IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

GLENN R. FUNK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 16C-333**
	)	
SCRIPPS MEDIA, INC., and PHIL WILLIAMS,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants Scripps Media, Inc. and Phil Williams hereby move this Court, pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, to dismiss the Amended Complaint filed herein by Plaintiff Glenn R. Funk for failure to state a claim upon which relief can be granted. Plaintiff's Complaint must be dismissed because the allegations reported in the news stories at issue are constitutionally protected speech, are privileged as a fair and accurate report of the allegations made in another lawsuit and do not contain false and defamatory statements concerning the Plaintiff.

Defendants also ask this Court, pursuant to Tennessee Code Annotated § 20-12-119, to award them their attorneys' fees and costs in responding to these allegations. In support of this motion, Defendants have submitted the Affidavit of Phil Williams with exhibits that include a transcript and a video of the news stories at issue.

For the reasons set forth herein and in the accompanying Memorandum in Support, Defendants ask the Court to dismiss Plaintiff's Amended Complaint with prejudice and for an award of attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 14th day of March, 2016.

(X) Hand	James D. Kay, Esq.
( ) Mail	John B. Enkema, Esq.
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Ronald G. Harris

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Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Scripps Media, Inc. and Phil Williams have moved this Court to dismiss Plaintiff Glenn R. Funk's Amended Complaint pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure. Defendants have also moved pursuant to Tennessee Code Annotated § 20-12-119 for their costs and attorneys' fees in responding to Plaintiff's Amended Complaint. For the reasons set forth herein, this Court should grant Defendants' motion, dismiss all of Plaintiff's claims with prejudice, and award Defendants all their costs and attorneys' fees in responding to these claims.

I. INTRODUCTION.

This lawsuit is an attempt by an elected public official to silence and intimidate a journalist and news organization that has accurately reported on questionable conduct and judgment by that official. Plaintiff's lawsuit seeks to impose liability for constitutionally protected news reporting that fairly and accurately reported on allegations that are being made in

a separate lawsuit in Williamson County, Tennessee. That lawsuit involves the Plaintiff public official and is a matter of public concern. Defendants and other news media have reported on the testimony and allegations that have been made in that case. This lawsuit fails to state a claim upon which relief can be granted because the news reporting at issue is protected by the fair report privilege and the United States and Tennessee Constitutions' guarantees of free speech and free press, and also because it does not contain false and defamatory statements concerning Plaintiff.

II. FACTUAL BACKGROUND.

Plaintiff Glenn R. Funk is an elected public official currently serving as the District Attorney General for the Twentieth Judicial District in Nashville, Tennessee. (Amended Complaint, ¶ 1.) Defendant Scripps Media, Inc. ("Scripps") owns and operates NewsChannel 5 (WTVF) in Nashville. (Amended Complaint, ¶ 2.) Defendant Phil Williams is the chief investigative reporter for NewsChannel 5. (Amended Complaint, ¶ 3.)

Plaintiff's claims in the Amended Complaint are based upon a news story that was broadcast on February 3, 2016 and a second news story that was broadcast on February 4, 2016. (Amended Complaint, ¶¶ 8, 27.) The first news story reported on allegations and claims that had been made in a lawsuit currently pending in Williamson County, Tennessee. In that lawsuit, styled *David Chase v. Chris Stewart, et al.*, No. 2015-CV-200, Plaintiff David Chase alleged that the defendants had conspired to have him charged with assaulting a former girlfriend. Copy of Second Amended Complaint, Exhibit A hereto.

Mr. David Chase was previously charged with domestic assault in Davidson County, Tennessee in a case that received extensive media coverage due to the alleged actions of Mr.

Chase and also for the actions allegedly taken by one of the Metropolitan General Sessions Judges in releasing Mr. Chase from custody. In June 2015, Mr. Chase filed a lawsuit in federal court against the Metropolitan Government of Nashville, Davidson County, Tennessee and its police officers, alleging violations of his civil rights in connection with his arrest. *David Chase v. Matthew K. White, et al.*, Case No. 3:15-cv-00631 (M.D. Tenn. 2015). Exhibit B hereto.

Plaintiff Glenn R. Funk has been the District Attorney General in Davidson County since August 2014. In July 2015, the District Attorney's office dismissed the criminal charges against Mr. Chase, citing issues with the alleged victim's credibility and other problems with the case, stating, "The facts and law in this case compel dismissal." State's Notice of Dismissal, Exhibit C to Plaintiff's Amended Complaint. The Notice of Dismissal also stated that "the ethical and legal obligation of the office of the District Attorney require the State to dismiss this indictment." *Id.* at 6.

The indictment was dismissed. As an express "condition precedent" to the dismissal of those criminal charges against him, Mr. Chase was required by the District Attorney to dismiss his federal lawsuit against the Metropolitan Government and the defendant police officers. Public Statement of Glenn Funk, Exhibit B to Amended Complaint; Amended Complaint, ¶ 19. Mr. Funk has characterized this requirement as a "release-dismissal agreement." *Id.*

Mr. Chase filed the previously referenced civil lawsuit in Williamson County, Tennessee alleging the defendants therein conspired to have him criminally charged. *David Chase v. Chris Stewart, et al.* Exhibit A hereto. That lawsuit is still pending.

Defendants broadcast a news story on February 3, 2016 that reported on the claims and testimony in the Williamson County civil action. Mr. Funk was subpoenaed to give a deposition in that case. Subpoena and Notice of Deposition attached as Exhibit C hereto. Mr. Funk has

objected to giving his testimony in that case. Non-Party Glenn Funk, District Attorneys' Objection to Defendants' Subpoena attached as Exhibit D hereto. Defendants in that action sought to compel Mr. Funk's testimony. Defendants moved to compel Mr. Funk's testimony. Motion to Compel Examination of Glenn Funk (without exhibits) attached hereto as Exhibit E. In that Motion, counsel for certain of the defendants in the Williamson County case stated the basis for his need to depose Mr. Funk. Two of the reasons his deposition was needed was because of the alleged "Deal between David Chase and Glenn Funk" relating to dropping the criminal charges and the alleged "Bribery Solicitation" that the Chase family had testified they received from Bill Fletcher. *Id.* Deposition testimony from David Chase's parents, Dean and Sandy Chase, was cited in that pleading. *Id.*

February 3, 2016 News Story (referred to in the Amended Complaint and herein as the "First Story"). The First Story that was the sole basis of Plaintiff's original Complaint reported on the allegations made in the *David Chase v Chris Stewart, et al.* case in Williamson County; it did not state, as alleged in Plaintiff's Amended Complaint, that Mr. Funk solicited a bribe or blackmailed Mr. Chase. A DVD containing the news broadcast of the First Story is attached as Exhibit A to the Affidavit of Phil Williams. The script of the news story as broadcast is attached as Exhibit B thereto. The First Story as shown on the NewsChannel 5 website was attached as Exhibit A to Plaintiff's Amended Complaint.

The First Story was broadcast the evening of February 3, 2016. The original Complaint was filed the next afternoon, February 4, 2016, without any prior request for retraction. Other local news media, both print and broadcast, ran news stories reporting on these same allegations made in the Williamson County case in the same timeframe. Collective Exhibit C to Phil

Williams' Affidavit. It does not appear that Mr. Funk has brought lawsuits against any members of the news media except NewsChannel 5, owned by Scripps, and Phil Williams.

February 4, 2016 News Story (referred to in the Amended Complaint and herein as the "Second Story"). Plaintiff's Amended Complaint, filed herein on Friday, February 26, 2016, added a claim based upon the NewsChannel 5 news story broadcast on February 4, 2016. The Second Story included an interview with David Chase, the Plaintiff in the Williamson County lawsuit. (Amended Complaint, ¶¶ 26-27.) The only allegedly false statements made in the Second Story, according to the Amended Complaint, were the following statements made by Mr. Chase in his interview:

> 'I think the term used by Attorney General Funk was well if he doesn't [dismiss his civil suit] then I may go to jail, but David Chase definitely will go to jail. So that was not just blackmail, it was a threat' [and] 'In my opinion [Funk] blackmailed me, using my criminal case and incarceration as leverage to get me to drop a federal civil case that I had grounds to file.'

Amended Complaint, ¶ 27, (parentheticals added in Amended Complaint). The DVD attached as Exhibit A to Phil Williams' Affidavit also contains the Second Story as broadcast. Exhibit D to his affidavit is the script of the news story as broadcast. The Second Story as presented on the NewsChannel 5 website was attached as Exhibit D to Plaintiff's Amended Complaint.

Defendants have filed this Motion to Dismiss to show this Court that the allegations concerning the First Story should be dismissed because the statements made in that news story about which Plaintiff complains are protected by the fair report privilege and therefore fail to state a claim upon which relief can be granted.[1] As to the Second Story, Defendants will show

[1] Plaintiff would also not be able to prove any of the other elements of his libel and false light-invasion of privacy claims as to this First Story, including a false and defamatory statement concerning Plaintiff, actual malice or damages to reputation, but those elements are not the basis of this Motion.

that there are no false or defamatory statements concerning Plaintiff in that news story, and thus all claims on that news story should also be dismissed.[2]

III. LEGAL STANDARD.

In support of their Motion, Defendants have submitted a true and correct copy of the news stories, as well as other materials outside the Amended Complaint. Accordingly, this motion to dismiss should be treated as a motion for summary judgment. See Tenn. R. Civ. P. 12.02(6) ("If . . . on a motion . . . to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.").

Summary judgment is appropriate where (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion; and (2) the moving party is entitled to judgment as a matter of law on the undisputed facts. Tenn. R. Civ. P. 56.04. Where (as here), the moving party does not bear the burden of proof at trial, the moving party "may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015).

[2] Plaintiff would also not be able to prove the other elements of his claims on the Second Story, but only the lack of a false and defamatory statement concerning Plaintiff are at issue in this Motion as to the Second Story.

IV. AUTHORITY AND ARGUMENT.

A. The Fair Report Privilege Bars Plaintiff's Claims on First News Story.

Plaintiff's Amended Complaint alleges that the First Story reported that he "in his role as District Attorney extorted money from a criminal defendant, solicited a bribe and even blackmailed a criminal defendant into dismissing a civil lawsuit." Amended Complaint, ¶ 6. The Amended Complaint repeats that allegation at several points, including the statement that, "The defendants go on to claim that Mr. Funk not only solicited a $2 million bribe, but he also allegedly blackmailed David Chase into dismissing a civil lawsuit . . ." Amended Complaint, ¶ 15. Plaintiff's Amended Complaint claimed that "Further, at no point has Mr. Funk solicited, been offered, or accepted any bribe, including his tenure as District Attorney." *Id.* at ¶ 20.

A review of the First Story shows that no such statements were made about Mr. Funk. The First Story did not state Mr. Funk solicited a bribe, extorted money from a criminal defendant or blackmailed a criminal defendant. Instead, the First Story reported on testimony and allegations that were actually being made in David Chase's lawsuit in Williamson County. It cannot be disputed that the testimony and allegations quoted in the news story were in fact made in that lawsuit.

As a report on the testimony and allegations made in the Williamson County lawsuit, the First Story is privileged under the "fair report" privilege and therefore cannot properly be the basis for Plaintiff's defamation and false light-invasion of privacy claims. The "fair report" privilege has long been recognized in Tennessee. Its history and purpose were traced in the Court of Appeals' opinion *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 284 (Tenn. Ct. App. 2007) stating:

> The Tennessee Supreme Court recognized the fair report privilege in 1871. *Saunders v. Baxter*, 53 Tenn. (6 Heisk) 369, 381 (1871) ("A bona fide report of the proceedings in a court of justice, in the absence of express malice, is not libel, though the publication may be injurious to the character of an individual.") Over thirty years later, the court pointed out that the foundation of the privilege was the importance attached to keeping the public informed of the proceedings in court, *American Publ'g Co. v. Gamble*, 115 Tenn. 663, 678, 90 S.W. 1006, 1008 (1906), and of the contents of papers filed in court. *Langford v. Vanderbilt University*, 199 Tenn. 389, 399, 287 S.W.2d 32, 37 (1956). Thus, the fair report privilege has traditionally protected "newspapers which make reports of judicial proceedings so the public may be apprised of what takes place in the proceedings without having been present." *Smith v. Reed*, 944 S.W.2d 623, 625 (Tenn. Ct. App. 1996).

Id. at 284 (emphasis added).

"Tennessee's version of the fair report privilege in its current form closely, though not exactly, mirrors the scope of the privilege found in the RESTATEMENT (SECOND) OF TORTS, § 611 at 297 (1977)." *Lewis,* 238 S.W.3d at 285. The RESTATEMENT (SECOND) OF TORTS defines the privilege as follows:

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

RESTATEMENT (SECOND) OF TORTS, § 611 (1977).

"The privilege enables persons reporting on official actions or proceedings to broadcast, print, post, or now blog about official actions or proceedings without the fear of being subjected to a tort action for fair and accurate reports, even if these reports contain defamatory or embarrassing statements by government employees." *Lewis,* 238 S.W.3d at 285 (emphasis added). Defendants submit that the First Story does not contain any false or defamatory statements, but if the fair report privilege applies, the allegation that false and defamatory statements were made in the report on the proceedings is immaterial. *Id.*; *American Publishing Co. v. Gamble*, 90 S.W. 105 (Tenn. 1905); RESTATEMENT (SECOND) OF TORTS, § 611 (1977).

The fair report privilege is a "qualified" privilege and not an absolute privilege. *Lewis,* 238 S.W.3d at 284; *Langford v. Vanderbilt University*, 318 S.W.2d 568, 574 (Tenn. 1958). In order for the privilege to apply, the report must be "a fair and accurate summation" of the action or proceeding reported and must display balance and neutrality. *Lewis,* 238 S.W.3d at 284, (*citing Smith v. Reed*, 944 S.W.2d 623, 625 (Tenn. Ct. App. 1996)). "The report need not be a verbatim, technically accurate account in every detail, as long as it conveys a correct and just impression of what took place. *Id.*; *American Publishing Co. v. Gamble, supra* at 90 S.W. at 1008; *Smith v. Reed*, 944 S.W.2d 623, 625 (Tenn. Ct. App. 1996); *Langford v. Vanderbilt University*, 318 S.W.2d at 574-575. As a "qualified privilege," the protection is lost if the report of a judicial proceeding contains a false statement of what actually occurred during the proceeding, any garbled or one-sided account of the proceeding or any defamatory observations or comments. *Lewis,* 238 S.W.3d at 284.

Deciding whether the fair report privilege applies can be resolved by summary judgment because its application is "a question of law to be determined by the court." *Smith v. Reed*, 944 S.W.2d 623, 624 (Tenn. Ct. App. 1996). In this case, the requirement that the report be of a public or official proceeding is met because the First Story at issue reported on the testimony and allegations being made in the case currently pending in Williamson County Circuit Court styled *David Chase v. Chris Stewart, et al.*, No. 2015-cv-200.

The earliest fair report privilege cases in Tennessee dealt with "proceedings in court . . . and of the content of papers filed in court." *Lewis,* 238 S.W.3d at 284, (*citing Saunders v. Baxter*, 53 Tenn. (6 Heisk) 369, 381 (1871); *American Publishing Co. v. Gamble*, 115 Tenn. 666, 678, 90 S.W. 1006, 1008 (1906) and *Langford v. Vanderbilt University*, 199 Tenn. 389, 396, 287 S.W.2d 32, 37 (1956)). In *Langford*, the Court specifically noted that the fair report privilege

extends to the contents of pleadings filed in court even though no judicial action has been taken thereon. 287 S.W.2d at 37. "Such is the rule, though the allegations of the pleading should prove to be false, or the truth thereof not established." *Id.*

The First Story at issue reports on pleadings filed, actual video footage from depositions taken, and text messages produced in that case. Deposition testimony falls within the scope of an official or public proceeding. *See Eisenstein v. NewsChannel 5 Network, LLC*, 389 S.W.3d 313, 321 (Tenn. Ct. App. 2102) (applying the fair report privilege to deposition testimony); *see also, Jamason v. Palm Beach Newspapers, Inc.*, 450 So.2d 1130 (Fla. Ct. App. 1984) (affirming summary judgment for newspaper based on fair and accurate reporting of deposition testimony from a judicial proceeding concerning alleged corruption in police department); *James v. Pulitzer Pub. Co.*, 195 S.W. 80, 84 (Mo. Ct. App. 1917) ("[T]he undisputed evidence is that defendants' reporter who 'reported' the divorce proceedings read the deposition which was on file.").

The other requirement for application of the fair report privilege is that it be a "fair and accurate summation of the proceedings." *Smith v. Reed,* 944 S.W.2d at 625. "The report need not be a verbatim, technically accurate account in every detail, as long as it conveys a correct and just impression of what took place." *Lewis*, 238 S.W.3d at 284 (citations omitted).

The First Story makes abundantly clear that what is being reported on are allegations being made in David Chase's lawsuit in Williamson County, Tennessee. The lead-in and introduction to the First Story emphasize the "allegations" being made in that case. Exhibits A and B to Williams Aff. For example:

> Tonight, explosive allegations emerge from one of the most controversial domestic violence cases in recent Nashville History . . .
>
> But NewsChannel 5 Investigates has uncovered even more salacious allegations surrounding that case – allegations of extortion, possible bribery, even blackmail. Those allegations raise questions about a long time Democratic political consultant, as well as the DA himself.
>
> The stunning allegations emerged in sworn testimony as a result of a lawsuit filed by David Chase.

Id. What followed in the First Story were actual video clips of the depositions taken in the lawsuit filed by David Chase in Williamson County. *Id.* The title "Explosive Allegations" was shown on the screen during the first part of the news story. Exhibit A to Williams Aff. The title of the website version is "Explosive Allegations Emerge from Chase Case." Exhibit A to Plaintiff's Amended Complaint. That online version also refers again and again to the "allegations" made in that lawsuit. *Id.* The Twitter reference to the news story also only refers to the "Allegations . . . ." Amended Complaint, ¶ 16.

The allegations reported on were in fact being made in the Williamson County lawsuit and relate to two subjects. The First Story reports allegations that Bill Fletcher, the public relations consultant working for the Chases, approached David Chase's father, Dean Chase, with a $2 million dollar request "to make this go away." Exhibits A and B to Williams. Aff. The First Story showed a clip from the deposition of David Chase's mother, Sandy Chase, where she was asked directly, "Was your perception that Bill Fletcher wanted $2 million to bribe someone?" *Id.* Her answer (also shown by the video of her deposition) was "I think [my husband] Dean [Chase] inferred that that was the purpose." *Id.* The First Story continued by showing a video clip from the deposition of David Chase's father, Dean Chase, in which he was asked specifically, "Did you believe the $2 million dollar request was to pay a bribe to someone?" *Id.* His attorney objected and told Mr. Chase not to answer. *Id.* The news story

next showed Mrs. Chase answering the question about her husband's reaction to the $2 million request: "He said that Fletch just got himself fired. He said there was no way we would do that and he was shocked." *Id.*

The First Story continued, showing Mrs. Chase testifying by being asked the following questions and responding as follows:

Attorney:	Making it go away would have required a decision on Glenn Funk's part, correct?
Sandy Chase:	Well, since he was in the control of the - - dropping the charges or not, I guess the answer would be yes.
Attorney:	Did you get the sense that Bill Fletcher's request for $2 million was to give to Glenn Funk?
Sandy Chase:	I did not get that - - that feeling. I didn't know what to think of it.

Id.

Contrary to Plaintiff's allegations, the First Story does not report that Glenn Funk solicited or accepted a bribe. It did report that there were allegations in the Williamson County lawsuit that political consultant Bill Fletcher had asked David Chase's father for $2 million to make the case go away and that witnesses were asked about whether such request related to a possible bribe. Those allegations were in fact being made and those questions in fact were asked in the Williamson County case and Defendants' news story accurately reported that fact.

The other portion of the allegations in the Williamson County lawsuit reported upon in the First Story relate to what Plaintiff Mr. Funk has called a "release-dismissal agreement." Public Statement of Glenn Funk, Exhibit B to Plaintiff's Amended Complaint. In that story, Mrs. Chase's video deposition is shown where she is asked, "Has David told you just flat out that he believes Glenn Funk did something illegal?" *Id.* Mrs. Chase is shown responding, "Yes,

requiring David to drop the case against Metro PD in order to have his stuff dismissed, that I know for sure, he was talking about." *Id.*

The First Story also showed a text message that David Chase sent saying "I dropped the federal case against Metro and PD . . . Had to . . . In order to get my stuff dropped after Funk blackmailed me." *Id.* Mrs. Chase was asked about this text message and others in her deposition. Sandy Chase Deposition in Williamson County case at 62-63, filed herein separately.

The First Story quoted at length from the statement sent by Mr. Funk to NewsChannel 5 wherein he admitted that he had required David Chase to drop his federal civil rights lawsuit against Metro and its police officers as a "condition precedent" to the criminal charges against him being dropped. Public Statement of Glenn Funk, Exhibit B to Plaintiff's Amended Complaint. As stated in the First Story, Mr. Funk's entire statement and additional portions of Dean Chase and Sandy Chase's video depositions were posted on the NewsChannel 5 website. Williams Aff., ¶ 7.

Plaintiff's Amended Complaint admits that the dismissal of Mr. Chase's federal civil rights lawsuit was a "condition precedent to having his criminal charges dismissed . . . ." Amended Complaint, ¶ 19. That same admission was made in the statement that Mr. Funk gave NewsChannel 5. Thus, even if the statements about the allegations regarding David Chase being forced to drop his federal civil rights lawsuit are not covered by the fair report privilege (which Defendants contend they are), they are not actionable because they are not false or defamatory. *See* discussion re: Second Story, *infra* at 18-21. Regardless of David Chase's opinions and characterizations of that requirement, it is undisputed that he was required to drop his federal

court lawsuit in order to have the criminal charges against him dropped by the Davidson County District Attorney.

The First Story is fair and balanced regarding the allegations others have made in the Williamson County lawsuit. The story never states that Mr. Funk solicited a bribe but in fact showed a deposition clip wherein Mrs. Chase said, "I did not get any impression about it involving Glenn Funk in the way of a bribe" at the very beginning of the news story. It also contained a similar statement in a deposition clip later in the news story. Exhibits A and B to Williams Aff.

Mr. Funk's office was asked for a comment on these subjects before the First Story was broadcast. Williams' Affidavit, ¶ 6, Exhibit E thereto. Mr. Funk submitted the statement that is attached as Exhibit B to his Amended Complaint. *Id.* In that statement, he commented directly on the allegations regarding the "release-dismissal agreement" but chose not to comment on the other allegations that were made. *Id.* The First Story quoted at length from Mr. Funk's statement, including giving his position as to why he required David Chase to dismiss his civil rights action. Exhibits and B to Williams Aff. The news story also reported on Mr. Funk's contention that this type of "release-dismissal" agreement was "routinely used by prosecutors throughout the United States." *Id.* The news story also stated that his entire statement was published on the station's website, which it was. Williams Aff., ¶ 7. Defendants also attached broader excerpts from the video depositions of Dean and Sandy Chase to its website to give viewers the full context of the testimony. *Id.*

The fair report privilege applies because the First Story fairly and accurately reported on the allegations and claims that were in fact being made in the Williamson County lawsuit. That determination can readily be made by this Court at this time. The Motion to Compel

Examination of Glenn Funk filed in Williamson County laid out the reasons defendants in that case needed to depose Mr. Funk. Exhibit E hereto. In that pleading, among the reasons that counsel for certain defendants alleged for their need to take Mr. Funk's deposition were the "Deal between Glenn Funk and David Chase" relating to the dropping of criminal charges and the alleged "Bribery Solicitation" that the Chases testified was received from their consultant Bill Fletcher. Exhibit E hereto at 3-9. As regards the alleged bribery solicitation, the Motion to Compel states as follows:

> At the same time the Chases were discussing, in their text messages the evolution of a deal with Glenn Funk, they were simultaneously assessing a bribery solicitation they had received from Waller Lansden 'consultant' Bill Fletcher. Mr. Fletcher had recently communicated a request to them of '2 million to make this go away.'

Exhibit E at 6. Deposition testimony of Dean Chase and Sandy Chase was cited in support of that Motion to Compel. *Id.*

It cannot be disputed that the testimony shown included in the First Story was actually given in depositions in that case. The video from the depositions of Dean Chase and Sandy Chase included in the First Story makes it clear that the substance of the story accurately reported how those persons testified. Transcripts of the Dean Chase and Sandy Chase deposition will be filed with this Court.[3]

There can be no dispute that the allegations regarding Mr. Funk and Mr. Fletcher were being made and investigated and that they were the subject of deposition testimony in the Williamson County case. Both Mr. Fletcher and Mr. Funk were subpoenaed for depositions in that case. Both objected to being deposed and filed objections to the deposition subpoenas. Funk's Objection, Exhibit D hereto, Fletcher's Objection, Exhibit F hereto. It is clear that the

[3] There is currently a controversy in the Williamson County lawsuit about the applicability and extent of protective orders that potentially may include these depositions. For that reason, Defendants will seek to file these deposition transcripts under seal at the present time.

allegations reported in the First Story are key issues and substantive allegations that are a subject in controversy in that lawsuit, a controversy that is a matter of public concern.

It should also be noted that other local news media ran similar stories reporting on these same allegations. For example, WSMV-Channel 4 broadcast a news story under the heading "DA's Secret Deal," with the title "How a Deal was Reached in the City's Most Controversial Domestic Violence Case" (February 3, 2016), and another story entitled "Crisis for the Crisis Consultant" with the subtitle "How the Powerful Chase Family Believed a Well-Known Crisis Consultant Tried to Extort Them." (February 4, 2016.) Collective Exhibit C to Affidavit of Phil Williams. The Nashville Post published a news story entitled "Extortion, Blackmail, Bribery Allegations Surround David Chase Case" with the subtitle "Consultant accused of proposing $2M would make case go away." *Id.* A Nashville Scene article was titled "Documents Show Allegations of Extortion and Possible Bribery in David Chase Case." *Id.* This news coverage demonstrates that the underlying controversy is a matter of public concern. Additionally, the similarity of other news media coverage illustrates that Defendants' news report was a fair report on the allegations being made in deposition testimony in a pending high-profile court case. Defendants are not aware, and do not believe, that Plaintiff has sued any of the other news media outlets that reported on these allegations.

B. Any Allegation of Actual Malice Would Not Defeat the Fair Report Privilege.

Plaintiff may attempt to avoid dismissal by arguing there may be disputed issues of fact regarding actual malice. The application of the fair report privilege is not dependent upon the existence or absence of either common law or actual malice.

In 2012 the Tennessee Court of Appeals, in its opinion in *Eisenstein v. WTVF-TV, NewsChannel 5 Network, LLC,* accurately stated the current state of the law in Tennessee when it stated:

> It appears that at one time the fair report privilege required an absence of malice . In *Saunders v. Baxter*, 53 Tenn. 369, 381 (1871), the Tennessee Supreme Court stated that "A bona fide report of the proceedings in a court of justice in the absence of express malice, is not libel, though the publication may be injurious to the character of an individual." Although this requirement seems to exist in some other states, *see Freedom Commc'ns, Inc. v. Sotelo*, No. 11-05-00336-CV, 2006 WL 1644602 at *5 (Tex. Ct. App. - Eastland June 15, 2006), subsequent Tennessee cases do not require it.

389 S.W.3d at 323 n.8 (emphasis added). As previously noted herein, the Court of Appeals in *Lewis v. NewsChannel 5, supra*, had a lengthy discussion on the history, purpose, and scope of the "fair report privilege" in Tennessee. 283 S.W.3d at 284-285. That opinion does not include the absence of malice or actual malice as a requirement for application of this privilege. *Id.* The RESTATEMENT (SECOND) OF TORTS definition of the fair report privilege, which the *Lewis* case said "closely mirrors" Tennessee law, also does not include absence of malice or actual malice as an element. RESTATEMENT (SECOND) OF TORTS, § 611, cited herein in full, *supra*, at 8.

"Actual malice" refers to the constitutionally mandated requirement that a public official bringing a defamation suit must prove that the defamatory statement was made with actual knowledge of the falsity or a reckless disregard for the falsity. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Some Tennessee cases have listed actual malice or lack thereof as part of the fair report privilege, but have done so without analyzing how to apply that in a particular case. *See, e.g., Grant v. Commercial Appeal*, 2015 Tenn. App. LEXIS 750 (Tenn. Ct. App. 2015). The comments to that RESTATEMENT section state that this privilege "permits a person to publish a report of an official action or proceeding or of a public meeting that deals with a matter of public

concern, even though the report contains what [the publisher] knows to be a false and defamatory statement." § 611, comment b.

Since the term "actual malice" deals with the defendant's level of knowledge of falsity, it simply does not fit with the recognized privilege for reporting what goes on in a judicial proceeding. The interest of the public is in having information on what happened in an official proceeding. RESTATEMENT (SECOND) TORTS, § 611, comment a. Reporting on such proceedings could be chilled or restricted if reporters were concerned about potential liability for reporting on allegations or testimony that later turned out not to be fully accurate.

As previously mentioned, there appears to be a lack of Tennessee case law explaining how an "actual malice" analysis would be applied in a fair report privilege case. As discussed, Defendants contend that it is not proper or required to do so. Even if this Court does believe that actual malice is relevant, then the test for the level of knowledge of falsity should be applied to whether the allegations were in fact made in the proceeding, not whether the allegations themselves are all true. As stated by one commenter:

> The sounder view is that the actual malice standard, when applied, should go not to the underlying truth or falsity of the report as such, but to the question of whether the proceedings have been fairly and objectively reported. A reporter may believe that a witness on the stand is lying, but that does not make the witness' testimony less newsworthy, and the reporter should be immunized for fairly and accurately reporting the witness' statements.

Rodney A. Smolla, 2 Law of Defamation § 8:78 (2d ed. 2015) (emphasis added).

As previously noted, it cannot be disputed that the claims and testimony reported upon were actually made in the Williamson County lawsuit. Defendants did not report that Plaintiff solicited a bribe or blackmailed David Chase. The First Story only reported allegations made by others about Mr. Fletcher and Mr. Funk. The statements in that news story are not false or defamatory. Even if they were (which Defendants deny), they are clearly protected by the fair

report privilege. If statements are found to be a fair and accurate report of the proceedings, "it is not material that the matter it contains is injurious to the persons involved or referred to therein." *American Publishing Co. v. Gamble*, *supra* at 678. "[I]f the report of a public official proceeding is accurate or a fair abridgement, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy." RESTATEMENT (SECOND) OF TORTS, § 611, comment d (1977).

Defendants' First Story gives a fair and accurate abridgement of the allegations being made, the testimony being given in the depositions, and the pleadings and documents filed in David Chase's civil conspiracy case in Williamson County on those subjects. Defendants' reporting is protected by the fair report privilege and all of Plaintiff's claims on that news story must be dismissed.

C. The Second Story does not contain any false or defamatory statements concerning Plaintiff.

The only statements from the Second Story that Plaintiff alleges to be false and defamatory are as follows:

> 'I think the term used by Attorney General Funk was well if he doesn't [dismiss his civil suit] then I may go to jail, but David Chase definitely will go to jail. So that was not just blackmail, it was a threat' [and] 'In my opinion [Funk] blackmailed me, using my criminal case and incarceration as leverage to get me to drop a federal civil case that I had grounds to file.'

Amended Complaint, ¶ 27, (parentheticals added in Amended Complaint). Plaintiff cannot prove essential elements of his causes of action regarding those statements.

An essential element of libel and false light-invasion of privacy causes of action is a false statement concerning the plaintiff. *See Stones River Motors, Inc. v. Mid-South Publishing Company*, 651 S.W.2d 713 (Tenn. App. 1983); *West v. Media Convergence*, 53 S.W.3d 640

(Tenn. 2001). "The damaging words must be factually false. If they are true or essentially true, they are not actionable . . ." *Stones River Motors,* 651 S.W.2d at 719.

The *Stones River Motors* case contains a lengthy discussion on "comments" and "characterizations" about published facts that is directly applicable in this case. In that case, the Court of Appeals stated:

> Since the statement must be factually false in order to be actionable, comments upon or characterizations of published facts are not in themselves actionable. If the published facts being commented upon are true and non-defamatory, the writer's comments upon them are not actionable, even though they are stated in strong and abusive terms. This principle has been given constitutional protection under the First Amendment by the United States Supreme Court.

651 S.W.2d at 720, (*citing, inter alia, Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970)). In the *Stones River Motors* case, defendant's comments characterizing plaintiff's business practices as a "rip-off" and "highway robbery" were held not actionable.

In this case, Plaintiff objects to Defendants' reporting of David Chase's characterizations of the "release-dismissal agreement" as "blackmail." Amended Complaint, ¶ 27. It is undisputed that Plaintiff Glenn Funk, as the District Attorney, made dismissal of Mr. Chase's civil rights lawsuit a "condition precedent" to dismissing the criminal charges against him. Amended Complaint, ¶ 19; Public Statement of Glenn Funk, Exhibit B to Amended Complaint. Statements reporting on that fact are not actionable because they are true.

Nor is it actionable to report on David Chase's opinions or characterizations of Mr. Funk's requirement that the civil rights action be dismissed, including his use of the term "blackmail." The Tennessee Court of Appeals in the *Stones River Motors* case described the United States Supreme Court case of *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, supra* as follows:

> In the *Greenbelt Cooperative* case, the defendant had used the word 'blackmail' to describe the plaintiff's negotiating tactics. The Court held that the word was not actionable because it was simply a 'vigorous epithet' used to describe the plaintiff's conduct, factually described in the same article. There the Court stated "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what it meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Id. at 720 (emphasis added).

The Supreme Court's analysis concerning the use of the word "blackmail" fits this case precisely. The Second Story showed David Chase being interviewed and using the word "blackmail" to characterize the events that were accurately reported, i.e. the circumstances of the "release-dismissal agreement."[4] For the reasons stated in the *Greenbelt Cooperative* case, such characterization of these events is not actionable.

In a case involving a media defendant, it is constitutionally mandated that the plaintiff has the burden of proving the offending statements are false. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). Plaintiff's claims based upon the Second Story must be dismissed because he cannot prove that there was any false or defamatory statement made concerning the Plaintiff in that news story.

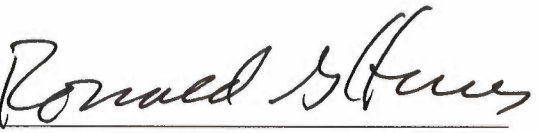
[4] To the extent that the First Story should be found to not be covered by the fair report privilege, the references to the release-dismissal agreement and "blackmail" in that story also fit this analysis and provide another reason for dismissal.

CONCLUSION

Defendants are entitled to summary judgment dismissing Plaintiff's Amended Complaint and all claims made therein with prejudice. Defendants also should be awarded attorneys' fees and costs pursuant to Tennessee Code Annotated, § 20-12-119.

Respectfully submitted,

NEAL & HARWELL, PLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 14th day of March, 2016.

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