IN THE FIFTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

JOSHUA CONWAY, *Plaintiff,*	)	Case No. 16C-664
v.	)	Judge Joseph P. Binkley
KUMARI S. FULBRIGHT, and KUMARI FULBRIGHT, INC., *Defendants.*	)	JURY DEMAND

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS SECOND MOTION FOR SUMMARY INJUNCTIVE RELIEF

I. Introduction

This is a libel action filed by the Plaintiff, Mr. Joshua Conway, against Defendant Kumari Fulbright and her corporation (collectively, "Defendant Fulbright"), that stems from Defendant Fulbright's appearance on a nationally broadcast reality television program in July 2015. Mr. Conway's libel claims arise out of Defendant Fulbright's false and defamatory accusations that Mr. Conway: (1) stole money from Defendant Fulbright; (2) drugged Defendant Fulbright; and (3) stole jewelry from Defendant Fulbright.[1]

In her Amended Answer, Defendant Fulbright judicially admitted that she recounted all three of the above accusations.[2] In her deposition, however, Defendant Fulbright openly repudiated her accusations that Mr. Conway stole money from her and

[1] Docket Entry #1 (Plaintiff's Complaint), ¶ 36–41; ¶ 46.
[2] Docket Entry # 70 (Defendants' Amended Answer), ¶ 36 ("Admitted [that] defendant Fulbright appeared on the television program and recounted the accusations."). *See also id* at ¶ 37 (admitting that Defendant Fulbright recounted all three accusations).

drugged her.[3] Defendant Fulbright also candidly acknowledged that she lacks the evidence necessary to sustain her burden of proof with respect to either of these two accusations—rendering summary judgment on these claims indisputably appropriate.[4]

Similarly, there is no genuine dispute that Defendant Fulbright's third accusation—that Mr. Conway stole jewelry from her—is false as well. Further, because the fact discovery deadline in this case has now elapsed,[5] summary judgment on this claim is also appropriate. Accordingly, Mr. Conway moves this Court to declare all three accusations false and to enjoin Defendant Fulbright from repeating them going forward.[6]

II. Procedural History of Plaintiff's Motion

Mr. Conway filed his First Motion for Summary Injunctive relief on October 10, 2016.[7] Thereafter, on October 17, 2016, Defendant Fulbright moved for an indefinite continuance of Mr. Conway's motion primarily on the basis that she had not been able to take third-party depositions from witnesses Larry Hammond, David Radde, Robert Ergonis, and Aaron Ellertson.[8] Mr. Conway opposed Defendant Fulbright's requested continuance because all four witnesses had already testified about the matters in dispute in a related proceeding.[9]

Upon review, this Court expressly noted its authority to grant Mr. Conway his requested relief pursuant to *In re: Conservatorship of Jack Wayne Turner*.[10] There, the

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[3] *See infra*, Section VIII.
[4] *Id.*
[5] Docket Entry #73 (Case Management Order #3), ¶ 3.
[6] Docket Entry #1 (Plaintiff's Complaint), p. 14, ¶ 2.
[7] Docket Entry #45–#46 (Plaintiff's Motion for Summary Injunctive Relief and Memorandum in Support).
[8] Docket Entry #53 (Defendant's Motion for Indefinite Continuance); Docket Entry #63 (Affidavit of William Leech).
[9] Docket Entry #65 (Plaintiff's Response in Opposition to Defendant's Second Motion for an Indefinite Continuance).
[10] Docket Entry #68 (Order) (citing *In re: Conservatorship of Jack Wayne Turner*, No. M2013-01665-COA-R3CV, 2014 WL 1901115, at *20 (Tenn. Ct. App. May 9, 2014)).

Court of Appeals held that: "we adopt the 'modern rule' and hold that defamatory speech may be enjoined after a determination that the speech is, in fact, false."[11] However, this Court also granted Defendant's motion for an indefinite continuance in order to permit the Defendant to depose the aforementioned witnesses and conduct additional third-party discovery.[12]

Ten months later, Defendant Fulbright has not even attempted to depose any of the aforementioned witnesses, and she has not conducted any of the other third-party discovery identified in her October 2016 motion for an indefinite continuance, either.[13] The fact discovery deadline in this case also expired on August 1, 2017.[14] Accordingly, Mr. Conway respectfully renews his motion for summary injunctive relief.

III. Facts Underlying Plaintiff's Libel Claims

A. *Mr. Conway's Kidnapping.*

In 2009, Defendant Fulbright pleaded guilty to conspiracy to commit kidnapping and aggravated assault for her role in kidnapping and assaulting Mr. Conway at gunpoint.[15] Law enforcement subsequently described the circumstances of Mr. Conway's kidnapping as "torture,"[16] and the evidence overwhelmingly supports that characterization. For example, during the trial of one of her co-defendants, Defendant Fulbright testified under oath that while Mr. Conway was tied up and held at gunpoint by her co-conspirators, she physically beat him and threatened to "cut off his balls" with a

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[11] *Id.*
[12] Docket Entry #68 (Order).
[13] Docket Entry #53 (Defendant's Motion for Indefinite Continuance); Docket Entry #63 (Affidavit of William Leech).
[14] Docket Entry #73 (Case Management Order #3), ¶ 3.
[15] Docket Entry #70 (Defendant's Amended Answer), ¶ 16 ("Admitted that Defendant plead guilty to two felony offenses.").
[16] Docket Entry # 65, pp. 5-6 (citing Exhibit A).

knife.[17] Defendant Fulbright subsequently spent two years in an Arizona prison as punishment for her crimes, and she was also ordered to pay Mr. Conway restitution.[18]

B. *Defendant Fulbright's Reality TV Appearance*

In 2015, Defendant Fulbright appeared on a nationally broadcast reality television program to discuss her role in Mr. Conway's kidnapping.[19] During the Episode, Defendant Fulbright accused Mr. Conway of stealing money from her, drugging her, and stealing jewelry from her.[20] Defendant Fulbright also claimed that she was "justified" in committing her above-described crimes against Mr. Conway as a result.[21] Mr. Conway vigorously disputes all three of these scurrilous accusations, and he has sued Defendant Fulbright for libel as a result of them.

C. *Defendant Fulbright's Repudiation of Her Money Theft and Drugging Claims*

In her deposition testimony, Defendant Fulbright openly repudiated her accusations that Mr. Conway either stole money from her or drugged her.

As to her first accusation, she acknowledged that: "I don't know that he's stole the money."[22] She further claimed that: "I never said he stole it and [that] I know it."[23]

Similarly, as to her second accusation—that Mr. Conway drugged her—Defendant Fulbright testified:

> Maybe it was the bartender. **There's a lot of other explanations. I made that clear anytime I've ever**

[17] Docket Entry #70 (Defendant's Amended Answer), ¶ 15 ("the statement is admitted.").
[18] Docket Entry #70 (Defendant's Amended Answer), ¶ 16 ("Admitted that Fulbright served two years in prison. Admitted that Fulbright was ordered to pay restitution.").
[19] Docket Entry #70 (Defendant's Amended Answer), ¶ 32 ("Admitted that defendant Fulbright appeared on a television program, the subject of which was the incident described herein."); ¶ 33 ("Admitted that Fulbright appeared on a television program entitled 'One Bad Choice.'").
[20] Docket Entry #70 (Defendant's Amended Answer), ¶ 36 ("Admitted the [sic] Fulbright appeared on the television program and recounted the accusations."). *See also id.* at ¶ 37.
[21] *Id.* at ¶ 37.
[22] Fulbright Deposition, p. 70, line 6.
[23] Fulbright Deposition, p. 70, line 10.

> **spoken on this issue.**
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> [T]here's definitely other explanations.
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> **I think [a 25 percent chance] may be the percentage it could have been.** We're talking it could have been [the] bartender, could have been the person I was with. I don't know. We would have to count possible people and divide.
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> [W]e would have to know how many possible people there were and divide and gain the percentage that way."[24]

D. *Defendant Fulbright's Provably False Claim of Jewelry Theft*

With respect to Defendant Fulbright's third allegation—that Mr. Conway stole her jewelry—Mr. Conway's libel claim entirely turns on the truth of the allegation in paragraph 20 of his Complaint, in which he avers:

> 20. [T]he Plaintiff pawned Defendant Fulbright's jewelry specifically at her request. In fact, the Plaintiff spoke with Defendant Fulbright on the phone about the sale while he was carrying it out.[25]

Defendant Fulbright flatly denies Mr. Conway's allegation that she asked him to pawn her jewelry.[26] However, relying on admittedly authentic phone records and the testimony of a neutral third-party witness, Mr. Conway can prove beyond any genuine dispute that he had a twelve-minute phone call with Defendant Fulbright about pawning her jewelry while he was in the pawn shop negotiating its sale.[27] Overwhelming additional

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[24] Fulbright Deposition, pp. 72–81 (emphases added).
[25] Docket Entry #1 (Plaintiff's Complaint), ¶ 20.
[26] Docket Entry #70 (Defendant's Amended Answer), ¶ 20 ("Denied.").
[27] *See infra*, Section VIII-3.

facts—for example, Defendant Fulbright's failure to file a police report or insurance claim after her jewelry was "stolen"; Defendant Fulbright's failure to note any claim of jewelry theft in her diary; the fact that Mr. Conway never attempted to conceal the jewelry sale; the fact that after a complete investigation, law enforcement concluded that Defendant Fulbright had lied about the jewelry theft, etc.—also militate in favor of this conclusion.[28] Accordingly, an injunction against Defendant Fulbright's false and defamatory statement that he stole her jewelry should issue as well.

IV. Elements Necessary to Sustain an Injunction for Libel

To sustain an injunction for defamation (or libel in the case of a television broadcast[29]), our Court of Appeals has held that two elements must be established by a preponderance of the evidence: (1) that the speech to be enjoined is "false," and (2) that the speech to be enjoined is "defamatory."[30] Repeated reliance on this holding in subsequent cases confirms this two-factor inquiry.[31]

Black's Law Dictionary defines a statement to be "false" when the statement is "untrue," whether "by intent, by accident, or by mistake."[32] Additionally, Tennessee law defines a statement to be "defamatory" when it "exposes that person to wrath, public hatred, contempt, or ridicule, or deprives that person of the benefits of public confidence or social interaction."[33]

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[28] *Id.*

[29] *See Ali v. Moore*, 984 S.W.2d 224, 227 (Tenn. App. 1998) ("broadcasts should be considered as libel; particularly if they are based on written scripts.").

[30] *See Turner*, No. M-2013-01665-COA-R3-CV, 2014 WL 1901115, at *20.

[31] *See, e.g., Loden v. Schmidt*, No. M2014-01284-COA-R3-CV, 2015 WL 1881240, at *9 (Tenn. Ct. App. Apr. 24, 2015) (explaining that injunctions against speech are permissible under *Turner* following a determination "that statements were [1] false and [2] defamatory").

[32] *See* Black's Law Dictionary (10th ed. 2014).

[33] See T.P.I.—CIVIL, 7.01 "Defamation" Defined, 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 7.01 (2016 ed.).

V. Burden of Proof in Libel Actions

The Tennessee Supreme Court has held that in libel cases, a plaintiff "need not show. . . that the statement is false."[34] Instead, "**[t]here is a legal presumption of falsity which *the defendant* may rebut by proving truth as a defense.**"[35] A federal court applying Tennessee law on this point as recently as August 23, 2016 confirms this standard.[36] Accordingly, Defendant Fulbright bears the burden of proving the truth of her statements.

However, "the burden of proof rests upon the plaintiff to show defamation . . . ." *Id.* Accordingly, Mr. Conway bears the burden of proving that Defendant Fulbright's presumptively false accusations were defamatory.

VI. Summary Judgment Standard

"Summary judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial."[37] The standards that govern motions for summary judgment are established by Tenn. Code Ann. § 20-16-101 and Tenn. R. Civ. P. 56.04, respectively. Because Defendant Fulbright bears the burden of proof as to falsity while Mr. Conway bears the burden of proof as to defamation, both standards apply to the instant motion. Under each standard, "where the record taken as a whole could not lead a rational trier of

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[34] *Id.*
[35] *Id.* (emphasis added)
[36] *See Gamble v. Equal Employment Opportunity Comm'n Office of Field Programs*, No. 16-2402-SHL-DKV, 2016 WL 4446324, at *3 (W.D. Tenn. July 6, 2016), report and recommendation adopted, No. 16-CV-2402-SHL-DKV, 2016 WL 4444905 (W.D. Tenn. Aug. 23, 2016) (holding that "the plaintiff need not show that the statement is false because '[t]here is a legal presumption of falsity which the defendant may rebut by proving truth as a defense.'") (quoting *Memphis Pub. Co.*, 569 S.W.2d at 420).
[37] *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016).

fact to find for the non-moving party, there is no genuine issue for trial."[38]

A. *Falsity—Defendant's Burden*

Tenn. Code Ann. § 20-16-101 establishes that:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
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> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
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> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

B. *Defamation—Plaintiff's Burden*

In *Rye v. Women's Care Ctr. of Memphis*,[39] the Tennessee Supreme Court harmonized Tennessee's summary judgment standard with its federal counterpart by formally adopting the standard outlined by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Celotex* instructs:

> If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery.[40]

VII. Material Facts As To Which There Is No Genuine Dispute

Exhibits and citations to the case record that support the undisputed facts

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[38] *Id.* (quotation omitted).
[39] 477 S.W.3d 235, 265.
[40] *Id.* at 331.

referenced in the instant motion have been filed simultaneously with this motion as *Plaintiff's Second Statement of Undisputed Facts in Support of His Motion for Summary Injunctive Relief*. Specific record citations are also footnoted within the instant motion for the Court's convenience.

VIII. Argument

For the reasons that follow, there is no genuine dispute that Defendant Fulbright's accusations that Mr. Conway: (1) stole money from Defendant Fulbright; (2) drugged Defendant Fulbright; and (3) stole jewelry from Defendant Fulbright are both false and defamatory. Accordingly, Mr. Conway is entitled to an injunction as a matter of law.[41]

1. Falsity of Accusation that Mr. Conway Stole Money from the Defendant Fulbright.

Under Tennessee law, Defendant Fulbright's accusation that Mr. Conway stole money from her is presumed to be false unless she carries her burden of proving that it is true.[42] Helpfully, however, Defendant Fulbright has since repudiated this accusation, testifying under oath that: "[N]o one witnessed stealing the money. **I don't know that he's stole the money. . . . I never said he stole it and [that] I know it.**"[43]

Accordingly, this accusation being *presumptively* false, and Defendant Fulbright

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[41] *Turner*, No. M-2013-01665-COA-R3-CV, 2014 WL 1901115, at *20. *See also Loden*, No. M-2014-01284-COA-R3-CV, 2015 WL 1881240, at *9 (holding that injunctions should be permitted in defamation actions following a "determination that statements were false and defamatory"). In Turner, the Court of Appeals also explained that: "the finding the enjoined speech is false does not, necessarily, have to be made after a full evidentiary hearing specifically in a defamation lawsuit. However, the trial court issuing the injunction must, nonetheless, make a finding that the enjoined speech is defamatory, which finding must be supported by a preponderance of the evidence." 2014 WL 1901115, at *20. Thus, although permitted, a full evidentiary hearing is not required to enjoin libel. *Id.* Certainly, there is no such requirement when the evidence demonstrates that there is no genuine dispute that the two requirements necessary to issue an injunction based on libel – falsity and defamation – are both established.

[42] *Memphis Pub. Co.*, 569 S.W.2d at 420 (holding that in libel actions, "[t]here is a legal presumption of falsity which the defendant may rebut by proving truth as a defense."). *See also Gamble*, 2016 WL 4446324, at *3 (holding that under Tennessee law, a defamation plaintiff "need not show that the statement is false because there is a legal presumption of falsity which the defendant may rebut by proving truth as a defense.") (quotation omitted).

[43] Fulbright Deposition, p. 70, lines 5–10 (emphasis added).

having admitted that she herself "do[esn't] know" it to be true,[44] the presumption carries, and this accusation must be deemed false as a matter of law.[45]

2. Falsity of Accusation that Mr. Conway Drugged Defendant Fulbright.

Defendant Fulbright's accusation that Mr. Conway drugged her is similarly presumed to be false unless she sustains her burden of proving that it is true.[46] Helpfully once again, however, Defendant Fulbright now repudiates this accusation as well, testifying:

> Maybe it was the bartender. **There's a lot of other explanations. I made that clear anytime I've ever spoken on this issue.**[47] . . . **[T]here's definitely other explanations.**[48]

As to the level of proof that she herself believes she can sustain with respect to this particular accusation, Defendant Fulbright also testified:

> **I think [a 25 percent chance] may be the percentage it could have been.** We're talking it could have been [the] bartender, could have been the person I was with. I don't know. We would have to count possible people and divide.[49]
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> * * * *
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> [W]e would have to know how many possible people there were and divide and gain the percentage that way."[50]

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[44] *Id.*

[45] Defendant Fulbright's claim in her deposition that she never adopted this position conflicts with her judicial admission in her Amended Answer that she did. *See* Docket Entry # 70 (Defendants' Amended Answer), ¶ 36 ("Admitted [that] defendant Fulbright appeared on the television program and recounted the accusations."). *See also id* at ¶ 37 (admitting that Defendant Fulbright recounted all three accusations).

[46] *Memphis Pub. Co.*, 569 S.W.2d at 420 (holding that in libel actions, "[t]here is a legal presumption of falsity which the defendant may rebut by proving truth as a defense."). *See also Gamble*, 2016 WL 4446324, at *3 (holding that under Tennessee law, a defamation plaintiff "need not show that the statement is false because there is a legal presumption of falsity which the defendant may rebut by proving truth as a defense.") (quotation omitted).

[47] Fulbright Deposition, p. 70, lines 14–16.

[48] Fulbright Deposition, p. 72, line 25–p. 73, line 1.

[49] Fulbright Deposition, p. 78, lines 9–13.

[50] Fulbright Deposition, p. 81, lines 6–8.

Beyond her admission that she cannot bear her burden of proving that Mr. Conway drugged her by a preponderance of the evidence,[51] Defendant Fulbright also acknowledged that there is substantial evidence that she was never drugged at all—much less drugged by Mr. Conway. For example, Defendant Fulbright admitted: (1) that she never reported her supposed drugging;[52] (2) that she has no medical evidence that she was ever drugged;[53] (3) that she has no documentary evidence that she was ever drugged;[54] (4) that she never saw anyone—much less Mr. Conway—drug her;[55] and (5) that she was drinking (voluntarily) on the evening in question.[56] Further, Defendant Fulbright testified that (6) "[a]lcohol is really temperamental when it comes to the state of [her] body,"[57] and as a result, "it's possible" she could simply have blacked out from drinking voluntarily rather than having been drugged at all.[58]

Because Defendant Fulbright is plainly unable to carry her burden of proving that Mr. Conway drugged her based on the above evidence—and because Defendant Fulbright has candidly acknowledged this inability herself—an injunction should issue on this claim as well.

3. Falsity of Accusation that Mr. Conway Stole Jewelry from Defendant Fulbright.

Third, the record in this case indicates that there is also no genuine dispute that Defendant Fulbright falsely accused Mr. Conway of stealing her jewelry. Objective and verifiable evidence from the Parties' phone records—coupled with the consistent

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[51] *Id.*
[52] Fulbright Deposition, p. 81, lines 21-23.
[53] Fulbright Deposition, pp. 71-72
[54] Fulbright Deposition, p. 78, lines 23-25.
[55] Fulbright Deposition, p. 72, lines 9-11.
[56] Fulbright Deposition, p. 80, lines 4-7.
[57] Fulbright Deposition, p. 79, line 14-15.
[58] Fulbright Deposition, p. 79, line 16.

testimony of a neutral third-party witness and the Parties' respective behavior both during and after the sale—establishes beyond any genuine dispute that Ms. Fulbright knew about the jewelry sale *and actually discussed it with Mr. Conway while the sale was taking place*. Accordingly, Mr. Conway respectfully asks this Court to conclude—as the Arizona Attorney General's Office did after an extensive investigation into this case—that there is no genuine dispute that Mr. Conway "talked to Kumari that day and that [her] jewelry was sold with her consent, at her wish."[59]

A. *The Parties' Phone Records*

In the instant case, the Parties' phone records prove that they had a twelve-minute phone call while Mr. Conway was negotiating the sale of Defendant Fulbright's jewelry inside the pawn shop where the jewelry was ultimately sold.[60] While testifying during the trial of her co-defendant Robert Ergonis, Defendant Fulbright was also forced to acknowledge—under oath—that her phone records indicated that this twelve-minute phone call did, in fact, take place.[61] The Parties' phone records were then introduced, authenticated, and explored in considerable detail by multiple witnesses.[62] They were

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[59] Docket Entry #49 (Ergonis Trial Transcript Day 2), p. 26, lines 7-15.

[60] *See, e.g.*, Docket Entry # 50 (Ergonis Trial Transcript Day 4), p. 100, lines 4-7 (Tucson Police Department Detective Steve Harn testifying that: "On November 20th [2007] at 12:46 p.m., the number listed [on Mr. Conway's phone records] is the (313) 363-3941 which is Kumari Fulbright's number, and it's 12 minutes in duration."); Docket Entry # 52 (Ergonis Trial Transcript Day 7), p. 137 line 18 – p. 138 line 6 (Ms. Fulbright testifying that she does not dispute the accuracy of phone records that indicated a phone call between her phone and Mr. Conway's at 12:46 p.m. on November 20th, 2007); Docket Entry # 51 (Ergonis Trial Transcript Day 6), Testimony of Aaron Ellertson, p. 96, lines 8-25 (testifying that Mr. Conway came into his pawn shop on November 20, 2007 at 12:32 p.m.); p. 107, line 22 – p. 108, line 7 (Aaron Ellertson testifying that some time after entering his pawn shop on November 20, 2007, Mr. Conway made a phone call to someone who appeared to be a significant other); p. 116, line 25 – p. 117, line 7 (Aaron Ellertson testifying that Mr. Conway referred to the individual on the other line as "babe" and used "affectionate terms" with her).

[61] Docket Entry # 52 (Ergonis Trial Transcript Day 7), p. 137, line 18 – p. 138 line 6 (Ms. Fulbright testifying that she does not dispute the accuracy of phone records that indicated a phone call between her phone and Mr. Conway's at 12:46 p.m. on November 20th, 2007). *See also* Docket Entry #70 (Defendant's Amended Answer), ¶ 23 ("Admitted that the pawnshop owner testified regarding the alleged phone call.").

[62] *Id.*

also used to great effect during Mr. Ergonis's trial to impeach Defendant Fulbright's unsupported claim that Mr. Conway had "stolen" her jewelry,[63] which the Arizona Attorney General's office regarded as "a lie."[64]

During her deposition in this case, Defendant Fulbright was forced to acknowledge once again that her phone records "evidence the existence of th[e] phone call" at issue.[65] Accordingly, Defendant Fulbright is reduced to disputing only the *subject* of the conversation she had with Mr. Conway while he was pawning her jewelry—rather than the acknowledged reality that a twelve-minute phone call occurred.

Tellingly, though, Defendant Fulbright has admitted that she cannot say what her phone call with Mr. Conway was *actually* about, and she has offered no affirmative evidence on the matter whatsoever.[66] In stark contrast, however, each of the two other witnesses to the Parties' phone call—Mr. Conway and Mr. Aaron Ellertson, the pawnshop's owner—both distinctly recalled that the subject of the Parties' phone call was whether Mr. Conway had been offered a reasonable price for Defendant Fulbright's

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[63] Docket Entry #49 (Ergonis Trial Transcript Day 2), p. 26, lines 7-15 (Arizona Attorney General Kim Ortiz characterizing the phone records introduced during Mr. Ergonis's trial as follows: "[T]his is what the phone records are going to show you, that on the 20th, the day that he first went in to try and make the sale during the lunch time hour, 12:46 p.m., there's a 12 minute phone call between Josh Conway's cell phone and Kumari Fulbright's cell phone. That's corroborating evidence. That shows you that he talked to Kumari that day and that this jewelry was sold with her consent, at her wish.").

[64] Fulbright Deposition, p. 140, lines 20–22 (Q: "They took the position that you had lied about your jewelry being stolen, did they not?" A: "They did."); p. 140, lines 14–15 ("[M]y story went against Josh's. They took his to be truth, then my story is a lie."). *See also* Docket Entry #49 (Ergonis Trial Transcript Day 2), p. 26, line 18–p. 27, line 10 ("this is what the evidence is going to show you. It's going to show you that Kumari Fulbright started a chain of events with a lie, a chain of events that spiraled out of control, a chain of events that this man took charge of with weapons and violence and resulted in Josh Conway being tied up and assaulted with a gun put in his head, a gun put in his mouth and tortured for eight hours until he escaped. She told her ex-fiance that Ergonis -- she told him that Conway stole her jewelry. We're never going to know why, and sometimes in life you just don't know. Sometimes juries -- sometimes jury trials don't give you all the answers. We're never going to know why Kumari did that, but what you're going to know at the end of the trial is that she lied about it.").

[65] Fulbright Deposition, p. 110, lines 2–9.

[66] Fulbright Deposition, p. 120, lines 18–20.

jewelry.[67] Thus, **the full universe of affirmative evidence that exists on the subject of the Parties' phone call demonstrates that their conversation was about whether Mr. Conway had been offered a fair price for Defendant Fulbright's jewelry.**[68] Accordingly, summary judgment is appropriate on this claim as well, because under Tennessee's recently-adopted federal standard for summary judgment:

> [Courts] resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *[Courts] do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*[69]

Most critically, neutral third-party witness Aaron Ellertson—the pawn shop's owner—witnessed the aforementioned phone call between the Parties firsthand, distinctly recalled it, and provided detailed testimony about it.[70] Thereafter, Mr. Ellertson gave multiple consistent statements to law enforcement about the phone call even before the Parties' phone records were reviewed to confirm its existence.[71] Mr. Ellertson also testified, under oath, that: (1) the phone call at issue took place; (2) Mr. Conway sounded like he was talking to a significant other; and (3) the conversation between Mr. Conway and the recipient of the phone call—later proven to be Defendant Fulbright—involved a

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[67] Docket Entry #50 (Ergonis Trial Day 4), p. 164, lines 18-25 (**Mr. Conway testifying** that after he received a price quote for Defendant Fulbright's jewelry, he "[c]alled her, let her know, you know, what they were offering, if that was enough," and also talked with Defendant Fulbright "about taking it around to some different places."); Docket Entry # 51 (Ergonis Trial Transcript Day 6), p. 101, lines 7-18 (**Aaron Ellertson testifying** that Mr. Conway's phone conversation was with a female and involved a discussion to the effect that "they quoted me this much and I'm going to check someplace else and then I'm going to come back, and I've got to go over here" in reference to the sale of the jewelry being pawned.).

[68] *Id.*; *see also* Fulbright Deposition, p. 121, lines 4–9 (no other identified witnesses to the phone call).

[69] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)

[70] *Id.*

[71] Fulbright Deposition, p. 119, lines 6–9 (referencing Fulbright Deposition Exhibit #13).

discussion of an appropriate price for the jewelry that was being sold.[72]

Defendant Fulbright has admitted that this was, in fact, the substance of Mr. Ellertson's testimony.[73] Further, because Defendant Fulbright has no affirmative evidence to the contrary, Mr. Ellertson's recollection of the Parties' phone call—and Mr. Conway's identical recollection[74]—both independently and collectively "negate[] an essential element of [Defendant Fulbright's] claim" that her jewelry was stolen.[75]

B. *The Parties' Behavior Before and After the Jewelry Sale*

As importantly, the Parties' respective behavior before, during, and after the jewelry sale similarly makes clear that there was no jewelry theft.

For her part, Defendant Fulbright's behavior evidences the reality that no jewelry theft was committed or even *suspected*. For example, after the sale, Defendant Fulbright admits that she never filed a police report or insurance claim regarding her purportedly stolen jewelry.[76] Further, Defendant Fulbright never made any mention of Mr. Conway

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[72] Docket Entry # 51 (Ergonis Trial Transcript Day 6), Testimony of Aaron Ellertson, p. 96, lines 8-25 (testifying that Mr. Conway came into his pawn shop on November 20, 2007 at 12:32 p.m.); p. 107, line 22 – p. 108, line 7 (Aaron Ellertson testifying that some time after entering his pawn shop on November 20, 2007, Mr. Conway made a phone call to someone who appeared to be a significant other); p. 116, line 25 – p. 117, line 7 (Aaron Ellertson testifying that Mr. Conway referred to the individual on the other line as "babe" and used "affectionate terms" with her); p. 101, lines 7-18 (Aaron Ellertson testifying that Mr. Conway's phone conversation was with a female and involved a discussion to the effect that "they quoted me this much and I'm going to check someplace else and then I'm going to come back, and I've got to go over here" in reference to the sale of the jewelry being pawned.).

[73] Docket Entry #70 (Defendant's Amended Answer), ¶ 23 ("Admitted that the pawnshop owner testified regarding the alleged phone call.").

[74] Docket Entry #50 (Ergonis Trial Day 4), p. 164, lines 18–25 (Mr. Conway testifying that after he received a price quote for Defendant Fulbright's jewelry, he "[c]alled her, let her know, you know, what they were offering, if that was enough," and also talked with Defendant Fulbright "about taking it around to some different places.").

[75] *See* Tenn. Code Ann. § 20-16-101(1).

[76] Docket Entry #70 (Defendant's Amended Answer), ¶ 24 ("Admitted that no police report was filed."). *See also* Docket Entry #52, Ergonis Trial Transcript Day 7, p. 193 lines 12–17:

> Q (Prosecutor Gattone): "So from November 25th, '07 to December 8th, there is neither a police report or an insurance claim for your missing or, quote, 'stolen' jewelry[?]"
>
> A (Defendant Fulbright): "That's right. There was no police report or insurance claim."

supposedly stealing her jewelry in any of her many diary entries about their relationship.[77] Additionally, although she was a capable law student at the time, Defendant Fulbright never filed a criminal complaint with the Tucson Police Department[78] or even a civil lawsuit against Mr. Conway regarding the supposed jewelry theft in order to offset the thousands of dollars in restitution that she was ordered to pay Mr. Conway following her conviction.[79] Mr. Conway uncontroversially submits that these are not the actions of someone who believed that thousands of dollars' worth of jewelry were stolen from her.

Mr. Conway's behavior, too, demonstrates that the jewelry sale was entirely legitimate. As noted, Mr. Conway called Defendant Fulbright's cell phone and had a twelve-minute phone call with her *while he was in Mr. Ellertson's pawnshop negotiating the sale of her jewelry*.[80] It goes without saying that such behavior defies any rational claim that he was hiding the sale from her. Mr. Conway also did not attempt to conceal his involvement in the sale of Defendant Fulbright's jewelry either during the transaction or afterward. Instead, he produced his photo identification for the cashier, provided a fingerprint for each pawned item, wrote down his address and his telephone number, and personally signed each pawn slip.[81] Mr. Conway respectfully submits that these are not

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[77] Docket Entry #52 (Ergonis Trial Transcript Day 7), p. 192 lines 17–18 (Ms. Fulbright testifying under oath that "there's no entry [in her diary] indicating that theft").
[78] Docket Entry #70 (Defendant's Amended Answer), ¶ 24.
[79] Fulbright Deposition, p. 67, lines 21–22; (answering "I did not" in response to question of whether Defendant Fulbright ever sued Mr. Conway). *See also* p. 73, lines 5-6.
[80] *See supra*, n. 60.
[81] Kumari Fulbright Deposition Exhibit #13, p. 8. *See also* Docket Entry #51 (Ergonis Trial Transcript Day 6), p. 92, lines 9–25 (Aaron Ellertson testifying that he "absolutely" takes an I.D. from his customers and that they "always" have to provide a "right index" fingerprint down on a pawn slip to complete a transaction); p. 93, lines 10-18 (discussing the pawn slip completed by Mr. Conway); p. 104, lines 17-20 (Aaron Ellertson testifying that the sale of Ms. Fulbright's jewelry was consummated after everything was "typed up, put in the computer, fingerprints are done."); Docket Entry # 50 (Ergonis Trial Transcript Day 4), p. 97, lines 8-25 (Tucson Police Department Detective Steve Harn testifying about the pawn slips completed by Mr. Conway and noting that "Mr. Conway's name [is] on there," that there is "a place for a fingerprint," and that it "gives an address").

the actions of someone who is in the process of stealing thousands of dollars' worth of jewelry, either.

Notably, after an extensive investigation into this matter, Mr. Conway was not arrested on suspicion of stealing Defendant Fulbright's jewelry. To the contrary, Defendant Fulbright was arrested, and the Arizona Attorney General's office concluded that her claim that Mr. Conway stole her jewelry was an utter fabrication.[82] Accordingly, with respect to the supposed jewelry theft at issue, the Arizona Attorney General accurately concluded that Defendant Fulbright had "lied about it."[83]

Based on the above-described evidence, "the record taken as a whole could not lead a rational trier of fact to find" that Mr. Conway stole Defendant Fulbright's jewelry.[84] Summary judgment on this claim should issue accordingly.

4. The Defamatory Nature of Defendant's False Accusations

Defendant Fulbright's false accusations that Mr. Conway stole her money, drugged her, and stole her jewelry were published with the knowledge that they would be broadcast to a national television audience.[85] These false accusations also easily satisfy

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[82] Fulbright Deposition, p. 140, lines 20–22 (Q: "They took the position that you had lied about your jewelry being stolen, did they not?" A: "They did."); p. 140, lines 14–15 ("[M]y story went against Josh's. They took his to be truth, then my story is a lie."). *See also* Docket Entry #49 (Ergonis Trial Transcript Day 2), p. 26, line 18–p. 27, line 10 ("this is what the evidence is going to show you. It's going to show you that Kumari Fulbright started a chain of events with a lie, a chain of events that spiraled out of control, a chain of events that this man took charge of with weapons and violence and resulted in Josh Conway being tied up and assaulted with a gun put in his head, a gun put in his mouth and tortured for eight hours until he escaped. She told her ex-fiance that Ergonis -- she told him that Conway stole her jewelry. We're never going to know why, and sometimes in life you just don't know. Sometimes juries -- sometimes jury trials don't give you all the answers. We're never going to know why Kumari did that, but what you're going to know at the end of the trial is that she lied about it.").

[83] *Id.*

[84] *Rye*, 477 S.W.3d at 251 (quotation omitted).

[85] Docket Entry #64 (Exhibit G, Defendants' Response to Request for Admission p. 3, No. 5 ("While participating in filming the Episode, Kumari S. Fulbright knew or believed that the Episode would be broadcast to a national television audience. **RESPONSE: ADMITTED.**"));

the definition of defamation.[86]

At common law, all three accusations would be considered defamatory *per se* because they accuse Mr. Conway of having committed a felony offense involving moral turpitude.[87] Mr. Conway also incurred professional sanction after the accusations were broadcast,[88] and the public contempt to which Mr. Conway was subjected is reflected in numerous simultaneous social media postings by strangers that viciously impugn Mr. Conway's character.[89] To mention a few, for example, as a consequence of the Episode, strangers began referring to Mr. Conway as "the stealing boyfriend."[90] Others blamed Mr. Conway for his own kidnapping and torture, telling Defendant Fulbright that: "he violated [you] and stole from [you]" and that "[y]ou can't blame yourself for wanting the truth to come out."[91] Others still stated: "I blame the thief."[92] Even those who knew the truth of the matter recognized that Defendant Fulbright had "made [Mr. Conway] look like a scumbag."[93]

Simply stated, Defendant Fulbright's false and scurrilous accusations that Mr. Conway stole her money, drugged her, and stole her jewelry subjected him to wrath, public hatred, contempt, and ridicule, and they unlawfully deprived him of the benefits of public confidence. An injunction on each claim should issue as a result.

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[86] T.P.I.—CIVIL, 7.01 (defining a statement as defamatory when it "exposes that person to wrath, public hatred, contempt, or ridicule, or deprives that person of the benefits of public confidence or social interaction.").
[87] *See Kersey v. Wilson*, No. M2005-02106-COA-R3CV, 2006 WL 3952899, at *6 (Tenn. Ct. App. Dec. 29, 2006) ("Under the common law of defamation, some words were considered to be so injurious upon their face that no actual proof of damages was required to make them actionable. . . . These defamations *per se* included allegations that a plaintiff had committed a crime involving moral turpitude.").
[88] Plaintiff's Response to Defendants' First Set of Interrogatories, Interrogatory #18.
[89] Docket Entry #48 (Exhibit H; selected social media screenshots of statements by strangers).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

IX. CONCLUSION

For the foregoing reasons, there is no genuine dispute that Defendant Fulbright's accusations that Mr. Conway stole her money, drugged her, and stole her jewelry are false and defamatory. Accordingly, Plaintiff's Second Motion for Summary Injunctive Relief should be granted; the above-described statements should be declared false; and an injunction that prohibits Ms. Fulbright from repeating these false allegations should issue.

Respectfully submitted,

By: _____

Daniel A. Horwitz, BPR #032176
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
(615) 739-2888

Counsel for Plaintiff

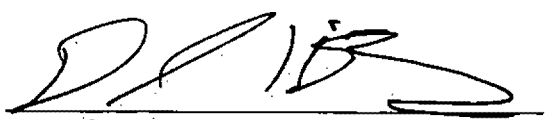
NOTICE OF HEARING ON MOTION

A hearing on the above motion will be held on the 15th day of September, 2017 at 9:15AM CST at the Davidson County Courthouse, 1 Public Square, Nashville, TN. Failure to appear or respond to this motion may result in this motion being granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2017, a copy of the foregoing was sent via USPS, postage prepaid, and/or by email to the following:

William M. Leech, III
P.O. Box 198742
Nashville, TN 37219-8742
(615) 256-0138
wleech@minkdukelaw.com

By: 
Daniel A. Horwitz, Esq.