IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

THOMAS NATHAN LOFTIS SR.	)	
	)	
Appellant/Plaintiff,	)	
	)	No. M2017-01502-COA-R3-CV
	)	
v.	)	
	)	
RANDY RAYBURN	)	
	)	
Appellee/Defendant.	)	

Appeal from the Final Judgment of the Eighth Circuit Court
For Davidson County, Case No. 17C-295

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This is an appeal from an order of the Circuit Court for Davidson County granting Defendant's Rule 12.02(6) Motion to Dismiss. (R. 274). Notice of appeal was timely filed on July 26, 2017. (R. 277-278).

Even though no evidence was taken since the only "proof" were the allegations in the Complaint, Defendant nonetheless filed a "notice" that a "transcript" would be filed at the cost of Mr. Loftis. (R. 281-284). This was ordered without a motion or a hearing. (R. 285-286). Plaintiff/Appellant moved to alter or amend this order, which was denied without explanation (R. 303).

Mr. Loftis asks that this court review both the Order of Dismissal and the denial of the Motion to Alter, Amend, and to Set Aside. No charge should be assessed against him since a transcription of this oral argument is wholly immaterial to the review of a ruling based entirely on the complaint.

STATEMENT OF THE FACTS

This case is a text book example of the tort of false light invasion of privacy. Tom Loftis devoted his career to educating young people in cooking skills. The Defendant has portrayed him as incompetent in his life's work and by implication responsible for the alleged shortage of capable line cooks in Nashville. Because the school had been named for him, Defendant Rayburn had to "do something." That "something" was to shift the blame from himself to Tom Loftis.

Mr. Loftis is not a public figure. (R. 76). He had toiled faithfully for a number of years as full time coordinator of the culinary arts program at Nashville State. He had built the program from fifty students to approximately 300. (R. 73).

On March 2, 2016, the Tennessean newspaper published comments made by the defendant Rayburn. (R. 74). Rayburn expressed concern over "the dearth of qualified line cooks in town, from our best restaurants to the hotels and convention centers. Rayburn recognized this need every day in his kitchen…so he decided to do something about it by dedicating himself to helping build a Culinary Arts program at what used to be called Nashville Tech." (R. 74).

"It hasn't been easy, "Rayburn said. When he supposedly sought the help an unnamed and unnumbered set of local restauranteurs for feedback, "the reports he got back weren't flattering. The program was simply turning out unqualified students." (R. 75).

Mr. Rayburn's pride was aroused. Because his "name (was) on the building," he chose to apply his experience "in how to cut losses and move on quickly." He "decided to get more involved." (R. 75).

Mr. Rayburn's management involvement began "by cleaning house from the top by removing director Tom Loftis." (R. 75).

The unmistakable suggestion of these remarks 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;
5) Therefore, it was necessary to "clean house" by removing the man depicted as personally responsible for the perceived deficiencies

Mr. Rayburn revealed no specific deficiencies. There was no mention of any effort to identify any individuals who had ever attended the school, or if they had, to determine whether

they had graduated. No effort was made to verify these astonishing generalizations. Were these alleged deficiencies a function of a failure of instruction, or rather the inadequacy of the individuals? In fact, among chefs mentioned were some who had never employed a graduate of the school. (R. 75). The obvious implication was to represent these concerns as a consensus among the best known restauranteurs in town. The problem, thus described, could only be solved by "cleaning house," starting with Tom Loftis.

These insults were as unnecessary as they were mean spirited. But Rayburn did not stop there. He portrayed himself as courageous because Plaintiff was the brother-in-law of Mr. Bill Freeman, who was a candidate for Mayor of Nashville at the time. If the election had gone a different way, "it might have affected funding for the school." (R. 75).

Mr. Rayburn then implied that Mr. Loftis might unethically have retaliated by punishing the school with a loss of funding from the Metropolitan Government, should Mr. Freeman become Mayor. Nashville State, however, is a State of Tennessee institution under the control of the Tennessee Board of Regents. Metro does not control or primarily fund Nashville State, and Mr. Freeman, whose integrity was gratuitously impugned with Mr. Loftis, would have been powerless to deprive the school of State appropriations. (R. 76). Mr. Rayburn surely knew this.

Mr. Rayburn had sought and had not received a role in the Freeman campaign and supported a different candidate. (R. 76). It is reasonable to infer that his antipathy toward Mr. Loftis was motivated in part by his resentment of Mr. Freeman.

It is false and reckless to attribute the real, embellished or imagined shortcomings of hundreds unidentified people to a single cause: Tom Loftis. The implication that all restaurant employees were incompetent because Nashville State students were poorly trained because of Tom Loftis was reckless and was made with a conscious disregard for the truth.

These unnecessary and unseemly comments would plainly have been offensive to a person of ordinary sensibilities in the position of Mr. Loftis. The perception was certainly offensive to Rayburn.

THE RULING OF THE CIRCUIT COURT

The Court's order of July 19, 2017, failed to address the Plaintiff's theories' of the case. This is a suit for false light invasion of privacy and defamation by implication or innuendo.

The Court stated without explanation that "there is significant and substantial overlap between false light and defamation..." (R. 275). The Court noted that whether any statement "...is capable of being understood as defamatory is a question of law to be determined by the Court." (R. 275).

The Court then concluded 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." (R. 275).

The Court did not address any of the elements of false light claims or of defamation by innuendo or implication.

STANDARD OF REVIEW – RULE 12.02(6)

A defendant who files a motion to dismiss for failure to state a claim admits the truth of all the relevant and material allegations contained in the Complaint, but asserts that the allegations fail to establish a cause of action. In considering such a motion, the Court must construe the Complaint liberally, presuming all factual allegations to be true and giving the Plaintiff the benefit of all reasonable inferences drawn therefrom. Tenn. R. Civ. P. 12.02(6); *Webb v. Nashville Area Habitat for Humanity*, 346 S.W.3d 422 (Tenn. 2011).

The Court will review the trial court's legal conclusion *de novo* with no presumption of correctness. *Id*; *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48 (Tenn. 2004).

ISSUES PRESENTED FOR REVIEW

I. Whether the public comments of Randy Rayburn placed Tom Loftis in a negative and unfair light?

II. Whether the Appellee should have known that Mr. Loftis, as a reasonable man, would be seriously aggrieved and offended by publicity suggesting that pandemic incompetence among line cooks in Nashville was directly attributable to him?

III. Whether the final order of the trial court should be set aside for failure to rule upon the only two theories advanced by the Plaintiff?

IV. Whether an order requiring Appellant to bear the cost of a transcript of an oral argument should be reversed because the appeal was from an order pursuant to Rule 12?

V. And, whether the request for Appellant to pay for the transcript containing a misrepresentation of words of counsel, characterizing these as a judicial admission, should result in sanctions?

ARGUMENT

THE FIRST AMENDED COMPLAINT STATED A CLAIM FOR FALSE LIGHT INVASION OF PRIACY AND DEFAMATION BY IMPLICATION OR INNUENDO.

While circumstances may exist in which both a conventional defamation theory and false light invasion of privacy elements are implicated, they are not the same torts. A statement that a person has committed a crime, for example, might well be defamatory and truth could be plead as a defense. A false light or defamation by innuendo claim, however, makes actionable language which might, in this example, suggest or imply that the Plaintiff was guilty of a crime.

False light is a distinct tort and has been so recognized since *West v. Media General Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001).

In *West*, the court adopted the separate tort of false light invasion of privacy as that theory was described in Section 652E of the Restatement (Second) of Torts (1977):

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

West, supra, at 643, 644.

Mr. Rayburn gave publicity to alleged inadequacies among line cooks in Nashville. He falsely placed Mr. Loftis in the light of being responsible for their inadequacies. This implied – indeed, essentially stated – that Mr. Loftis was incompetent or unfit, and an impediment to the future of the culinary industry in Nashville.

The *West* court adopted the actual malice standard only where the plaintiff is a public official or public figure, as in standard defamation claims, or when the claim is asserted by a private individual about a matter of public concern. *Id* at 647. The court expressly rejected actual malice as a standard, however, for false light claims brought by private plaintiffs, such as Mr. Loftis.

A false light claim is dependent upon context and sensitive to misleading omissions, rather than the literal truth of certain words. The essence of a false light claim is the <u>false impression conveyed by words received within context, including omissions that themselves alter meaning</u>.

As the *West* Court said in footnote 5:

> The facts may be true in a false light claim. However, the angle from which the facts are presented or the omission of certain material facts, results in placing the Plaintiff in a false light. "Literal accuracy of separate statements will not render a communication 'true' where the implication of the communication as a whole was false.... The question is whether [the Defendant] made 'discrete presentations of information in a fashion which rendered the publication susceptible to inferences casting [the Plaintiff] in a false light'."

Santillo v. Reedel, 430 Pa. Super. 290, 634 A.2d 264, 267 (1993)(citations omitted)(emphasis added).

Rayburn's words omitted any mention of the number of line cooks who had attended Nashville Tech while Mr. Loftis was in charge; what their short comings were; how those shortcomings were the fault of Mr. Loftis; how the persons were perceived to have been unqualified; and, by whom.

The question then becomes whether the light in which the Plaintiff has been placed would be highly offensive to a reasonable person. The question in a false light claim is this: Could a reasonable jury find that the Defendant through mischaracterization, omission or otherwise, intentionally created a negative and unfair impression of the Plaintiff. "It may be satisfied when there exist obvious reasons to doubt the veracity of the person who supplied the information or the accuracy of the information itself." *Lewis v. NewsChannel 5 Network, LP.*, 238 S.W.3d 270, 301.

What this means is that one who publishes words, pictures or information and mischaracterizes a person in some misleading manner may be guilty of a false light tort. One who knowingly *omits* relevant facts and thereby destroys the context within which the truth would have been revealed, may be guilty of a false light tort. Thus the omission or the mischaracterization *themselves* meet the reckless disregard element. It is difficult to read Tennessee's false light cases otherwise. Whether these elements have been met was not determined by the trial court.

It is ironic indeed that Rayburn portrays himself as worried that his reputation was at risk due to allegedly poor training by the school, yet denies that shifting the blame for this supposed systemic unpreparedness to Mr. Loftis would have been as offensive to Mr. Loftis as to himself. Rayburn and Loftis, as men of ordinary sensibilities, would both find being blamed for the incompetence of hundreds of unnamed people involved in their life's work to be offensive.

Appellant would respectfully direct the Court to comment (c) to §652E of the Restatement, which addresses the "highly offensive to a reasonable person" element of the tort:

> The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity...It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.

Tom Loftis was himself trained at Nashville Tech, had lead the culinary arts program for years, and had earned the title of "chef." It is reasonable to conclude that his reputation in the restaurant community in his home town was important to him. It is reasonable – even obvious - that a "major" misrepresentation of his character, history and activities by imputing the alleged incompetence of his supposed students to him can reasonably be expected to have caused serious offense to a man in his position.

THE TRIAL COURT FAILED TO RULE ON PLAINTIFF'S CLAIM

None of the elements of these torts s adopted in Tennessee were discussed by the Circuit Judge. He dismissed a claim that was not brought and ignored the ones that were. Mr. Loftis was entitled to the following findings:

1). Did Rayburn's words contain mischaracterizations or omissions?

2). Did these words portray Mr. Loftis in a negative and unfair light?

3). Should the Defendant have known that Mr. Loftis, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity?

This court can readily answer all of these questions in the affirmative. At a minimum, the case should be remanded for consideration by the trial court of the claims that were brought.

APPELLANT SHOULD NOT BE ASSESSED THE COST OF A TRANSCRIPT OF ORAL ARGUMENTS BELOW

Appellant on July 16, 2017, advised the court that because the matter had been determined pursuant to a Rule 12 motion, no transcript or statement of evidence would be filed. (R 279). Appellee then filed a "Notice That a Transcript or Statement of Proceedings Is to Be Filed." (R. 281).

No motion was filed to compel Mr. Loftis to prepare and file a transcript. No hearing was held. Yet the trial court entered an "Order Regarding Transcript of the Evidence on Appeal" on August 8, 2017. (R. 285-286).

Loftis moved to alter, amend and set aside this order on August 16, 2017. (R. 287-288). No "Transcript of Evidence" could be filed, because no evidence had been taken. T.R.A.P. 24(b). The Appellee was entitled to file such a transcript at its own expense, in any event.

Mr. Loftis's motion referred to a "transcript of evidence" because that was what the court had ordered to be prepared.

The Appellee responded that T.R.A.P. 24(b) referred not merely to evidence, but also to "proceedings," and that "judicial admissions are, indeed, 'evidence.'" (R. 290).

The order which the court was asked to set aside made no mention of "proceedings."

The basis for including a transcript of the argument before the trial court is frivolous, not made in good faith, and should be the subject of sanctions.

The spurious "judicial admission" proposed by Rayburn was said to have been on page 25, line 18 of the Transcript. The disingenuous representation to the court was that counsel for Mr. Loftis argued that Rayburn spoke "as the voice of the school, as the Board," and this was somehow evidence of an issue not ruled upon by the court and therefore not before this court. (R. 290).

Line 14 through 22 states as follows:

> THE COURT: Now, wait, but it says – it didn't say – he says "they." Who's the "they" in the "They started by cleaning house"?
>
> MR. BLACKBURN: Well, they're describing him as the – as the voice of the school, as the board, as the – the person for whom the school is named – named. And the next paragraph begins with, "Rayburn's group knew they needed fresh blood." That's what they knew.

These words were colloquy with the court, in response to a question, and merely referred to language within the offending article in answer to the question. (Transcript 25:18).

These words are immaterial to any ruling of the court or to any question raised in this appeal. No "judicial admission" can conceivably be found from counsel quoting from the Tennessean article in response to a question.

Without explanation, Judge Jones denied the Motion to Alter or Amend. (R. 303) Loftis has been billed four hundred fifty dollars ($450).

This is absurd and should not be tolerated by this court.

CONCLUSION

For the reasons stated, the order granting Appellee's motion to dismiss for failure to state a claim should be reversed and this matter remanded for further handling consistent with the ruling of this court; and,

The order requiring Mr. Loftis to bear the expense of a transcript of the oral argument should be reversed; and, that Mr. Rayburn and his counsel should be assessed all the expense occasioned thereby, including attorney fees incurred by Mr. Loftis in response to this frivolous request.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via electronic mail and by United States Mail, postage prepaid, on this 13th day of November, 2017, upon the following:

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