCA-R3CD, 2006 WL 721301, at *2 (Tenn. Crim. App. Mar. 21, 2006) ("when a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal.") (citing *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983)). *See also id.* ("Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue.").

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.[181]

"[I]f the appellate court determines that an appeal is frivolous, the appellate court may award attorney's fees pursuant to this statute." *Eberbach v. Eberbach*, No. M2014-01811-SC-R11-CV, 2017 WL 2255582, at *4 (Tenn. May 23, 2017).

Although exercised sparingly, Tenn. Code Ann. § 27-1-122 is based on important public policy interests. As our Supreme Court held in *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977):

> Successful litigants should not have to bear the expense and vexation of groundless appeals. Nor should this Court, which is becoming increasingly burdened by direct appeals, be saddled with such cases. . . . The Tennessee Legislature obviously intended the frivolous appeals statute [Tenn. Code Ann. § 27-1-122], to discourage such appeals and to redress the harm to harassed appellees.

Id. *See also Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999) ("Successful parties should not have to bear the cost and vexation of baseless appeals."). This public policy is also especially critical where—as here—a lawsuit represents a meritless attempt to delay a final judgment, to coerce government action, and to punish a public official for speaking in his official capacity about a matter of public importance.

"An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success." *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn.

[181] Tenn. Code Ann. § 27-1-122.

Ct. App. 2001). In the instant case, Mr. Loftis's 13-page, nearly citationless appeal easily qualifies, particularly with respect to his arguments: (1) that the Trial Court failed to rule on his claims; (2) that the Trial Court erred in permitting a transcript to be filed; and (3) that Mr. Rayburn should be sanctioned.

Mr. Loftis's central claim of error in this appeal—that the Trial Court failed to rule on his theories of relief—is not supported by a single record citation,[182] resulting in its automatic waiver.[183] This claim is also refuted by even a cursory glance at the Trial Court's Order itself, which unmistakably reflects that it did rule on his claims.[184] The claim is patently frivolous as a result.

Mr. Loftis's claim that the Trial Court abused its discretion by permitting a transcript to be filed is similarly frivolous. The Trial Court's Order strictly complied with Tenn. R. App. P. 24(d).[185] Its decision to permit a transcript to be filed was also subject to extraordinary deference and was arguably unreviewable.[186] Further, Tenn. R. App. P. 24(d) was designed specifically to prevent the type of vexatious litigation that Mr. Loftis has now unnecessarily multiplied by pressing this claim on appeal.[187] Thus, this claim was frivolous as well.

Finally, Mr. Loftis's risible claim for sanctions was never raised in the Trial Court, did not even attempt to comply with the requisite procedure for obtaining

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[182] *See* Appellant's Brief, p. 10.
[183] *See supra* notes 60 & 61.
[184] See R. at 274-75.
[185] *See supra* pp. 38-41.
[186] *Bradshaw*, 854 S.W.2d at 869; *Artrip*, 688 S.W.2d at 453 ("The Trial Court is the final arbiter of the transcript or statement of the proceedings.").
[187] *Bradshaw*, 854 S.W.2d at 869 (noting "the policy of avoiding technicality and expediting a just resolution on the merits by according deference to the trial court's decision on which matters are properly includable in the record, thereby avoiding additional litigation on that subject alone."); *Housler*, 167 S.W.3d at 296.

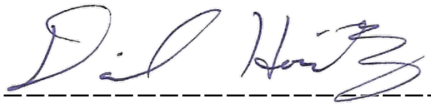
sanctions, and is also utterly devoid of merit. As such, it should be deemed frivolous, too.

Consequently, pursuant to Tenn. Code Ann. § 27-1-122, this Court should exercise its discretion to assess a full or partial award of "just damages against the appellant, which may include but need not be limited to, costs . . . and expenses incurred by the appellee as a result of the appeal." *Id.*

XI. CONCLUSION

For the foregoing reasons, the Trial Court's judgment should be **AFFIRMED**. Further, Mr. Rayburn should be awarded his reasonable attorney's fees and costs: (1) for successfully defending against this action under Tenn. Code Ann. § 29-20-113; (2) for defending against a meritless claim for sanctions; and (3) because Mr. Loftis's appeal is frivolous.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2017, a copy of the foregoing was sent via UPS, postage prepaid, to the following:

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