On appeal from the Franklin County Circuit Court, Docket No. 2016-CV-170
M2017-00045-COA-R3-CV

Court of Appeals – Middle Division
The State of Tennessee

ROBERT WEIDLICH,

Plaintiff-Appellee,

-v-

LISA RUNG,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TENNESSEE

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Dated: April 12, 2017

Oral argument is requested in accordance with Tenn. R. App. P. 35(a).

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JURISDICTION AND VENUE

This Court has jurisdiction in accordance with T.C.A. § 16-4-108(a)(1), and venue is proper in accordance with T.C.A. §§ 16-4-108(a)(2) and 4-1-203 (placing Franklin County in the Middle Division of the Tennessee Court of Appeals).

STATEMENT OF THE ISSUES

1. Did the circuit court err in holding that the allegedly defamatory statement made by Ms. Rung was capable of carrying a defamatory meaning?
2. Did the circuit court err in failing to consider whether Mr. Weidlich was a limited purpose public figure who must prove that the allegedly defamatory statement was made with actual malice?
3. Did the circuit court err in holding that Ms. Rung acted with malice?
4. Did the circuit court err in finding that Ms. Rung acted negligently?
5. Did the circuit court err in holding that evidence that provided context to the statement made by Ms. Rung was hearsay and irrelevant?
6. Did the circuit court err in finding that Mr. Weidlich was entitled to damages?

STATEMENT OF FACTS

This case arises from a pointedly worded Facebook post that Defendant-Appellant Lisa Rung made regarding Plaintiff-Appellee Robert Weidlich, based on stickers she saw on his car advertising what she understood to be a racist hate group; her knowledge of him as a prominent and public opponent of the establishment of a Gay Straight Alliance at the local high school; and her understanding that his wife had

initiated a run for the very same school board in front of which Mr. Weidlich had opposed the establishment of a Gay Straight Alliance.

In February of 2016, Ms. Rung, Mr. Weidlich, and approximately three hundred other people attended a Franklin County School Board meeting, the purpose of which was to hear opinions about the formation of a Gay Straight Alliance club at Franklin County High School. (Technical Record ("TR") vol. II at 7:9–12; 13:17–14:6.)

At that meeting, Mr. Weidlich voluntarily spoke in opposition to the club, and made, in Ms. Rung's opinion, "really obscene," "harmful," and "inflammatory" statements about the formation of the club and "fisting." (*Id.* at 18:4–16; 66:2:–16.) As a result of his statements, Mr. Weidlich and his family came to be referred to by other attendees of the meeting as "the Fisty family." (*Id.* at 18:4–16; 66:2–12.) Mr. Weidlich testified at trial that he intended to continue attending the school board meetings and making the same inflammatory comments, because he "ha[s] a stake in education and [he has] the right to speak to the school board." (*Id.* at 63:1–7.)

Sometime between the February 2016 meeting and a second meeting in April of 2016, Ms. Rung called the Franklin County board of elections and learned that Loretta Weidlich, the Plaintiff's wife, had taken steps to run for the Franklin County School Board. (*Id.* at 66:17–21.)

Following the school board meeting in April, Ms. Rung saw Mr. Weidlich's car in the parking lot bearing bumper stickers for the League of the South, an organization that Ms. Rung "knew was considered a hate group." (*Id.* at 17:19–18:3.) Ms. Rung, who has "children in the [Franklin County] schools," was of the opinion that a

person associated with Mr. Weidlich's homophobic viewpoints and with the League of the South "might not be a good candidate for the school board." (*Id.* at 67:3–9.)

Believing that "voters had a right to know what people stood for and what they believed," (*id.* at 25:10–11), Ms. Rung took a photo and made the Facebook post at issue here: the photo of Mr. Weidlich's car with a caption reading, "Free bonus prize. The Fisty family are also white supremacist! We need to keep this handy come election time." (TR Ex. 1.)

Mr. Weidlich then brought this suit for defamation.

STATEMENT OF THE CASE

In April of 2016, Mr. Weidlich served Ms. Rung with a complaint alleging defamation based on the Facebook post. (TR vol. I at 3–4.) An amended complaint was filed with the court in June 2016, (*id.* at 12–13); Ms. Rung's answer to the amended complaint, in which she denied making a defamatory statement about Mr. Weidlich, was also filed in June. (*Id.* at 10–11.)

Later that month, the General Sessions Court for Franklin County, the Honorable Thomas C. Faris presiding, heard Mr. Weidlich's case for defamation, and entered a brief order finding that (1) there was sufficient proof of defamation, and (2) Ms. Rung's defense "of a public issue and of public concern, and that she was a journalist, . . . did not rise to the level of a defense," but that (3) "the Plaintiff was unable to prove a relationship between the defamation and his damages claimed." (*Id.* at 14–15.) Judgment was granted in favor of Ms. Rung. (*Id.*)

Mr. Weidlich appealed the judgment of the General Sessions Court to the Circuit Court for Franklin County in July of 2016, pursuant to T.C.A. § 27-5-108. (*Id.* at 16–17.)

A bench trial was conducted before the Honorable Justin C. Angel in the Circuit Court for Franklin County on September 13, 2016. During the course of the trial, the circuit court sustained Mr. Weidlich's objections to evidence introduced by Ms. Rung concerning the broader political context in which the Facebook post was made, (TR vol. II at 15:15–17:17), and the sources of Ms. Rung's beliefs about the racist nature of the League of the South. (*Id.* at 20:21–22:17.) A judgment in favor of Mr. Weidlich was entered on September 29, 2016. (TR vol. I at 19–20.)

That judgment, drafted by opposing counsel at the circuit court's request, contained no reasoning for the circuit court's decision. Accordingly, Ms. Rung moved to alter or amend the judgment in accordance with Tenn. R. Civ. P. 59.04, requesting that the judgment be replaced with the transcript of the trial containing the court's verbal explication of its decision, and that motion was granted and the amended order was entered on November 29, 2016, in accordance with Tenn. R. Civ. P. 58. (TR vol. I at 22–23.)

In the amended judgment, Judge Angel first opined that we live in an environment where "the new nametags at Vanderbilt [University] will actually state your name, and below it, it says the pronouns you wish to be identified with. . . . I don't know who you want to blame it on, different political persuasions or whatever, to create such an environment to where words have to be so carefully selected. You say the wrong

thing at the wrong time to the wrong person, it can end your entire career." (*Id.* at 27–28.)

Moving onto the case at hand, the circuit court held that Mr. Weidlich and his wife were not public officials. (*Id.* at 30–31.) The court further held that the allegedly defamatory statement made by Ms. Rung was an actionable assertion of fact because Ms. Rung did not preface her statement with "in my opinion" or other qualifying language. (*Id.* at 33.) In addition, the court concluded that the statement was unprivileged, because Ms. Rung was not a journalist, yet published to "the world" on Facebook, and that the statement was made both maliciously and negligently because Ms. Rung "knew what she was doing" and because "she had no conversation or no personal knowledge that Mr. Weidlich or his family were white supremacists." (*Id.* at 34.) Finally, the court found that Mr. Weidlich's business was damaged as a result of the statement made by Ms. Rung based on the testimony of Daniel Hendon, who testified that, after he decided not to patronize Mr. Weidlich's mechanic services, he "probably spent about $7,000" to have his trucks repaired with other mechanics. (TR vol. II at 34:5, TR vol. I at 34–37.) The court assessed $7,000 in compensatory damages in the form of lost profits and $5,000 in punitive damages in the form of attorney's fees against Ms. Rung. (TR vol. I at 37–38.)

SUMMARY OF ARGUMENT

This case centers on a Facebook post that was made to inform voters about a public school board candidate's association with both a hate group and a man who had made offensive remarks in opposition to the formation of a Gay Straight Alliance in a local high school. Ms. Rung, a concerned citizen and mother, was appalled

by statements Mr. Weidlich had made about members of the lesbian, gay, bisexual, and transgender ("LGBT") community at widely attended and closely followed school board meetings in early 2016. After a similar meeting in April of 2016, Ms. Rung had seen Mr. Weidlich's car with bumper stickers advertising his support for the League of the South—an organization that Ms. Rung understood to be a hate group that championed white supremacist ideologies. Believing that voters other than herself would and should be concerned that Mr. Weidlich's wife—a school board candidate—had ties both to Mr. Weidlich's anti-homosexual positions and the League of the South's racism, Ms. Rung posted a photo of the Weidlichs' car to Facebook along with a caption that explained why she thought the photo was relevant to the upcoming school board elections.

Mr. Weidlich thereafter sued Ms. Rung for defamation based on her Facebook post. After a bench trial, the circuit court ruled in favor of Mr. Weidlich. In doing so, the court ignored or misapplied longstanding legal principles intended to ensure free speech. In particular:

First, Ms. Rung's Facebook post was not capable of carrying a defamatory meaning as a matter of law and thus was not actionable on a defamation theory. Tennessee courts protect statements of opinion that are based on disclosed, non-defamatory facts. In this case, Ms. Rung's statement was an interpretation of the disclosed fact that bumper stickers supporting the League of the South were on the Weidlichs' car. The First Amendment also protects hyperbolic, rhetorical statements made in the context of heated public debates. The court ignored the contentious and heated school board meetings and the upcoming school board election, both of which provide crucial context to Ms. Rung's post and contradict any interpretation of her

statement as asserting a factual claim, versus voicing her opinion on a matter of great importance to both Ms. Rung and her community.

Second, Mr. Weidlich was a limited purpose public figure and thus was required to prove Ms. Rung's actual malice. The circuit court, however, failed to engage in any analysis of Mr. Weidlich's status as a public figure, holding only that neither he nor his wife were public officials. That was improper because Mr. Weidlich was a central figure at the forefront of a public controversy—the formation of a Gay Straight Alliance club at Franklin County High School—that had engulfed the local community. Furthermore, Mr. Weidlich's relationship to a school board candidate—his wife—further speaks to his status as a limited purpose public figure. By failing to address the public figure issue, the circuit court improperly lowered Mr. Weidlich's burden of proof. And he could not have met the burden to which he should have been held because there was no evidence in the record—*none*—that Ms. Rung acted with actual malice—that is, that she knew or acted with reckless disregard to the falsity of her Facebook post.

Relatedly, not only did Ms. Rung not act with malice, but she also acted reasonably under the circumstances. The circuit court impermissibly shifted the burden of proof onto Ms. Rung to prove the reasonableness of her actions. It was not Ms. Rung's burden, however, to prove that her beliefs concerning the League of the South or that her reliance on the bumper stickers on Mr. Weidlich's car were reasonable, and Mr. Weidlich presented no evidence to demonstrate that Ms. Rung's actions were unreasonable.

Third, the circuit court's judgment is marred by two erroneous evidentiary rulings that effectively barred Ms. Rung from defending herself. The court improperly

excluded as hearsay evidence concerning the League of the South that Ms. Rung sought to introduce to show the reasonableness of her belief that the League promotes white supremacist ideals. That evidence was critical in order to place her statements in context. The court also improperly excluded as irrelevant evidence concerning statements Mr. Weidlich had made at the school board meetings, even though those statements illustrated Mr. Weidlich's role as a public figure in the controversy.

Fourth, the court's damages award of $7,000 in compensatory damages and $5,000 in attorney's fees was flawed. The $7,000 compensatory damages award was based on testimony suggesting that Mr. Weidlich had lost income because a customer of his mechanic's shop decided to take his business elsewhere after learning of Ms. Rung's statement. That testimony was entirely speculative and could not support such an award as a matter of law. As to the award of attorney's fees, there is no statutory basis for an award of fees in a defamation case, and in any event Mr. Weidlich failed to plead attorney's fees in his amended complaint as required by Tennessee law. Furthermore, the fees could not be assessed as punitive damages because Mr. Weidlich failed to prove that Ms. Rung acted with actual malice by clear and convincing evidence.

This Court should reverse the circuit court's judgment and direct entry of judgment for Ms. Rung.

ARGUMENT[1]

I. MS. RUNG'S STATEMENT WAS NOT ACTIONABLE ON A DEFAMATION THEORY

The statement on which the circuit court relied to find Ms. Rung liable for defamation, (TR vol. I at 33), was not actionable on a defamation theory as a matter of law.

To prove a claim of defamation, a plaintiff must show that the statement published by the defendant is capable of conveying a defamatory meaning. *See Revis* v. *McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000). A statement capable of conveying a defamatory meaning is one that states an assertion that can be proven true or false as an objective matter. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 21 (1990). In determining whether allegedly defamatory statements are actionable, courts read them "as a person of ordinary intelligence would understand them *in light of the surrounding circumstances.*" *Revis*, 31 S.W.3d at 253 (emphasis added). "Allegedly defamatory statements should be judged within the context in which they are made." *Id*. Furthermore, "one may not recover in actions for defamation merely upon the expression of an opinion which is based upon disclosed, nondefamatory facts, no matter how derogatory it may be." *Windsor* v. *Tennessean*, 654 S.W.2d 680, 685 (Tenn. Ct. App. 1983) (citing Restatement (Second) of Torts, § 566 (1977)).

Ms. Rung's statement, when understood in context, cannot reasonably be interpreted as making a factual assertion about Mr. Weidlich, nor can it be interpreted as

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[1] Questions of law are reviewed de novo by this Court. *Braswell* v. *AC and S, Inc.*, 105 S.W.3d 587, 588 (Tenn. Ct. App. 2002). A trial court's findings of fact are subject to de novo review with a "presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d).

implying undisclosed, defamatory facts. The statement is non-actionable as a matter of law.

First, Ms. Rung's statement was commentary on the public, non-defamatory fact that Mr. Weidlich had stickers advertising the League of the South and advocating secession on his car. The statement at issue was the caption to a photo that Ms. Rung posted on Facebook containing an unaltered picture of Mr. Weidlich's car. (TR Ex. 1.) As is clear from the relationship between the statement and the photo, Ms. Rung's statement did not imply the existence of undisclosed facts on which she based her commentary; to the contrary, she provided anyone viewing the post with the only fact upon which she relied in forming her opinion in the clearest manner possible—a photo replicating exactly what she saw. The statement is non-actionable on this basis alone. *Stone River Motors, Inc.* v. *Mid-South Pub. Co.*, 651 S.W.2d 713, 720–21 (Tenn. Ct. App. 1983) ("If the published facts being commented on are true and nondefamatory, the writer's comments upon them are not actionable, even though they are stated in strong or abusive terms."); *accord Davis* v. *Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at *3 (Tenn. Ct. App. Sept. 30, 2015) (application for permission to appeal denied by Tennessee Supreme Court on Feb. 18, 2016).

Second, the statement in question was surrounded by "loose, figurative, or hyperbolic language" which "negate[d] the impression that [Ms. Rung] was seriously maintaining" an assertion about Mr. Weidlich that is capable of being proven true or false. *Milkovich*, 497 U.S. at 21. The statement begins with the words, "[f]ree bonus prize." (TR Ex. 1.) It refers to the Weidlich family by the nickname Mr. Weidlich's

inflammatory statements at the school board meetings had earned him: "the Fisty family." (*Id.*) The punctuation of the sentence carries the ironic tone through to its mock-enthusiastic conclusion that the Weidlichs are "white supremacists!" (*Id.*) This is just the type of "rhetorical hyperbole" and "vigorous epithet" that cannot be reasonably interpreted as making an assertion of fact. *Greenbelt Co-op. Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970); *Farmer* v. *Hersh*, No. W2006-01937-COA-R3CV, 2007 WL 2264435, at *5 (Tenn. Ct. App. Aug. 9, 2007) ("Mere hyperbole or exaggerated statements intended to make a point are not actionable defamatory statements.") (no appeal taken to the Tennessee Supreme Court).

Indeed, Ms. Rung's statement—that the Weidlichs were "white supremacists"— is substantially similar to charges of racism and bigotry that courts across the country have held to be non-actionable statements of opinion, incapable of being proven true or false. *See Jones* v. *City of Philadelphia*, 893 A.2d 837, 845 (Pa. Cmwlth. 2006) (accusation of anti-Semitism in email following city council meeting was non-actionable); *In re Green*, 11 P.3d 1078, 1080–87 (Colo. 2000) (accusations of bigotry and racism in letter to judge were based on non-defamatory, disclosed facts and thus were non-actionable); *Vail* v. *The Plain Dealer Pub. Co.*, 649 N.E.2d 182, 185–86 (Ohio 1995) (accusations of bigotry and homophobia in newspaper opinion piece were non-actionable); *see also* David Elder, *Defamation: A Lawyer's Guide* § 8:31 (2016) (collecting cases).

Third, Ms. Rung posted the statement on Facebook using her personal account. Facebook, by its very nature, facilitates the posting of unfiltered content by its users. As courts across the country have acknowledged, "online blogs and message

boards are places where readers expect to see strongly worded opinions rather than objective facts." *Summit Bank* v. *Rogers*, 142 Cal. Rptr. 3d 40, 60 (Cal. Ct. App. 2012); *accord Sandals Resorts Intl. Ltd.* v. *Google, Inc.*, 86 A.D. 3d 32, 43 (N.Y. App. Div. 2011) ("The culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a freewheeling, anything-goes writing style.") (citation and quotation marks omitted). As one court has explained in concluding that a statement in an Internet forum was a non-actionable statement of opinion:

> Internet forums are venues where citizens may participate and be heard in free debate involving civic concerns. It may be said that such forums are the newest form of the town meeting. We recognize that, although they are engaging in debate, persons posting to these sites assume aliases that conceal their identities or blog profiles. Nonetheless, falsity remains a necessary element in a defamation claim and, accordingly, only statements alleging facts can properly be the subject of a defamation action. Within this ambit, the Supreme Court correctly determined that the accusation on the newspaper site that the plaintiff was a "terrorist" was not actionable. Such a statement was likely to be perceived as "rhetorical hyperbole, a vigorous epithet." This conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus.

LeBlanc v. *Skinner*, 103 A.D.3d 202, 213 (N.Y. App. Div. 2d Dep't 2012) (other internal quotation marks and citations omitted). Facebook is not a venue for precise factual assertions, but is instead a place for statements of expression and personal opinion—exactly the type of remark made by Ms. Rung here.

Finally, Ms. Rung made her observation about Mr. Weidlich in the context of an ongoing and heated local debate about a controversial topic upon which she and Mr. Weidlich vehemently disagreed. (TR vol. II at 13:17–15:10.) Courts have declined to find defamation liability in substantially similar circumstances because

audience members are less likely to interpret statements "published in the context of a political debate on a public issue" as making a factual assertion. *Mast* v. *Overson*, 971 P.2d 928, 932–33 (Utah Ct. App. 1998) (statements made during heated political debate over development of a golf course were non-actionable); *see also Koch* v. *Goldway*, 817 F.2d 507, 509–10 (9th Cir. 1987) (accusation that political opponent is a Nazi in the context of heated political debate was non-actionable); *Revis*, 31 S.W.3d at 252 (characterization of plaintiff's facial expression as "menacing, threatening, denigrating, contemptuous and insubordinate" during public confrontation in context of heated labor dispute was non-actionable).

Despite all these authorities, the circuit court nonetheless held that Ms. Rung's statement was a defamatory assertion of fact based solely on the fact that Ms. Rung did not preface her statement with the phrase "in my opinion" or expressly qualify her assertion.[2] (TR vol. I at 33.) There is simply no basis in law to support that holding. Under the precedents set out above, the question is not whether Ms. Rung uttered certain "magic words" that would insulate her from defamation liability. Rather, the law is clear that what matters is the nature of the statement and the context in which it was made. The circuit court failed to engage in *any* meaningful analysis of those issues. That was improper, and independently warrants reversal of the court's judgment.

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[2] The court stated in full: "The statement made in Exhibit 1 says – it's posted by Ms. Lisa Rung, the defendant, 'Free bonus prize. The Fisty family are also white supremacists! We need to keep this handy come election time.' So this statement does not say, in my opinion, they are white supremacists or they may be white supremacists or due to the fact they have this sticker on their car they could be white supremacists. It makes the statement, 'They are white supremacists!' If that is her opinion, she definitely didn't make it sound like her opinion. She made it sound as if it was a fact." (TR vol. I at 33.)

II. EVEN IF MS. RUNG'S STATEMENT WERE ACTIONABLE, SHE CANNOT BE HELD LIABLE FOR DEFAMATION

A. Because Mr. Weidlich Was a Limited Purpose Public Figure, He Was Required to Prove Actual Malice

The circuit court held that neither Mr. Weidlich nor his wife were public officials. (TR vol. I at 30–31.) The court did not consider, however, whether Mr. Weidlich was a limited purpose public figure who must prove that Ms. Rung made the statement at issue with actual malice in order to prevail. That omission was improper.

Public figures, including "limited purposes" public figures, who bring a defamation action must prove that a defamatory statement was made with actual malice. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 327 (1974). To determine whether a plaintiff is a limited purpose public figure, Tennessee courts look at the "status of the individual and the nature and extent of his involvement" in the particular controversy at issue. *Press, Inc.* v. *Verran*, 569 S.W.2d 435, 441 (Tenn. 1978). Courts employ a "two-pronged analysis" to determine whether an individual is a public figure: "First, a 'public controversy' must exist. Second, the nature and extent of the individual's participation in the particular controversy must be ascertained." *Clark* v. *American Broad. Cos., Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982) (disapproved of on other grounds by *Bichler* v. *Union Bank & Trust Co. of Grand Rapids*, 745 F.2d 1006 (6th Cir. 1984)). The plaintiff's "status must, in the last analysis, be dependent not only upon title or some convenient nomenclature, but also upon the character, nature, purpose, intent and extent of his participation in the particular controversy." *Press, Inc.*, 569 S.W.2d at 441.

With respect to the first prong, there was a public controversy concerning the formation of a Gay Straight Alliance club at Franklin County High School. The

debate around the club attracted the attention of hundreds of local residents. (TR vol. II at 14:2–4.) And, as Mr. Weidlich himself testified, his participation was about more than just the formation of a Gay Straight Alliance, and instead concerned parents' "stake in education" in the Franklin County School System. (*Id.* at 63:3–7.) The debate thus "received public attention because its ramifications [would] be felt by persons who are not direct participants," *i.e.*, parents of children in the Franklin County school system, like Ms. Rung. *See Waldbaum* v. *Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980).

With respect to the second prong, "[t]he nature and extent of an individual's participation is determined by considering three factors: first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy." *Clark*, 684 F.2d at 1218. All three of these factors showed that Mr. Weidlich was a direct participant in the public controversy.

Mr. Weidlich made inflammatory statements about members of the LGBT community at public school board meetings as part of his efforts to prevent the formation of a Gay Straight Alliance. (TR vol. II at 7:6–12; 18:4–9.) He voluntarily addressed the board and the crowd at these events, which drew an audience of hundreds. (*Id.* at 14:2–25.) He had access to the same channels of communication for combating the allegedly defamatory statement as Ms. Rung had to make it in the first place—namely, Facebook and other social media. Finally, Mr. Weidlich testified that he had gone to, and intended to continue going to, school board meetings in order to speak on the subject of a Gay

Straight Alliance club being formed at the local high school. (*Id.* at 14:18–15:2, 62:9–63:7.) His remarkable comments had even earned him and his relations the nickname "the Fisty family." (*Id.* at 18:10–16.)

Based on this evidence, there is no question that Mr. Weidlich was a limited purpose public figure who "thrust [himself] into the vortex" of the important public controversy that was the debate surrounding the formation of a Gay Straight Alliance at Franklin County High School and the upcoming school board elections, and that "the character, nature, purpose, intent and extent of his participation in" that controversy was great. *Press, Inc.*, 569 S.W.2d at 441.

Moreover, Mr. Weidlich's status as a limited purpose public figure is further supported by his relationship to his wife, who was a candidate for a position on the same school board before which Mr. Weidlich had publicly expressed ideas that were deeply offensive to Ms. Rung.[3] *See Krueger* v. *Austad*, 545 N.W.2d 205, 212–13 (S.D. 1996) (holding that a wife's relationship to her candidate husband and active participation in his campaign are relevant to her status as a public figure); *see also Piper* v. *Mize*, No. M2002-00626-COA-R3-CV, 2003 WL 21338696, at *10 (Tenn. Ct. App. June 10, 2003) (holding that one plaintiff's status as the wife of the mayor of Clarksville was relevant to her status as a public figure) (no appeal taken to the Tennessee Supreme Court).

[3] The circuit court recognized that a candidate for public office is a "public official," (TR vol. I at 31), but found that Ms. Weidlich was not an "official candidate" because she had not yet returned her qualifying petition to the board of elections. (*Id.*) The circuit court cited no authority for its bright line rule for "official" candidacy.

Ms. Rung strongly opposed Ms. Weidlich's bid for the school board in light of Mr. Weidlich's public statements and his family's apparent association with the League of the South, and took it upon herself to oppose Ms. Weidlich's candidacy. (TR vol. II at 67:3–9.) In fact, the allegedly defamatory statement was made for the express purpose of collecting information to use against Ms. Weidlich in the upcoming election. (*Id.* at 8:6–8.) Mr. Weidlich's inflammatory public statements, coupled with his wife's effort to directly influence the education of the children of Franklin County and Ms. Rung's belief in their joint association with a "hate group," (*id.* at 17:24–18:3), made the Weidlichs figures of great interest and concern to Ms. Rung and the people of Franklin County. As a result, Ms. Rung appropriately highlighted what she perceived to be the family's troubling views in a posting directly referencing the upcoming elections. This is exactly the kind of speech that the Supreme Court has held warrants "the fullest and most urgent application" of First Amendment protections. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971).

Despite this clear evidence, the court made no inquiry whatsoever into whether Mr. Weidlich was a limited purpose public figure. In failing to recognize Mr. Weidlich as such, the circuit court impermissibly lowered his burden of proof at the expense of Ms. Rung's constitutional protections. This was improper and justifies reversal.

B. There Was No Evidence Whatsoever of Ms. Rung's Actual Malice

Because Mr. Weidlich was a limited purpose public figure, he was required to prove with clear and convincing evidence that the allegedly defamatory statement made by Ms. Rung was made with "actual malice," that is, with knowledge

that the statement is false or with reckless disregard for the truth. *Press, Inc.*, 569 S.W.2d at 442; *Tomlinson* v. *Kelley*, 969 S.W.2d 402, 405 (Tenn. Ct. App. 1997). The determination of whether a public figure plaintiff has met his burden of presenting "clear and convincing evidence that the defendant was acting with actual malice" is a question of law. *Tomlinson*, 969 S.W.2d at 405 (citing *Trigg* v. *Lakeway Publishers, Inc.*, 720 S.W.2d 69, 74 (Tenn. Ct. App. 1986)). To prove that a defendant acted with actual malice, it is not enough to show that the defendant "fail[ed] to investigate" the truth of an allegedly defamatory statement. *Trigg*, 720 S.W.2d at 75 (quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968)). Instead, the "[p]laintiff must show that 'a false publication was made with a high degree of awareness of . . . probable falsity. . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id*. (quoting *St. Amant*, 390 U.S. at 731)).

The record here is bereft of clear and convincing evidence that Ms. Rung acted with the requisite level of awareness of the presumed falsity of her statement. First, there is no evidence at all that Ms. Rung knew that her statement was false. Likewise, the record contains no evidence that Ms. Rung entertained any "serious doubts" as to the truth of her statement, and thus is devoid of any indication that Ms. Rung acted recklessly with regard to the falsity of her statement. *St. Amant*, 390 U.S. at 731. Nor could the record contain any such evidence, since the circuit court foreclosed the admission of Ms. Rung's evidence demonstrating the basis for her belief that Mr. Weidlich was a "white supremacist" in light of his advertised affiliation with the League of the South. (TR vol. II at 21:20–23.) Mr. Weidlich presented absolutely no evidence on this point, and thus

failed to meet his burden. And the circuit court thus had no basis for deciding whether Ms. Rung had acted recklessly. *Cf. Moore* v. *Bailey*, 628 S.W.2d 431, 434 (Tenn. Ct. App. 1981) (finding defendant acted with recklessness based on direct testimony that the defendant had "actual doubts about the truth of his previous statements about the plaintiff" about whom he had made accusations of wrongdoing).

In contrast, Ms. Rung's *uncontested testimony* is that she saw that Mr. Weidlich's vehicle had a bumper sticker for the League of the South, an organization that she understood to be a hate group, and, after coming to a considered opinion about the League of the South, she posted the allegedly defamatory statement on Facebook. (TR vol. II at 17:19–18:3; 22:21–23:3; 65:24–66:1). Even Mr. Weidlich's counsel recognized that Ms. Rung saw "something on [Mr. Weidlich's car] that [Ms. Rung took] to be white supremacist . . . ." (*Id.* at 10:3–4.)

The circuit court nonetheless held that Ms. Rung acted "maliciously" because she "knew what she was doing, . . . she knew the negative connotation and the derogatory nature of this statement," and that "she had no conversation or no personal knowledge that Mr. Weidlich or his family were white supremacists. (TR vol. I at 34.) That holding was based on the court's misapprehension of the actual malice standard. The first finding—that Ms. Rung "knew what she was doing" —has no bearing on Ms. Rung's knowledge about whether the statement she made was true or not. And the second finding—regarding the fact that Ms. Rung did not speak directly with Mr. Weidlich about whether or not he is a white supremacist—was insufficient as a matter of law to prove recklessness. *Trigg*, 720 S.W.2d at 75 (quoting *St. Amant*, 390 U.S. at 731.) (failure to investigate is insufficient to prove actual malice); *Piper*, 2003 WL 21338696,

at *11 (even proof of subjective disbelief combined with a failure to investigate is insufficient to support a claim of actual malice). In short, Mr. Weidlich presented *no* evidence, much less clear and convincing evidence, that Ms. Rung acted with actual malice.

C. Even if Mr. Weidlich Was Not a Limited Public Figure, He Still Failed to Prove Ms. Rung's Negligence

Even if Mr. Weidlich were not considered a limited public figure, the circuit nonetheless improperly found Ms. Rung liable for defamation because it erroneously concluded that Ms. Rung acted negligently. (TR vol. I at 34.)

Under Tennessee law, a defendant may be held liable for making a defamatory statement about a private person if the defendant "acts negligently in failing to ascertain" the truth of the statement. *Press, Inc.*, 569 S.W.2d at 442. "[T]he appropriate question . . . is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it." *Memphis Pub. Co*., 569 S.W.2d at 418. "[W]hether the defendant in fact believed the information to be true and the reason why the defendant relied on the source of the information is highly pertinent to the defendants' fault, an element which [plaintiff] had the burden to prove." *Whitehurst* v. *Martin Med. Ctr., P.C.*, No. W2001-03034-COA-R3-CV, 2003 WL 22071467, at *6 (Tenn. Ct. App. Aug. 28, 2003) (no appeal taken to the Tennessee Supreme Court).

The record here in no way supports a finding of negligence on the part of Ms. Rung. To the contrary, the record conclusively shows that Ms. Rung acted with reasonable care. Ms. Rung based her understanding about Mr. Weidlich's beliefs on the bumper stickers advertising the League of the South affixed to his car; at no point did Mr.

Weidlich offer any evidence to suggest why it was unreasonable for Ms. Rung to do so in forming an opinion about the type of person Mr. Weidlich might be in light of the organizations he is willing to publicly advertise and affiliate himself with. Furthermore, Ms. Rung's beliefs about the nature of the League of the South were based on the uncontroverted fact that she understood the League of the South to be a "well-known," "well[-]documented" "hate group," (TR vol. II at 10:3–9, 17:19–18:3), illustrating that, in keeping with Tennessee law, she had a "reliable" source in forming her opinion. *See Whitehurst*, 2003 WL 22071467, at *6 ("[W]hen a source of information is reliable, it is not necessary for the defendant to have verified the information by an extrinsic source to avoid liability.") (holding that defendants' reliance on physician's statement when making defamatory statement could be found to be reasonable by a jury); *see also* *Livingston* v. *Hayes*, No. E2000-01619-COA-R3-CV, 2001 WL 823636, at *6–7 (Tenn. Ct. App. July 23, 2001) (no appeal taken to the Tennessee Supreme Court).

The circuit court's contrary conclusion appears to be based exclusively on its finding that Ms. Rung "had no conversation or no personal knowledge that Mr. Weidlich or his family were white supremacists" and that "some bumper stickers on the back of a car . . . does not prove that you're a white supremacist." (TR vol. I at 34–35.) Under governing law, this was never Ms. Rung's burden to prove.

III. THE CIRCUIT COURT IMPROPERLY EXCLUDED HIGHLY RELEVANT EVIDENCE PROFFERED BY MS. RUNG

The circuit court made two evidentiary rulings that impermissibly prevented Ms. Rung from being able to introduce evidence that her belief about the racist nature of the League of the South was reasonable or that Mr. Weidlich had made himself

infamous with his statements to the Franklin County School Board concerning the formation of a Gay Straight Alliance. Both rulings were error, and warrant reversal.

First, the circuit court prevented Ms. Rung from testifying about her understanding that the League of the South is a white supremacist organization, holding that any such testimony would be hearsay. (TR vol. II at 20:21–22:17.) That holding was improper.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Evidence offered for a reason other than to "prove the truth of the matters asserted therein" is, by definition, not hearsay. *Coates* v. *Thompson*, 666 S.W.2d 69, 75 (Tenn. Ct. App. 1983).

Here, Ms. Rung's counsel specifically clarified that Ms. Rung's testimony was being proffered to demonstrate her "opinion and whether she had a good faith opinion" about the League of the South (TR vol. II at 21:24–22:7.).[4] That testimony—about the sources of her knowledge and opinion of the League of the South—was not being introduced to prove that the League of the South *was* in fact a racist, white supremacist organization. Instead, it was proffered to show that Ms. Rung's opinion about the League had a good faith basis. (*Id.*) That testimony was therefore critical to Ms. Rung's defense. *Whitehurst*, 2003 WL 22071467, at *6 (evidence regarding defendant's belief and the basis for that belief is "highly pertinent" to the question of

[4] The circuit court suggested that counsel was "asking her to tell the Court what she found out about the League of the South and information she obtained about the League of the South and how that shaped her opinion, and the information she received about the League of the South is hearsay information." (TR vol. II at 22:11–16.)

fault). The circuit court's exclusion of that testimony was highly prejudicial to Ms. Rung, and its judgment should be vacated as a result.

Second, the circuit court ruled that evidence concerning the context in which Ms. Rung's statement was made was irrelevant. (TR vol. II at 15:15–17:17.) There is no question, however, that the context in which an allegedly defamatory statement is made is critical to the question whether the statement is actionable. *Revis* v. *McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000). In this case, the context meant everything because it shows that Ms. Rung was not stating actual facts but merely reacting to the circumstances of an ongoing, heated public debate. In particular, the circuit court excluded as irrelevant Ms. Rung's proffer of a transcript of the statement that Mr. Weidlich had made at the school board hearing in February of 2016. (TR vol. II at 15:15–17:17.) As Ms. Rung's counsel observed during the trial, "the statement [by Mr. Weidlich] was made in a public forum and this statement caused [Ms. Rung] considerable distress and it motivated her to take the action that she later took. So it's material in this entire affair. It explains why she did what she did." (*Id*. at 15:22–16:2.) The circuit court nonetheless excluded this evidence, and agreed with Mr. Weidlich that, because he had made no statements about racial minorities at the hearing, the transcript was irrelevant. (*Id*. at 17:9–17.) That ruling was improper because Ms. Rung's statement was made in the context of a bitter dispute between the proponents of the formation of a Gay Straight Alliance at Franklin County High School, like Ms. Rung, and its opponents, like Mr. Weidlich.

Ms. Rung attempted to introduce evidence that would have contextualized the dispute between Ms. Rung's camp and Mr. Weidlich's camp, which in turn would

have contextualized Ms. Rung's concern about and investigation into Mr. Weidlich's political leanings regarding minorities. The court's decision to prevent that evidence from coming in was erroneous and prejudiced Ms. Rung's ability to defend herself against Mr. Weidlich's claim.

IV. THE CIRCUIT COURT'S DAMAGES AWARD WAS IMPROPER

The circuit court awarded Mr. Weidlich $7,000 in compensatory damages and $5,000 in attorney's fees, for a total of $12,000. Because the circuit court improperly found Ms. Rung liable for the reasons stated, its damages award should be vacated. But even if the court's liability finding is sustained, its damages award cannot be.

A. There Was No Basis for Awarding Mr. Weidlich Supposed "Lost Profit" Damages

The evidence was insufficient to support a finding that Ms. Rung owed Mr. Weidlich $7,000 in compensatory damages. Mr. Weidlich bore the burden of proving his damages. *Overstreet* v. *Shoney's, Inc*., 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999). "Damages may never be based on mere conjecture or speculation." *Id*. In a defamation case, a plaintiff must show that his standing in the community and his public reputation for character has been injured by the alleged defamatory statement and that as a result he suffered actual damages due to that loss of standing or reputation. *Davis* v. *The Tennessean*, 83 S.W.3d 125, 130 (Tenn. Ct. App. 2001). "[U]nless 'actual malice' is shown, . . . compensatory damages must be proved, not presumed." *Memphis Pub. Co*., 569 S.W.2d at 421.

In this case, the actual damages alleged by Mr. Weidlich were the lost profits to his mechanic business. (TR vol. I at 37.) One of Mr. Weidlich's customers, Mr. Hendon, testified that he gave business to two other individuals that he would have

otherwise given to Mr. Weidlich as a result of Ms. Rung's statement. (TR vol. II at 39:6–40:12.) He testified that he paid one man "a total of about [$]5,000 in all" to work on his truck. (*Id.* at 39:25.) Mr. Hendon later paid another man to work on his truck. (*Id.*at 40:1–7.) Mr. Hendon did not, however, have any documentation indicating how much he paid to either man. (*Id.* at 40:8–16.) Instead, he simply estimated that he "probably spent around $7,000" in total patronizing other mechanics. (*Id.* at 34:5.) The circuit court awarded Mr. Weidlich compensatory damages of $7,000 as "damages in the amount of loss of profits to [Mr. Weidlich's] business" based solely on Mr. Hendon's testimony. (TR vol. I at 35–37.)

The circuit court erred in awarding Mr. Weidlich $7,000 in compensatory damages because Mr. Weidlich failed to prove he actually lost $7,000 in profits. Mr. Weidlich offered no testimony that he would have charged $7,000 for the work Mr. Hendon needed. Indeed, Mr. Weidlich offered no proof of the exact nature of the work at all. Mr. Weidlich also failed to demonstrate what portion of the $7,000 represented his actual lost profit had he performed the job. Mr. Weidlich also never offered proof that he would have made a comparable profit had the job gone to him, so the $7,000 figure is pure speculation. Mr. Hendon testified that Mr. Weidlich "cut [him] prices on fixing the truck," indicating that Mr. Weidlich may have charged less for the job and realized less profit. (*Id.* at 43:16–18.)

The court's award of $7,000 as compensatory damages has no basis in the evidence presented. Because Mr. Weidlich failed to meet his burden of proof with respect to the amount of compensatory damages, his claim fails and no damages should have been awarded.

B. Mr. Weidlich Was Precluded from Seeking Attorney's Fees.

The circuit court awarded Mr. Weidlich $5,000 in attorney's fees. (TR vol. I at 37–38.) That portion of the court's award cannot be sustained for two main reasons.

First, Tennessee adheres to the "American rule" under which a party in a civil action may recover attorney's fees only if there is a contractual or statutory provision creating the right to recover fees. *Cracker Barrel Old Country Store, Inc*. v. *Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009). Furthermore, a plaintiff must specifically plead attorney's fees to recover them. *Marshall* v. *First Nat'l Bank of Lewisburg*, 622 S.W.2d 558, 560–1 (Tenn. Ct. App. 1981); Tenn. R. Civ. P. 9.07. Neither Mr. Weidlich nor the court cited to any relevant statute that creates a right to recover attorney's fees in a defamation case. Because there is no statute authorizing an award of fees, the American rule prevails, and the parties must bear their own attorney's fees. In addition, because "an award of attorneys' fees is fairly unusual, plaintiff should have the obligation of specially pleading such an item of damages." *Marshall*, 622 S.W.2d at 561.

Here, Mr. Weidlich made no request for attorney's fees in his amended complaint. (TR vol. I at 13, 17.) The circuit court nonetheless *sua sponte* awarded Mr. Weidlich his later-claimed fees. Under the precedents set out above, the court had no authority to do so.

Second, the circuit court based the award of attorney's fees on the "extreme unwarranted defamatory statements made" and "the fact that [Mr. Weidlich] had to hire an attorney to clear his name and go to court and so forth." (*Id.* at 37–38.) The court thus appears to have awarded attorney's fees as a form of punitive damages.

Punitive damages, however, are compensable only where a plaintiff proves by clear and convincing evidence that the defendant acted with actual malice. *Memphis Pub. Co.* v. *Nichols*, 569 S.W.2d 412, 416–17 (Tenn. 1978) (quoting *Gertz* v. *Robert Welch, Inc*., 418 U.S. 323, 350 (1974)). For all of the reasons provided *supra* in Part II.B, Mr. Weidlich failed to prove that Ms. Rung acted with actual malice, and thus an award of punitive damages was improper.

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