IN THE 12TH JUDICIAL DISTRICT OF TENNESSEE
CHANCERY COURT OF MARION COUNTY

THUNDER AIR, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS	)	CASE NO. 8424
	)	
JOE E. BLEVINS, JR., and,	)	
RONNIE KENNEDY,	)	
	)	
Defendants.	)	

APPEARANCES:

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August 26, 2024

Before The Honorable Justin C. Angel

Sequatchie County Justice Center

THE COURT: I guess it's still morning. Good morning, everybody.

MR. HORWITZ: Good morning, Your Honor.

MR. HARBISON: Good morning.

MR. KINARD: Good morning, Your Honor.

THE COURT: Thank you for being patient with me. I sent y'all e-mails telling you how it's going to be. I knew how my dockets go and, you know, this was a date that worked for everybody and I guess we just stuck with it and decided to try to make it happen today. So, as you can see, the morning was pretty busy.

This is out of the Chancery Court of Marion County, Case Number 8424, Thunder Air, Inc., versus Joe E. Blevins, Jr., and Ronnie Kennedy. There are several pending motions before the Court. I received another one the other day, I guess a suggestion of death. Should we take that one up first?

MR. KINARD: Certainly, Your Honor. We didn't technically file a suggestion of death. It was a motion for stay. Sorry. It's a suggestion of death and a motion for stay, because it appears that Mr. Kennedy has passed away. Our condolences to him and his family. But based on -- assuming that is the fact of the case, then it would be inappropriate to proceed without the appropriate party substituted in, Your Honor.

MR. HARBISON: May I, Your Honor?

THE COURT: Yes.

MR. HARBISON: May I?

THE COURT: Yes.

MR. HARBISON: So thank you, Your Honor. And I'm Jay Harbison on behalf of Mr. Kennedy's heirs now, unfortunately. Before I address the motion to stay, I just want to say, I think on behalf of everybody, I genuinely appreciate Your Honor accommodating us today. I know it's a lot of paper, I know, but this is, frankly, a pretty important case.

Motion to stay, they filed it on Friday afternoon at 4:00 o'clock. It's not set for a hearing. It's not actually before the Court this morning. There's a couple different reasons why I think the Court should deny it, first and foremost because I haven't had the opportunity to even respond to it yet. I would be remiss if I didn't note that Local Rule 12.02(6) says that the parties have to meet and confer. I have the exact language here. A motion has to have any party and/or counsel filing any motion place a certificate of attempts to reach an agreement thereon. Their motion to stay contains no such certificate.

No one contacted me about this motion to stay prior to filing it. Had they just picked up the phone and called me like they were supposed to, they would know that I've been in contact with Mr. Kennedy's heirs, his widow, Cynthia, his son, Ed, who fully intend to open up an estate for him, step into his shoes, and continue to defend this lawsuit. I just haven't had time to

do that yet because he did pass away on August the 10th, I believe.

Their motion cites Rule 25. Technically, it's Rule 25.01. Your Honor, all 25.01 says is that when a party dies and the cause of action does not abate, which this one doesn't, I'd be happy to go into that if we'd like, you have 90 days -- you make a suggestion of death upon the record and you have a 90-day window to move to substitute in the proper party. So they've now filed the suggestion of death. They did that on Friday. I have 90 days to open up an estate for Mr. Kennedy and get him substituted in. Presumably they'll agree to that. I mean, I don't see why they wouldn't.

But, you know, the purpose of -- I found some cases last night. The purpose of filing a suggestion of death is only the trigger of the running of this 90-day period. That's Williams v. Williams, Tennessee Court of Appeals 2012. Importantly, I think, there's no time requirement for making a suggestion of death upon the record. Until it is made, the 90-day period for a motion to substitute does not begin to run. That's Pearson v. Koczera, K-O-C-Z-E-R-A. That's a Tennessee Court of Appeals from 2018.

So, respectfully, Rule 25.01 which is the only thing their motion to stay cites, it contains no timing requirements. It provides no authority for entering a stay as to Mr. Kennedy. Respectfully, it seems clear to me, at least, that Thunder is trying to delay these proceedings and drive up the costs.

Again, that's pretty much all I have, but the last point I guess I'd make, Your Honor, I'm happy to talk about why this case doesn't abate under the abatement statute, but they seem to concede that. The last thing I'll say, I found a case late last night, Douglas v. Estate of Robertson. That's a Tennessee Court of -- or, excuse me, Tennessee Supreme Court from 1994 construing Rule 25.01. And that case says the trial Courts have broad discretion under 25.01, quote, to expedite litigation and preserve fundamental rights of parties.

They claim it's procedurally improper or procedurally inappropriate to proceed, but there's just respectfully no legal basis for that. I think if we proceed on the anti-SLAPP petitions, it would moot the motion to stay anyway. So that's pretty much all I have to say on that.

THE COURT: Thank you.

MR. HARBISON: Thank you.

THE COURT: Any quick response to that?

MR. KINARD: If confirmed that Mr. Kennedy has passed away, he's no longer participating, can no longer direct the litigation, at the point that an administrator is, in fact, appointed and there is, in fact, an appropriate party that can be substituted in, then we can talk about that, but it apparently hasn't happened yet based on Mr. Harbison's representations. As a result, I think it's premature to do anything since there isn't actually a party there on the other side as to Mr. Harbison. As

to Mr. Blevins, I think it's appropriate to proceed, Your Honor.

THE COURT: Okay. I will continue this motion, not -- the motion in regards to the stay. I will continue that motion and hold it in abeyance 90 days -- beyond 90 days from today to give the opposing side time to properly respond and do what they need to do.

MR. HARBISON: Yes, Your Honor. Technically, 90 days from Friday, I think --

THE COURT: Right.

MR. HARBISON: -- is when they filed the suggestion of death.

THE COURT: Thank you for that correction.

MR. HARBISON: One thing I did forget is, the Rule 25.01 does say you have 90 days unless you need more time, which we could ask for. I don't -- he didn't have much. I think it's a pretty simple process.

THE COURT: We'll cross that bridge when we get there.

MR. HARBISON: Thank you, Your Honor.

THE COURT: Okay. It's --

MR. KINARD: Another procedural point, Your Honor, is you --

THE COURT: Yes, sir.

MR. KINARD: -- requested written confirmation about a waiver of the potential conflicts you identified in your e-mail. We have that with us so that, before we can proceed, that you

have that from us, Your Honor.

THE COURT: Thank you. What about the opposing side; do you have those handy or are you going to submit them later?

MR. HORWITZ: They are being faxed in. It may have happened already this morning. Co-counsel will assist faxing that in, but it'll be today.

THE COURT: Okay.

MR. HARBISON: Your Honor, I can do that tomorrow when I get back to the office, but we're on the record. We have a court reporter. We, of course, have no issue with any of this.

THE COURT: Thank you for doing that. And, again, I've learned my lesson the hard way early on in my legal -- or my judicial career is, just disclose everything, let everybody know, let everybody have an informed consent about whether or not we should -- the Court should proceed or recuse. So thank y'all for going through that and agreeing with my request to submit that in writing.

All right. Now, how should we proceed on the next pleading?

MR. HARBISON: Well, Your Honor, we have two anti-SLAPP petitions under the Tennessee Public Participation Act or TPPA. My friend, Mr. Horwitz, calls it the TPPA. I think the other side calls it the TPPA. I am hell-bent on calling it the Anti-SLAPP Act, which is more wordy, but there's other -- there's another statute called the TPPA, so I -- for clarity purposes,

that's just my preference, but it makes no difference. I think the way that Mr. Horwitz and I were planning on proceeding is, we have two -- we have -- we each made our own petition under the Anti-SLAPP Act. They filed a single response. So what Mr. Horwitz and I were planning on him doing is having him get up and explain a couple of things and me get up and explain a couple of things and then have them respond.

MR. KINARD: And that's agreeable to us, Your Honor.

THE COURT: Okay. Thank you. Proceed.

MR. HORWITZ: Good morning, Your Honor.

THE COURT: Good morning.

MR. HORWITZ: I think it's still morning. Daniel Horwitz of the Nashville Bar on behalf of Mr. Blevins. I'm here with Mr. Blevins and his family and friends who are supporting him here.

Your Honor, I don't know if this Court has had a Tennessee Public Participation Act case before it. If you have, I'm happy to skip the history of the statute, why it's important, why it exists, but --

THE COURT: Well, let me interrupt you. No, I haven't. As I said in the e-mails, it's not really my wheelhouse.

MR. HORWITZ: Yes, Your Honor.

THE COURT: But that's why I've been -- I read everything you guys sent to me, even though it was my birthday this past weekend and I was at the --

MR. HARBISON: Well, Your Honor, you didn't say that. You didn't tell us that.

THE COURT: I was on a birthday trip to the lake in South Carolina and I was inside. I got some sun on my face, but mostly I was reading and catching up and preparing for this thing, but it's okay.

MR. HARBISON: Then I really meant what I said earlier.

THE COURT: It's part of my job. But no. I requested the oral argument because I need some education on this.

MR. HORWITZ: Yes, sir.

THE COURT: And I'm humble enough to admit it. You know, I can do a first degree murder trial with five minutes' notice, but this needs -- this, for me, my brain works different, and I need to receive some education about it, so feel free.

MR. HORWITZ: Happy birthday, Your Honor.

THE COURT: Thanks.

MR. HORWITZ: I'm happy to do that. I know there's been a ton of briefing filed and I will go through the history of this act, but I'm going to come around to saying this case, despite the voluminous briefing, is significantly easier than it may have seemed initially. The reason for that is, they don't defend the lone cause of action that they have asserted in their Complaint, so we're here on a fairly narrow issue that they don't even defend, and this case is going to have to be dismissed for that reason alone, but let me step back.

In 2019, the Tennessee General Assembly enacted the Tennessee Public Participation Act. The purpose of that statute was to give those like Mr. Blevins and Mr. Kennedy, who were sued for exercising their first amendment rights, the right to free speech in this case, to use something resembling a hybrid dismissal process. It expedites this Court's review of a speech-based cause of action, allows this Court to put a hold on discovery, by statute it is stayed, and quickly address the merits of this lawsuit to prevent those who are victimized by plaintiffs who are trying to retaliate against defendants for exercising their lawful rights of free speech, get before the Court quickly, get the SLAPP suit that is filed against them -- which stands for Strategic Lawsuit Against Public Participation -- dismissed, get their attorney's fees paid, and if the Court deems it appropriate, to sanction the plaintiff who filed this case.

So the process of this statute is threefold. The first step is the petitioner, in this case Mr. Blevins and Mr. Kennedy, has an initial burden of demonstrating that a lawsuit was filed in relation to or in response to their exercise of, in this case, the right of free speech. That is a broad statutory definition. In this case it is undisputed. They do not contest the fact that the petitioners have met their initial burden at step one.

Under a very recent case from the Tennessee Supreme Court, it's the McQueen case, happened to be Mr. Harbison's case,

Tennessee Supreme Court says, if it is not disputed that a petitioner has met their initial burden under step one, you move to step two. At step two of the TPPA analysis, it is the plaintiff's burden to come forward with admissible evidence that establishes a prima facie case -- prima facie proof of each element, each essential element of the claims in the cause of action.

Now, there are not a whole bunch of claims here. There is one libel of title claim asserted against Mr. Blevins and there is one libel of title claim asserted against Mr. Kennedy. So we have petitioned, under the TPPA, to dismiss the claim against Mr. Blevins. It is now their burden to come forward with admissible evidence that satisfies their burden as to each element of their libel of title claim.

If we were to lose at step two, this Court would then turn to step three to see if we have established any valid defenses to the cause of action. If we have, you would still have to dismiss this, but, Your Honor, we are not going to get there. As I mentioned at the outset, this is much simpler than it may have seemed initially. With the Court's permission, I'd like to hand up a little bit of paperwork to demonstrate why. So first what I'm going to hand Your Honor is their Complaint. I've tagged it. I've got a copy for my friends on the other side.

THE COURT: Thank you.

MR. HORWITZ: Your Honor, this is the Complaint that

they filed in this case. I'd like to direct Your Honor's attention to Page 4. And I've highlighted everything I'm going to be talking about here. This is Section 3, the lone cause of action asserted against Mr. Blevins. It reads, "Count 1, Libel of title by Defendant Blevins." Turning to the next page, Your Honor. Paragraphs 27 and 28. Plaintiff alleges Defendant Blevins' written statements constituted libel of Plaintiff's title to its property, River Gorge Ranch. Paragraph 28, Plaintiff alleges that as a proximate result of Defendant Blevins' libel of title, Plaintiff has been required and will continue to be required to incur legal fees, consulting fees, and other expenses, quote, to repair and rehabilitate the title of Plaintiff's property in River Gorge Ranch.

Turning to Page 6 of their Complaint, it says, the ad damnum portion, Section B and C, they ask this Court to find that the defendants, including Mr. Blevins, are liable for defamation of title of Plaintiff's property, and in C they ask for damages, among other things, associated with repairing and rehabilitating title. There is no mention anywhere, no suggestion, no implication, certainly no cause of action asserting any claim for injurious falsehood, which is not the same thing. And there never has been.

Your Honor, I'm going to hand up, for the Court's convenience, the agreed scheduling order that got us here today.

THE COURT: Thank you.

MR. HORWITZ: When the parties were last here, we had some scheduling disputes, but the parties reached agreement on what we were going to do at this hearing. This is what we all agreed. This Court is going to hear arguments on the defendants' claim that Plaintiff cannot establish facts that would establish a prima facie case for each of the elements of a cause of action for defamation of title. The Court entered a briefing order, scheduling order, saying three times, we're going to be here briefing and discussing and arguing as to whether or not they have established each of the elements of a cause of action for defamation of title. Once more, this agreed scheduling order, no claim, no mention of injurious falsehood, which is not the same thing for express iterations of a statement that we are going to be arguing about whether they have satisfied a cause of action for defamation of title.

Now, why does this matter, Your Honor? Because in the response that they filed to our TPPA petitions, they do not contend that Mr. Blevins comitted defamation of title. They don't assert that he said anything about the plaintiff's title. They don't introduce into the record any evidence whatsoever, any allegation, even, that any statement he made went to the plaintiff's title at all. That is an essential element of a libel of title claim. That is why it is called libel of title.

THE COURT: Is it limited to only ownership issues with the property and title?

MR. HORWITZ: No, Your Honor.

THE COURT: Or can it also, I guess, contain statements made to the condition of property subject to title?

MR. HORWITZ: No. So there are many ways that you can commit a libel of title. For example, if I put a lien on somebody's property and that lien is bogus, I have clouded their title in a meaningful way. I am liable for libel of title. If I announce that I actually own this property that a plaintiff claims to own, I have put a cloud on their title. They now have to come to court in order to prevent against an adverse possession-type claim. I have clouded their title. If I attach property as part of a judgment, but the judgment does not -- does not exist, isn't final, for whatever reason that attachment was improper, I have clouded the plaintiff's title in that way. There are lots of ways to commit this Court -- or to commit this tort, but the important thing to know is that it has to do with the title to the plaintiff's property. It's not just statements generally about property. Defamation of title concerns title. End of story.

What they have responded to say is not that Mr. Blevins committed any libel of title, but that he committed a different and altogether separate tort of injurious falsehood which appears nowhere in their Complaint and is not part of what we agreed that we were going to be discussing today. And the law is very clear. This Court does not consider anything outside the pleadings --

that includes their responsive briefing -- when adjudicating the motion that we have today.

Handing up for the Court's convenience, Tennessee Supreme Court seminal case on how to adjudicate a 12.02(6) motion. It is Webb vs. Nashville Area Habitat for Humanity.

THE COURT: Thank you.

MR. HORWITZ: Direct the Court's attention to Page 6, Your Honor. Portions highlighted. Quote, The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. Pleadings are specific. They are in a Complaint, an Answer, a Counter-Complaint, Cross-claim. They are not briefing. There is no injurious falsehood claim in this case. They have not asserted one and they have not defended the only claim that they did assert against Mr. Blevins, which is for libel of title.

THE COURT: What about exhibits to the pleadings? Can the Court review those?

MR. HORWITZ: When you say the pleadings, Your Honor, are you talking about the Complaint and the Answer?

THE COURT: Well, I just -- I was e-mailed lots of pleadings that --

MR. HORWITZ: Sure.

THE COURT: -- had lots of exhibits attached to them.

MR. HORWITZ: They added a lot of exhibits to their response, to their memorandum. That is not a pleading and it

cannot be considered. And regardless, they haven't amended or even attempted to amend their Complaint yet. There simply is no injurious falsehood claim in this case.

THE COURT: So the Answer is not a pleading?

MR. HORWITZ: An Answer is a pleading. We filed an Answer here. You can consider an Answer. But there is no libel of -- or there is no injurious falsehood claim asserted in our Answer.

THE COURT: I understand, but then their response to your Answer contained exhibits.

MR. HORWITZ: They have not filed a response to our Answer. They don't get to file a response to our Answer. When I say Answer, I'm talking about the Answer to the Complaint. I'm not talking about the reply briefing.

THE COURT: Okay. Not the reply to the motion.

MR. HORWITZ: Yes.

THE COURT: Okay. Okay.

MR. HORWITZ: And this comes up in Federal Court quite a bit. I'm going to hand up another case for Your Honor's convenience, but Federal Courts use the same procedural rules that we do.

THE COURT: Thank you, sir.

MR. HORWITZ: Your Honor, we have cited this along with several other cases in our briefing here. This is 2020WL2201121, Middle District of Tennessee case. Going to direct Your Honor's

attention to Page 4. And the portion of this opinion that I'm interested in having this Court follow states as follows, Quote, A claim not previously asserted cannot be raised in a response to a motion to dismiss. Read that again. A claim not previously asserted cannot be raised in a response to a motion to dismiss. It cites authority for that proposition and goes on to say further, a brief and cursory reference to the general violation of a statute fails to support a viable claim for relief.

We don't even have a brief, cursory reference here. It is simply nowhere in their Complaint that they have asserted a claim for injurious falsehood. Had they done so, we would have briefed it, but we didn't. We responded to the only claim that they did assert. They cannot invent or inject a new claim into this proceeding by filing responsive briefing, and they don't defend the one claim that they did assert here, which is libel of title. For that reason, they have not established a prima facie case for libel of title. They lose not only at the 12.02(6) stage, but they also lose at the TPPA evidentiary stage because they have not said or asserted or proven that Mr. Blevins said anything ever about the title to the plaintiff's property. That requires --

THE COURT: In regards to the second prong of the analysis?

MR. HORWITZ: Correct.

THE COURT: All right.

MR. HORWITZ: The second element, right, a false statement about title is not met here. It's not even alleged here. They haven't attempted to defend it. They have simply said, we can assert a -- we can sustain a different tort that is nowhere in our Complaint. That means may lose. This is over. You don't have to do anything else. The TPPA petition to dismiss should be granted. There will be further proceedings associated with it. There is a mandatory award of attorney's fees under the statute, for instance, but for purposes of today, all this Court needs to do is say they fail on the face of the pleadings and they fail at the TPPA stage because there is nothing, no allegation, and certainly no proof that Mr. Blevins said anything about the plaintiff's title. That is the end.

I will note briefly for the record, because this is an evidentiary hearing, they have attempted to put in quite a few exhibits here. I'm going to object to two of them that matter. I believe it's tagged DBE in their 500 some page filing. It's this -- I think it's supposed to be a business record of reasons why folks who purchased land on this minefield mountain after learning that there are mines on the mountain decided to back out of that purchase. They have asserted that that establishes causation and the reason why my client can be sued for damages is because they -- these buyers backed out due to his statements.

Those are non-party statements that are not under oath and certainly were not asserted in court that are being offered

for their truth. That is hearsay, Your Honor. Those -- those non-party statements, out-of-court statements by non-parties being introduced for their proof are hearsay. They are inadmissible. This Court cannot consider them.

They also attempted to do a slightly different version of this. I believe it's Exhibit 33. It's a declaration by a buyer who backed out who makes general statements about having read stuff on social media and in the Nashville Scene that motivated him to withdraw his purchase. My client is not mentioned there. They certainly don't attempt to tie that action to anything that he did. It does not establish causation for that reason alone. But, Your Honor, you don't have to delve into this evidence. You don't have to go through their 30 some pages of the exhibits. You don't have to go into our exhibits, even. The fact of the matter is, this is a libel of title case. They have not established libel of title. They haven't even attempted to defend the claim. That's all Your Honor needs to do today. The TPPA petition should be granted. The case should be dismissed.

THE COURT: Thank you.

MR. HARBISON: Your Honor, I -- excuse me -- obviously incorporate everything Mr. Horwitz said on behalf of Mr. Kennedy's heirs. I have a somewhat unenviable task of kind of wading through some of the evidence. And I want to talk about what -- what the plaintiff put in to try to -- to try to satisfy

this step two of the anti-slapp analysis. What they do in their brief is they say -- they make these broad, sweeping statements such as Defendants, plural, said that, you know, the mountain is unsafe, that it's going to sink in, that the houses are going to collapse, et cetera, et cetera. They don't separate out between my client, Mr. Kennedy, and the co-defendant, Mr. Blevins, as co-defendant, which I think is not proper. And when they -- when they do that, when they make these broad statements with defendants plural, they just then point to Exhibit DBC, which is a hundred-page-long document of all the social media posts. Actually, to be technically correct, I believe it's 96 pages. It's not -- it's not numbered, but I counted them.

If the Court read on my reply brief on behalf of Mr. Kennedy, I went through kind of painstaking detail as to -- and pulled out the specific statements that they put in that Mr. Kennedy himself made, because when you -- when -- they didn't do it for you, and I think I can understand why. When you look at those statements, I think there's 18 of them, 17 or 18 that Mr. Kennedy made directly, they really boil down to one of two -- to really two things. First, truthfully stating that there are abandoned mines on Aetna Mountain, something I believe they concede, and then second, the Swiss cheese comment. That's it. That's what they have against Mr. Kennedy. They make these -- so I just want to make sure the Court understands, they make these sweeping generalizations, point to a 96-page document. When you

actually delve into what the evidence really is and really shows against my client, Mr. Kennedy, now Mr. Kennedy's heirs, to be technically correct, it's just, number one, there are abandoned mines there, and number two, Swiss cheese. That's it.

THE COURT: Can you take me back, did he say or allegedly say abandoned strip mines or abandoned underground mines?

MR. HARBISON: I can -- I can -- I can -- it's in Exhibit -- I made a chart, Your Honor, in my reply brief. I may be able to answer that after sitting back down. It may take me a second. But I don't think he -- I don't think he made the -- I don't think he made the distinction. It would be in the reply, the appendix to the reply, where I pulled them all out specifically. I mean, really, what the -- what Mr. Kennedy's statements in particular say -- let me just give a couple of representative examples. He re-posted an article about a different -- about a different development in Chattanooga. I don't see how that has anything to do with anything. Number two, he posted a photograph of power lines, which what I think is Aetna Mountain in the background, but I don't know. I don't see how that has anything to do with anything. He re-posted a post from the River Gorge Ranch Facebook that says, quote, We have some exciting news about our new office. We have relocated our new office at the bottom of River Gorge Ranch. I don't see how that has anything to do with anything.

Skipping ahead, he re-posted what appears to be a live stream of the Marion County Board of Commissioners. Again, what does that have to do with anything? He did re-post some of the Nashville Scene articles, which Thunder put in in their response. Those are, of course, hearsay and I cited the McQueen case, my case about that. It's actually the Intermediate Court of Appeals case that deals with the hearsay levels and newspaper articles. I lost that issue, so I know it pretty well.

What the Intermediate Court of Appeals in McQueen says is that the articles themselves are hearsay. Right? They're out-of-court statements. And, you know, if somebody is quoted inside of them, that's a double layer of hearsay. So Mr. Kennedy and Mr. Blevins are quoted in those -- in those Nashville Scene articles, but you don't even -- you can't even get there because you can't break through the first layer of hearsay.

He re-posted something from, you know -- he re-posted some Chattanooga Times Free Press articles about this controversy. He said, "LOL. You go," to a comment posted by Chris Ridley that had nothing do with this case, same with a comment from Michelle Story. I mean, when you really get down to the brass tacks here and you really delve into their Exhibit DBC against Mr. Kennedy, all they have is him saying there are mines there and the Swiss cheese comment. That's it. Mr. Kennedy certainly never said that the mountain is unsafe. He never said that the mountain is dangerous. He never said that the mountain

may collapse due to these subsurface mines. He never said that homesites are unsafe. He never said any of that. And it's their burden to -- their burden to say. It's their burden to put that before the Court, and he didn't do it. So that's another reason that their -- the Court should grant our anti-SLAPP petition.

I want to talk briefly about their geological report, because they make a lot of -- they talk about it a lot. Of course, they talk about it in the Complaint, didn't attach it to the Complaint, which they are supposed to, but we got a copy anyway. I think first the -- what I call -- I call it the UES report. I think there may be a different name, but -- the geological report, by its express terms, on the very first page, does not address the entire development. It is a limited geo -- geolog -- geophysical -- excuse me -- exploration of Phase One only, 370 out of 2,000 planned lots. So by its own terms, that's -- the geological report is only covering 18.5 percent, approximately, less than a fifth of the planned development. It tested a limited area for risk of subsidence, which is collapse or, you know, whatever, from prior strip mining, not underground mining. It only said that there's no risk of subsidence in the higher elevation lots. It said nothing about the other lots.

And then perhaps most importantly about the UES report -- this is on Page 8 -- it concluded that, quote, Mass grading and/or extensive blasting in the sandstone formations would likely increase the risk of future distress related to any

underlying mines. Increase the risk if you blast or mass grade. They want to claim that this geologic report proves, beyond a shadow of a doubt, that the entire place is great and nothing -- there's never going to be any problem with it. Simply doesn't say that. We don't know about the rest of the mountain. So, I mean, there is a risk there. The UES report says it. Of course, that doesn't really matter with regard to Mr. Kennedy, though, because he never said there was. He never said it was unsafe. He never said it was unstable. All he said was, there are mines there and Swiss cheese. That's it.

I want to talk about the element of falsity. I --

THE COURT: Am I allowed to consider this report, the geological report?

MR. HARBISON: I think the parties agree on that. I mean, it probably is hearsay, but, I mean, I -- we both put it in. We're certainly not objecting to it.

THE COURT: And I read the report and tried to decipher those graphs and --

MR. HARBISON: The graphs were a little much.

THE COURT: -- the maps and so forth the best I could. I did see multiple mentions of former strip mines. I just didn't see any mentions of underground mines.

MR. HARBISON: Well, and that's because when you look -- you have to look at what the scope of the report is. What's the charge? Right? What are they -- what are they

looking for? And it says -- I don't have it in front of me, but it says we're here to look at subsidence risk due to strip mining operations. It wasn't a report -- the best I can read it. I may be wrong. But it doesn't -- it's not a report to look for underground mines. It does, of course, mention the underground mines. And I think they've conceded -- I think everyone concedes and agrees that there are abandoned mines on this mountain. I mean, they said it at the Marion County Commission meeting. The UES report says it. I mean, it -- you know, there's no -- there's really no question that there are abandoned mines on this hill.

THE COURT: Strip mines or underground mines?

MR. HARBISON: Both.

UNIDENTIFIED AUDIENCE MEMBER: Both.

MR. HARBISON: Both.

THE COURT: And you're saying that they stipulate there are underground mines on the property?

MR. HARBISON: In the transcript of the Marion County Commission meeting that we -- I don't have the exhibit number.

THE COURT: I read it. I was just --

MR. HARBISON: I believe that's what it says. And the UES report mentions, you know, underground mines. It says they -- there's voids in the mountain. The quote is, an underlying -- underlying concern for voids or something like that. We -- I mentioned this in my opening brief.

THE COURT: Now, I looked at the scans, and they were identifying portions of sediment and rock that were only about 25 feet deep. Maybe one spot was a little bit lower than that.

MR. HARBISON: Right.

THE COURT: But, for the most part, I didn't see a deep scan of the mountain.

MR. HARBISON: Right. Well, all we have to do is look at Mr. Kennedy's maps for that answer and Mr. Kennedy's own testimony.

THE COURT: And I looked at those, too, tried to decipher those.

MR. HARBISON: Yeah. They're -- they're -- they're -- they're pretty interesting, frankly.

I want to talk about the element of falsity because, of course, that is an essential element of their claim. We're here in step two of the anti-SLAPP analysis. And I would note for the Court and the record that falsity is an element in both libel of title and injurious falsehood. So, you know, we have to have a false statement. Again, Mr. Kennedy said there are underground -- there's -- there are mines there and Swiss cheese. Neither of those is remotely false. I think we are going to probably be concentrating more on the Swiss cheese comment from Mr. Kennedy.

I would draw the Court's attention to the Milkovich case from the United States Supreme Court. We cited this heavily

in our brief. And Milkovich holds that statements that cannot, quote, reasonably be interpreted as stating actual facts because they are, quote, expressed in loose, figurative, or hyperbolic language are not provably false. I mean, that is, to me, we submit, Swiss cheese. Swiss cheese is not a false statement. The maps, the UES report, their own testimony at the Marion County Commission, we all agree, we should all agree that there are abandoned underground mines here. Swiss cheese, of course, does not collapse or cave-in simply because it has holes. It is -- Swiss cheese is not unstable. The fact that I'm sitting up here arguing this is somewhat surreal. Respectfully, the Swiss cheese comment conveys no factual impression that lots for sale will be dangerous. It is the exact type of loose, hyperbolic, opinion-based statement that the U. S. Supreme Court has repeatedly told us you cannot sue for.

I also want to talk about the elements of malice, hatred, ill will, spite. Again, malice is an essential element of both libel of title and injurious falsehood. Thunder's only evidence of malice against Mr. Kennedy, the only thing that they have, is they claim that he made his statements after Thunder refused to purchase his maps from him. That's all they have. There's no public statement I hate John "Thunder" Thornton, I hate Thunder Air, Inc., I hate River Gorge Ranch, nothing like that. So that's -- respectfully, they -- that doesn't satisfy their burden in the slightest. There's no evidence whatsoever

that Mr. Kennedy acted maliciously and there's no evidence that gives rise to any reasonable inference that he did so.

I want to talk about what Mr. Kennedy said in his declaration which they don't even attempt to rebut.

THE COURT: Didn't he say he supported the development?

MR. HARBISON: That's -- that's the -- that's the biggest point of all.

THE COURT: Yeah.

MR. HARBISON: I mean -- but before that, he says he's always -- he's lived there his whole life. He worked for the mining company. He's always known there were underground mines there. He knew this when he made the statements at issue. His knowledge came from a variety of sources, both firsthand and otherwise, his own personal experience. I mean, I think in his declaration, he says there are abandoned train tracks on my property that used to haul coal off the mountain. He honestly believed everything he said was true and he never had or harbored any serious doubt about the truth of his statements.

Secondly, on the malice piece, there's no evidence in the record as to when Mr. Kennedy supposedly demanded payment for his maps. I will concede there is a factual dispute here. Mr. Kennedy says, I tried -- I wanted to donate the maps. Thunder says he wanted -- he wanted us to buy them from him, and when we refused, he got mad. That doesn't matter, because we're not -- we're not at summary judgment. Right? We're not -- you

know, it's not was the red -- was the light red or green. It's do they -- have they filled that bucket, have they put any evidence in this malice bucket, and they haven't, because it was Thunder's burden to tell us when that conversation happened, and they haven't done that. Without knowing the date of when Mr. Kennedy supposedly demanded payment, there can be no inference of malice, let alone a reasonable one.

And then as the Court already picked up on, Thunder's response does not address Mr. Kennedy's testimony, so it's unrebutted that he, first, has no malice. He says that straight up in his declaration. He says, I don't have any malice or hatred towards John "Thunder" Thornton or Thunder Air, River Gorge Ranch, and then, most importantly, he's in favor of the River Gorge Ranch development. How is it possible for someone who is in favor of this development to have malice towards it or its developer? I submit it's simply not possible.

I also -- the last element here, damages, or the cases say pecuniary loss, that is also a common element of both injurious falsehood and libel of title. The parties agree, I think, that this last element -- again, it doesn't matter which cause of action it is. And I think I took this directly from their brief. It has to be the defendants' statements caused Thunder a pecuniary loss. So causation is a part of this. Respectfully, none of Thunder's evidence links the loss of any potential sale to Mr. Kennedy's own statements.

I call the Court's attention to the Ezell v. Graves case from the Tennessee Court of Appeals. Both parties have cited it. It's a libel of title case. And Ezell v. Graves tells us that the pecuniary loss element here must come, quote, directly and immediately from a defendant's statements. And so let's look at and talk about what evidence they did put in to try to establish this. Mr. Horwitz already touched on some of this. They put in a declaration from Mr. Bradshaw, Paragraph 16. And here's what he says. He says, As many as nine potential buyers of River Gorge Ranch lots have backed out because of Defendants', plural, false assertions that lots in River Gorge Ranch were unsafe due to old underground mines.

Of course, Mr. Kennedy never said it was unsafe. They have no proof of that. And they cite Exhibit DBE, which Mr. Horwitz has objected to as being partially hearsay. If we look at DBE -- let's just look at it for just a second. I apologize, Your Honor. It's this document. It's got Property 1, Property 2, contract price, sales price, all that. Let's look at what these hearsay statements, frankly, actually say. Well, there's one in particular that I thought was quite -- quite amusing. Starting with Number 8. After the long reservation process, coupled with the difficult soils, mine news, and the wife not ever being a hundred percent onboard, they have decided not to -- not to move forward. And half of these say things like that, you know -- you know, dropped because of coal mining,

dropped because of abandoned coal mines and septic systems and drinking water. Where is Mr. Kennedy? Frankly, where's Mr. Blevins? They're not -- they're not there.

You know, as the Court has probably figured out by now by this full courtroom, there's a lot of people in Marion County talking about this. It's been all over the news. So they can't -- you know, if some -- if a prospective buyer said, I'm -- I'm backing out because of mines, is it because Mr. Kennedy said there were mines, is it because Mr. Blevins said there were mines, or is it because the county commission voted on a resolution to study the mines or is it because somebody else said there were mines? They don't -- they don't link it up.

Same thing with Exhibit 33. We join Mr. Horwitz's objection to that. That's the declaration. It says nothing about Mr. Kennedy, or Mr. Blevins, frankly. So again, just to conclude my piece on the pecuniary loss element, were these prospective purchasers turned off because of something Mr. Kennedy said, something Mr. Blevins said, or something somebody else said? We don't know. And it was their burden to include that and they didn't do it. So without specific proof directly implicating Mr. Kennedy, Thunder has no evidence of this essential element either.

I do briefly want to talk about the defenses that's -- now we're moving into step three of the anti-SLAPP analysis. We cited this in our reply. Truth and opinion are both valid -- are

both valid constitutional defenses to speech-based claims. An opinion, of course, must reasonably imply actionable facts. I don't -- for reasons I've explained earlier, I don't think the Swiss cheese comment does that at all. At a minimum, it's definitely a statement of opinion. It's also true. I mean, I -- I didn't mean this in jest. If the Court looked at my reply brief, I put a picture of Swiss cheese next to one of Mr. Kennedy's maps, and there is a pretty strong -- they're even the same color. I mean, the maps show a hill that appears to be full of holes.

Last thing I'll say, they did raise an objection to the admissibility of some of these maps. I hit this on reply. They -- Thunder claims that they're not authenticated and that they're hearsay. Those are both pretty easily disposed of. They are authentic under both Rule 901(b)(1) as well as 901(b)(8). I know the Court does a lot of criminal work, so 901(b)(1) should be -- should be easy. Mr. Kennedy's declaration absolutely provides testimony that the maps are what they're claimed to be. That's authentication, easy.

901(b)(8) I don't think I've ever used myself, but Mr. Kennedy's declaration provides testimony that, A, there's no suspicions concerning its authenticity nor have they raised any suspicions about that. B, they came from the prior landowner's family. Mr. Kennedy's declaration talks about how he worked doing strip mining on the mountain years ago and got to know the

owner's family, and the owner's widow, Ms. Dorothy Black, is the one who gave him all these maps. So they came from, you know, a place where you would think they would under 901(b)(8). And then, C, they are more than 30 years old. There's dates on them from the '50s and earlier.

Lastly, let's talk about hearsay. These maps are simply not hearsay under Rule 803(16) because, again, they are more than 30 years old, they, quote, affect, A-F-F-E-C-T, affect an interest in property, and they are properly authenticated. That is a -- I will concede that that is a rule of evidence, 803(16), that I certainly have never used. I don't know if it's ever, frankly, been used, but if you read the language of that rule, these maps fits (sic) that exactly. Unless the Court has any questions, I will sit down.

THE COURT: I guess it may not be proper for me to review it, but do you have a copy of the land sale agreements from River Gorge to prospective buyers and any disclosures that may have been made by the company to these --

MR. HARBISON: We do not.

THE COURT: -- individuals where they may have discovered possible mines, possible instability, whatever, through a disclosure from the company?

MR. HARBISON: We do not.

THE COURT: Okay.

MR. HARBISON: You have to ask Thunder's counsel that.

There's been no discovery in this case, obviously.

THE COURT: I was just -- we were talking about how these individuals may have -- their source of the information regarding -- you pointed out that it could have come from different angles.

MR. HARBISON: It could have come from any -- it could have come from anyone. And, again, under that step two of the anti-SLAPP, it's Thunder's burden to, you know, link that up, to prove that causation for the pecuniary loss element, and they simply didn't do it.

THE COURT: Thank you, Counsel.

MR. HARBISON: Thank you, Your Honor.

MR. KINARD: At this point it's good afternoon, Your Honor.

THE COURT: Yes, sir.

MR. HARBISON: Is it?

MR. KINARD: And I apologize. I did not introduce myself properly before. Nate Kinard of the Chattanooga Bar from Chambliss, Bahner & Stophel representing Thunder Air. It's good to be with you. I'm going to try not to take 50 minutes. And there's a lot here. So at any point, Your Honor, I would invite you to ask questions, but I've got -- I'm going to try and hit some important points.

THE COURT: Yes, sir.

MR. KINARD: Let me start by trying to walk through

sort of chronologically with what Mr. Horwitz and Mr. Harbison argued and interspersing some of our responses throughout.

This is a case involving the TPPA. We do actually dispute that their prima facie case has been satisfied under the correct interpretation of law, that they have appropriately shown this case does involve the TPPA, but we think that we'll have to get an Appellate Court to revisit the law on that in order to succeed on that issue, so at least for the purposes of this hearing, we're not contesting it, but we do preserve that for appeal.

The second thing is, on this slander of title business, I'll be frank, Your Honor. I am very surprised that they came down from Nashville to argue this point. So last I checked, we're in Tennessee. The pleading standard in Tennessee is liberally construed in favor of plaintiffs. There are a dozen Tennessee Supreme Court cases saying look at the substance and not the form of a claim. We look at the underlying allegations. Do those underlying allegations state a claim?

And let me give you some specific examples of that. I think one of the best is from a case called Brown vs. City of Manchester, Tennessee Court of Appeals, a reported case by Judge Koch, who then ended up on the Tennessee Supreme Court. And in that case, the plaintiff had asserted a breach of contract claim. That's what he called it in his Complaint. And on appeal, the defendant had got -- they'd gotten it dismissed. And so it goes

up on appeal and the defendant says, hey, all he's got is a breach of contract claim. He can't try and get any other kind of claim in here. And the Court said, no, that's not how it works. We can look at these allegations and we can see that there's actually also a quantum meruit claim. Quantum meruit is a quasi contract claim. It is not a contract claim. The Court said, that's not how it works. We look at the substance and not the form, and the allegations identify a different claim here.

Now, does the Tennessee Supreme Court agree with that interpretation? Yes, it does. The Tennessee Supreme Court, in a case called Abshure, cited that specific case in support of the proposition that we look at the substance and not the form.

I'd also identify Donaldson vs. Donaldson. This is from the Tennessee Supreme Court, 557 S.W.2d 60. The plaintiff had labeled his claim abuse of court process. And the Court was analyzing whether the Complaint stated a claim, and it said, we're going to look and see whether this, the Complaint, identifies either an abuse of process or a malicious prosecution claim. Nothing suggests that there was malicious prosecution included in that Complaint. Nonetheless, the Court said, we're going to look at it, because the allegations could go in that direction. Sounds an awful lot like their argument. You know, I'm sure that the counsel for the defendants would have said, well, there's no malicious prosecution label in here. That's missing. We don't see that. All they say is abuse of court

process. That's not the analysis that Tennessee Courts utilize.

And this is also really familiar when you're analyzing the gravamen of a claim for statute of limitations purposes. Right? If the defendants were right, that you just focus on a label that's slapped onto a claim in a Complaint, then you could get a tort under your six-year statute of limitations or a -- by saying breach of contract claim. That's not how it works. If you try and do that, the Court is going to look and say, I know you call it a breach of contract in your Complaint, but I can tell, based on these allegations, it's a tort claim. This isn't how we do it here in Tennessee.

And despite their strong assertions that we've abandoned the claim that we've made in our Complaint, that's just not the case. This is a semantics game. It really is. Libel of title, we cited a number of hornbooks, distinguished authors in the field, that say libel of title, slander of title, disparagement, trade libel, these are all words that really overlap. It's a really imprecise term.

I even brought the hornbook, Your Honor. Prosser and Keeton on Torts. I bought this in law school. Dean Prosser says this. "The earliest cases, which arose shortly before 1600, involved oral aspersions cast upon the plaintiff's ownership of land, by which he was prevented from leasing or selling it; and from this tort acquired the name" -- and from this, the tort acquired the name of slander of title. So maybe their argument

would hold water in 1600 England.

The next page. In the 19th century, if -- "This tort was enlarged by slow degrees, first to include written aspersions and the title to property other than land, and then to cover disparagement of the quality of the property." Isn't that what we're arguing about, Your Honor? The Complaint very clearly articulates that the defendants have made disparaging and damaging statements about the conditions of the land, that they've been talking about there being mines on the land. And, in fact, the Complaint itself -- you've got a copy in front of you, Your Honor -- if you look, for example, at Paragraph 27, there's a similar allegation as to Defendant Kennedy.

Defendant Blevins' written statements constituted libel of the plaintiff's title. Right? What we're saying is, the allegations that you have above are stating a certain claim. If you see right above it, Defendant Blevins' written statements were disparaging to Plaintiff's property in River Gorge Ranch and to the value of the plaintiff's property rights therein. And you can see the allegations themselves. Several of the alleged statements specifically refer to the quality of the land. I mean, I think it's difficult to dispute that if you say there's underground mines under a piece of property, that you're talking about the quality of the property. And when you're talking about property in which you are trying to sell so that people can build beautiful homes on, that is a disparaging statement.

Let me also look at the restatement briefly. I think anytime the restatement is on your side, you can't let it -- you can't fail to mention it, and here it strongly favors our position, Your Honor. This is § 623A of the Restatement (Second) of Torts. "The general principle stated in this section is applied chiefly in cases of the disparagement of property in land, chattels, or intangible things or of their quality." Looking at § 64, Comment (a), it's a disparagement of property -- its title is Disparagement of Property, Slander of Title. In Comment (a), the restatement says, "This particular form of injurious falsehood that involves disparagement of the property in land, chattels, or intangible things is commonly called slander of title." It goes on to say, "The extension of the liability to other kinds of injurious falsehood has left the terms, quote, slander of title, end quote, and disparagement merely as special names given to this particular form of the tort." We're just playing with words here. This doesn't -- is no basis to reject Thunder Air's claim.

And then at 629, it's literally defining disparagement. What are the kind of statements that are actionable? In the body of the -- § 629 itself, "A statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels, or intangible things." And it goes on. I mean, it's right there in the text. It's buried in our brief, which is long. We cited some other treatises that say similar things.

Some of that is in itty-bitty, little footnotes. We included some -- some background. There's this one treatise cited by several influential sources. It said that the term "slander of title" is a ludicrously incomplete statement of what is now connoted thereby. That was in 1924. In 1924, it was ludicrously underbroad to describe -- to say, you know, slander of title is just about title.

So I think since we've clearly refuted that the mention of the term "slander of title" in our claim or literally anywhere else or even if I today had said we've pleaded a slander of title claim, it's really irrelevant. The point is whether the allegations in our Complaint assert a claim. The only difference between our claim and a kind of claim that frequently arises in Tennessee is that our statement is about quality and not about, you know, the ownership interest in the land specifically. That's the only difference. There is no other difference. I would submit it makes really no sense at all to say, oh, there's a claim when there is -- when you're talking about title, but no claim at all, you're out to lunch if it has to do with the quality of the land.

Oh, and I should mention these restatement sections, why do they matter, putting aside the fact that the restatement is a pretty solid source considering the Tennessee Supreme Court frequently adopts it and relies upon it, is that those specific sections have been adopted and relied upon by the Tennessee Court

of Appeals. Wagner vs. Fleming, we cited it at length. It says this. Difficult to square with some of the characterizations of this case that I've heard this afternoon. The Court said, "The defendants argue that the trial Court erred in holding that there is a cause of action for injurious falsehood in Tennessee. We disagree with the defendants. We hold that such a cause of action does exist in this jurisdiction." It goes on to quote and cite restatement sections that I was just describing to you earlier.

Now, they say, well, there are some later cases, you know, questioning that. None of them mention this case at all. One of them is a federal case, the other is an unreported case. I don't think that there is good authority to undermine this very clear statement from Wagner vs. Fleming.

I took some detailed notes on some of these federal cases that the defendants relied upon in trying to say that we crafted a new cause of action in our response. I think I've refuted that we crafted a new cause of action in our response, but I'm happy to talk about these federal cases. I'll just briefly note, unless there are any more questions, that there are federal cases, applying the federal pleading standard, which has been clearly rejected in Tennessee, and also it's just simply not what we're doing. You look at the underlying allegations in the Complaint and they state a claim.

Now, Mr. Harbison spent some considerable time talking

about some of the other elements in this case and some of the -- some of the facts in this case. Let me address those, but I want to flag that we have a procedural issue in connection with arguing over the facts in this case when we have a pending motion requesting discovery in this case. He keeps saying, they haven't shown their prima facie case. Well, we want discovery. We can't get it unless the Court approves us going to get that discovery. So let me just flag that and we'll come back to it later. I want to talk about some of this evidence.

Mr. Harbison talked a lot about, you know, specific statements by Mr. Kennedy. If you look at Page 4 and 5 of our brief, we talk about specific statements by Mr. Kennedy and Mr. Blevins, and in Mr. Kennedy's case, he was considerably less loquacious than Mr. Blevins, but he frequently would re-post things, statements of others. Now, I think it's up to a jury to say what that means. If Mr. Blevins said -- described that the property -- or himself was referring to the property as dangerous and saying it was undeniable that it was dangerous and Mr. Kennedy then re-posted that, I think a jury could determine whether or not Mr. Kennedy was adopting that statement himself. And we'll come back to that.

I think when we're trying to identify whether a particular statement is actionable, there's two questions here. First is, is it capable of having a disparaging meaning, and the second question is whether it is, in fact, false. Capable of

disparaging -- they're related, but they're not the same. The Courts will look and see whether a statement is capable of a disparaging meaning. It's a really -- it's a low initial step. So, you know, if I refer to Mr. North as a jerk after receiving an assignment as an associate a long time ago at 7:00 p.m. on a Friday to my wife, that's not actionable. Right? Whether he is or is not, calling somebody a jerk isn't. Right? There's other things that are sort of really vague, but when you're trying to analyze whether any given statement is, it can be really difficult to do this sort of analysis. And, obviously, the question here is about the Swiss cheese statement. Right? It's a short statement, and in this particular case, because of the context of the statement and the way in which it has been interpreted, I think that this is the sort of thing that needs to go to a jury, Your Honor.

And let me start by looking back to the restatement. I think it will put us on maybe more solid ground in trying to do our -- do our job here. The Restatement (Second) § 629, Comment (f) says this. If the communication is intended to convey a disparaging meaning and is so understood, it is immaterial that reasonable men would not have -- would not have so understood it. That actually directly contradicts what Mr. Harbison was saying that, you know, it has to be reasonably understood. Well, if you might think reasonable people wouldn't interpret this Swiss cheese statement as being disparaging but

that's how Mr. Kennedy meant it and that is, in fact, how people did understand it, then it's actionable. And we have, I think, pretty clear evidence of that, Your Honor, all without the benefit of discovery.

If you look at Footnote 2 of our brief, Page 5, we have several news articles quoting or referring to his Swiss cheese statement. They don't dispute that he made the statement. Right? So we don't have any sort of hearsay issue about whether he said that this mountain is Swiss cheese and there's no hearsay problem as to the articles because we don't think that it could probably describe Thunder Air's land being like Swiss cheese.

But these articles say this. This one is from Mr. Taylor. "A former miner on Aetna and a student of the mining history there, Kennedy called the mountain a Swiss cheese of abandoned coal mines." Another one from Mr. Ben. That's in -- this next one is in the Chattanooga Times Free Press. "That Mountain is what some people call Swiss cheese, Kennedy said." And then finally another one from Mr. Taylor. "The location sits atop what locals call a, quote, Swiss cheese, end quote, of abandoned coal mines, some dating back to the 1840s." Right?

So people have been understanding his statement about Swiss cheese to be saying something factual about the land. And here it's -- it's very pithy. I wish I was so clever to be able to communicate a very powerful, very serious idea in a way that captures the imagination so well, but being clever doesn't

insulate you from liability. And I think a jury could definitely make the determination that what Mr. Kennedy was talking about is about that there being so many underground coal mines under River Gorge Ranch's land that people should look at it as if they were looking at a piece of Swiss cheese. I would never build a house on something like that.

Let me talk about this UES Report. I looked at this report and asked myself a couple of times, what exactly does this mean? What are its precise scopes? Well, that sounds like something discovery is for. That sounds like something that I'd want to put a witness on the stand and I get to ask them questions about it. What are the important limitations of this? Is this, in fact, the way -- what you're trying to say? I mean, we think that they've misread the report.

You have declarations from Mr. Bradshaw and from Mr. Howard explaining what they understand the report to mean, and they've been working with these geologists for some time. My understanding is that Thunder Air paid about a hundred thousand dollars for the geologists to put together this information, you know, so that they could understand that, in fact, you know, this development is not going to cave in, that it's not dangerous because of underground fires or old underground mining activity. So I don't think you can look at this report and say this case shouldn't go to a jury, this case shouldn't even get any discovery. Quite the contrary. I think it strongly supports our

position.

Couple of evidentiary points. The maps that Mr. Kennedy attached to his declaration, he doesn't specifically say what each particular one is. He said these are -- this was given to me by the widow of a person that owned a mine up on Aetna Mountain. The person that actually drew these maps or that has personal knowledge of whatever these documents are, there's nothing in evidence from whoever that person is. And we don't actually know what these things go to. He doesn't claim to have ever even tried to, like, follow one of these maps and to see, oh, does this, in fact, correspond to a mine on Aetna Mountain. We don't know any of that. This is a pure guess. If they were to say we purport that these are old documents, I don't think we'd object, but what they are saying is that these actually represent mines presumably under River Gorge Ranch land, right, but you definitely can't get that from looking at the documents and they just haven't laid the foundation for that. Also they're hearsay. I mean, whoever -- you know, whoever wrote those maps decades ago, presumably you'd have to get some evidence from them or something else to corroborate it. Or some new maps. Let's see.

THE COURT: You don't think 901 authenticates them?

MR. KINARD: I don't think so. I mean, so they're saying, well, they are what we say that -- what they appear to be, what they say they are. Well, they don't actually really

precisely say. He says, I got these from the widow of someone. Right? How do we know that she knows what they go to? We don't know what Mr. -- if Mr. Kennedy knew what they went to either. Putting that aside, it's still a hearsay problem, but -- you can't look at that and actually say I know what this means or what this purports to be. I'm not even sure what it purports to be. You can't look at the document and say that.

And as for the hearsay exception and the 901 authentication based on it being a document that affects an interest in property, a map of land does not affect an interest in property. That's not what that exception is about. That exception is about deeds, negotiable instruments, things that are themselves transacting land or some sort of legal document. That's why they are given a higher imprimatur of quality or liability, but I definitely can't look at those maps and say this is the sort of thing, like a deed or an instrument, something like creating a mortgage in which I have a high confidence that this wasn't -- or that this is what it looks like it is. That's just not the case here.

As to the evidence of the malice of the defendants, well, we want discovery on that, so it's a bit of a cheap shot to say they haven't satisfied their prima facie case and they haven't shown evidence of malice while we have a motion pending asking for that discovery. I mean, if they just wanted to agree to it, then we could have -- we could have gotten that discovery

and maybe we'd have a more serious discussion. Either way, we have more than enough to go to a jury on this.

And, again, this isn't -- the Court isn't the decision maker on this case. It will be a jury. And what could a jury come up with? We already, I think, have enough to go to a jury. So if somebody says something that is -- a jury could determine to be disparaging and there is evidence of, you know, vindictiveness or some sort of spite, I think that's enough to show malice, because, after all, there aren't a whole lot of defendants that are willing to write a declaration that says, sure, I was acting with malice. Right? A self-serving declaration I don't think really should get you very far.

In this particular case with Mr. Blevins, he approached representatives from Thunder Air and he wanted to go riding across Thunder Air's land. He wanted a key, in fact, to accessing their land. When Thunder Air said no, he responded very negatively with words that we can't appropriately reproduce here, Your Honor. And, in fact, Mr. -- I think it was Mr. Howard's declaration reproduces how, after that event, Thunder Air started getting calls from regulators, administrative agencies, people with serious power over land developers. And when -- when Mr. Blevins was asked what's going on, he didn't deny that he had been making these calls. I believe Thunder Air representatives said, why are you making these calls? Why are you doing this? And he said, well, you won't give me a key.

That's, I think, pretty good evidence of malice and I think actually very strong evidence that, you know, Mr. Blevins was indeed intending to damage the River Gorge Ranch development.

As for Mr. Kennedy, again, we haven't had discovery, but similar, he wanted pecuniary gain from River Gorge Ranch. He came up to -- he came up and met with representatives from River Gorge Ranch and he said, hey, I've got all these maps of these things. This is my retirement, you know. I'd like you to buy them from me. And they said, no, we don't want to buy these from you. I suspect that it's because they wanted to get a professional expert with experience in the field to do a scientific analysis like the UES report, but they said, no, we don't want to buy these from you, and he became visibly upset when they said, no, we're not interested. So also he lost out on and was -- became visibly upset because of this experience.

And, I mean, frankly, him saying in a self-serving declaration I don't have any malice doesn't really -- I don't think that carries the day. A jury could certainly disagree with them, especially since in his declaration he gave a different account of the events of that important meeting. He said, well, I wanted to donate them. Well, we have witnesses that say, no, you wanted money and you were upset when you didn't get it. So we have strong reason to think that he's not -- he wasn't being truthful in his representations to the Court. A jury could think the same.

And him actually saying, well, I actually support the development, well, he attended a commission hearing and opposed it. And when he was re-posting all of these articles on his Facebook, including lots of damaging statements about River Gorge Ranch, it doesn't look like he was trying to support it. I think a jury could easily find to the contrary.

As to causation, we don't have discovery, but on top of that, could a jury find that, based on the evidence before the Court, that there is, in fact, sufficient causal link between the defendants' statements and the injury to their land? I think certainly yes. I don't think there's -- there's no case that says your witness has to specifically say I saw this person's statement and it's because of that person's statement only. Right?

First of all, in torts generally, and specifically as to this tort, all you need is that the defendant's wrongful actions were a substantial factor in leading to the injury. So if you have a property owner that says, you know, I'm not sure that my wife really liked the property anyways, but also because of these damaging things that have been said about mines on the land, that's why we backed out, that's a substantial factor in leading to the injury here.

You know, I think that the fact that this business record detailing reasons that River Gorge Ranch salesmen received from -- received from potential purchasers, some of whom were

under contract to buy, and the fact that it includes things that are unrelated to the mines I think supports the importance and the veracity of that information. It's just saying what these potential purchasers said. And we even have a declaration from one of those purchasers specifically that relates statements about the mines and the old mining activity on the mountain as being, if I recall correctly, at least a substantial part of the justification for them choosing not to move up there.

This is just not a case in which the plaintiff had their panties up in a wad, getting their feelings hurt about something. Thunder Air is not in the business of doing that. Thunder Air is trying to have a development and they are trying to build a beautiful homesite and beautiful community on the mountain. And when there are people that are spreading baseless claims about the quality of that land and people are walking away from purchases, even being under contract, because of those statements, that's actionable.

Your Honor, if there are any questions that you have.

THE COURT: I guess the same question I posed to defense counsel. What type of disclosures does your client make to prospective buyers? Are they put on notice at that point of potential old mining operations on the property?

MR. KINARD: To be candid, Your Honor, I do not know what sort of representation is made. I simply haven't seen those documents. So I don't know.

THE COURT: I'm just looking at other potential sources that they receive information regarding possible mines on the property.

MR. KINARD: And that's exactly the sort of argument that I think we expect to have in front of a jury.

THE COURT: And then I guess the last question is, in looking at your Complaint, I don't see any allegations directly stating that because of these alleged statements, that people backed out of purchase agreements or that sales were lost because of it. There's allegations that, because of these alleged statements, that your client incurred expenses and costs that they will now have to use to rehabilitate the value of the property and so forth. It says other expenses, but there's no direct allegation in your Complaint that says because these gentlemen allegedly made these statements that these people backed out of the purchase agreements.

MR. KINARD: So --

THE COURT: I don't see that language in your Complaint.

MR. KINARD: Sure. So let me -- let me address that. If you look at -- in the ad damnum section, Section C, "That this Court award judgment against Defendant Blevins for all damages and expenses caused by the wrongful acts of Defendant Blevins, including," and then it lists other things. I think -- and there's -- in Sub D -- this is on Page 6 of the Complaint -- it's

the same framing. So --

THE COURT: Okay. So you're saying it could go from the cost of putting up a billboard that says there's no mines on this mountain, you should buy a beautiful home here, to having to pay for 15, 20, 30 people's broken or breached, whatever, purchase agreements?

MR. KINARD: So --

THE COURT: You're saying that's the range of damages you're alleging?

MR. KINARD: Assuming that a jury were, in fact, to find that there's a causal relationship and all the other elements are satisfied, that is the case. I mean, there are lots of cases saying that if you're talking about trying to repair the value of the land, it's no -- it's what's ever appropriate. Attorney's fees are clearly covered. There's lots of cases saying that, that you can -- which is very unusual. Right? I mean, that's one of the very rare, non-statutory exceptions to getting your attorney's fees in a lawsuit.

THE COURT: Yeah.

MR. KINARD: There are a couple cases. They don't dispute that. But yes, arguably. And at this point -- our prima facie evidence doesn't at this point include something like putting up a billboard. What it has is, we had these potential purchasers. They backed out. We have a --

THE COURT: Where's that in your Complaint?

MR. KINARD: No, that's in the evidence that we've supported. And I don't think that the Complaint has to identify each particular way in which someone was damaged.

THE COURT: Does it -- shouldn't it at least put the other side on notice about what they have to defend against?

MR. KINARD: I think that if you have a claim that we have suffered damages as a proximate cause, that's enough. I don't think there's a case suggesting the contrary, because under Rule 8, you have to have a short and plain statement of what the claim is. Much more important is what the nature of the wrong is, I think, Your Honor, rather than identifying each particular way in which you have suffered damages.

THE COURT: But at the time you filed the Complaint, you had your, I guess, list of purchases that have -- that fell through, essentially, that you're alleging occurred because of these statements, though; correct? You had your number already figured out.

MR. KINARD: I don't believe so, Your Honor, no. And, in fact, I know for a fact that Exhibit 33, I think it was, did not -- that that list had not been created in that form at that time.

THE COURT: So at the time the Complaint was filed, it was speculative?

MR. KINARD: No, Your Honor. I mean --

THE COURT: Well, you don't -- you didn't know what

your damages are.

UNIDENTIFIED AUDIENCE MEMBER: Uh-huh.

MR. KINARD: I think we know that it had, in fact, suffered damages. That had been calculated in a precise number? No. And there's no case saying that you have to do that, Your Honor. I mean, that would run very much to the contrary to the principle that it's a short and plain statement of the claim. Also we have the other ways in which we've suffered injury which are clearly covered by -- clearly covered by the cases that address it.

THE COURT: Again, hypothetically, because --

MR. KINARD: Sure.

THE COURT: -- I'm just trying to sort it out, hypothetically, then, you're alleging that they caused damages that could be in a couple of thousands of dollars to a couple of millions of dollars and you just don't know that number yet?

MR. KINARD: At this point, I mean, the damages are accruing, so -- which is a very common thing in business-type cases is that you have, for example, lost profits, which we're not saying right here, right now. We're talking about difference in value of properties is what the evidence is before the Court, but, like, lost profits is frequently calculated up through -- you know, up through trial, certainly after the Complaint was filed. That is perfectly unremarkable. You obviously couldn't put that in your Complaint because it happens after the

Complaint. So I think that might be some sort of analogy. Compensatory damages don't have to be -- you know, the nature of those compensatory damages don't have to be specifically identified in a Complaint in order to plead the claim. And that's the point I'm making, Your Honor.

THE COURT: I agree with you. They don't have to be specific --

MR. KINARD: Sure.

THE COURT: -- but it seems like there should be some sort of parameter from which the defendants are put on notice of what the potential damages are.

MR. KINARD: That's what discovery is for.

THE COURT: How could you ever settle a case if you don't know what the potential damages are?

MR. KINARD: Well, Your Honor, I've done it dozens of times, personal experience. That's what discovery is for. For example, Your Honor, in Federal Court, you have mandatory initial disclosures which come after the Complaint.

THE COURT: Right.

MR. KINARD: Right?

THE COURT: Right.

MR. KINARD: And in State Court, you -- it's very standard to file discovery requests seeking exactly that information. Tell me what are your heads of damage. What are the types of damages? How are you calculating those? That's

ordinary. That's how you get that sort of information, because it doesn't come in the Complaint.

THE COURT: All right. Is there a cut-off line for these alleged damages? You said they're still incurring or accruing, I guess would be the property term. Then if somebody backs out of a purchase two or three years from now?

MR. KINARD: I don't know the answer to that question.

THE COURT: And they cite, well, we heard there might be mines on the property. Does that go back to them as well?

MR. KINARD: I think --

THE COURT: How would you -- how would your -- your causal link seems to get weaker as time expands.

MR. KINARD: Certainly. Right. I think -- I think that's the sort of argument that the defendants will be presenting to a jury is -- and especially the farther in time you get away, especially there's, you know, more -- you know, more and clear evidence cutting the other way. Right? Or you might even say we don't really believe those people. Right? Those are all the sorts of credibility determinations. Like it's very common in tort claims, when you're identifying the scope of damages, to say there's too tenuous of a link between this, either due to the passage of time or it's simply too improbable, but those aren't things that we resolve at this stage, but that's exactly the sort of battles that I expect we'll be fighting.

THE COURT: So you want the case to go to a jury?

MR. KINARD: Did I say that, Your Honor? Yes.

THE COURT: So you expect a Marion County jury to hold Mr. Blevins and the estate of Mr. Kennedy liable for millions and millions of dollars?

MR. KINARD: Your Honor, we haven't specifically identified millions and millions. In fact, if you look at the evidence that we've put in front, it's -- from those eight particular properties, I think it was $36,000, right, was a net differential. Now, that's in part because there were -- you know, different properties shook out a different way. But whether or not a jury will, in fact, make that decision is going to be up to the jury. And this is an important case. This is simply not the sort of case that needs to be killed in the bed as the defendant would like.

THE COURT: Yes, sir. Thank you.

MR. KINARD: And sorry, Your Honor. One final point. If -- if the -- I want to reiterate we have this motion pending for discovery.

THE COURT: Uh-huh.

MR. KINARD: My understanding, based on the communications between the parties, was that the defendants intended to argue just about this -- this semantic argument about what slander of title means today and that's why we agreed to have the motion for discovery heard today, at the same time. I think the result of that -- we've gone beyond it, which is fine.

We were ready. But if the Court intends to also address these other issues at this point, beyond just that construction of the pleadings issue, then we're going to need a resolution on the discovery, I think, before the entire matter can be resolved, even if that's in Thunder Air's favor, Your Honor. And the reason for that is because a TPPA petition can be immediately appealed. And so assuming the Court were to find there's enough here that we need to go into discovery, then it would be appropriate to get discovery that we've requested before the Court rules on the motion so that a complete record can go in front of the Court of Appeals. We don't want to have to go back up and then come back down and go back up.

THE COURT: I understand. I just thought I'd talk about the issues since I have all of you in the same room.

MR. KINARD: Sure.

THE COURT: It seems kind of difficult to get you all in the same room, so I thought, while I was here, I would maybe go beyond the limits of, I guess, today's hearing, but okay.

MR. KINARD: If you couldn't tell from our briefing, I'm perfectly happy to tangle with some of the theoretical issues and certainly appreciate the Court's attention on that, Your Honor.

THE COURT: Thank you, sir.

MR. KINARD: Thank you.

MR. HORWITZ: Your Honor, I discovered during the

course of that presentation that there are some things that we agree on, Thunder and I. The first is that I am surprised we had to drive all the way from Nashville to make this argument. I've done dozens of these TPPA cases and I have never encountered one quite this easy where the cause of action that is asserted in the Complaint is undefended in response to the petition.

The second thing that we agree on is that they have conceded that step one of the TPPA analysis is met here. They are apparently reserving something we don't know about for challenge on appeal. I think that is probably waived. It's not anywhere in their briefing. But they have conceded, at least for purpose of this hearing, we have met our burden in step one. We are on to step two.

Now, I heard my friend on the other side say that we are playing with words, playing with words regarding these torts. We are not, Your Honor. These are not synonymous torts. They are different torts with different elements, meaningfully different elements. One requires a statement about the title to the property. The other one does not.

An injurious falsehood claim requires, quote, intent. It's an intent-based tort. He intends for publication of the statement to result in harm to the interests of the other. These are just simply not the same thing. I've just discovered for the first time, again, not anywhere in their briefing, that despite having filed this Complaint months ago, despite us having filed

our TPPA petitions months ago, despite us having come to this Court, gotten an agreed order that we were going to brief and argue about a libel of title claim, that this plaintiff, with his four attorneys, thinks he should be treated essentially the way a pro se litigant who can't draft a Complaint competently would and have this Court ignore what they wrote and read in a different cause of action that is unasserted.

Your Honor, nobody doubts that this Court reviews the gravamen of a Complaint. Everyone is in agreement on that. And when you read this Complaint, whether the gravamen of it is a libel of title claim or an injurious falsehood claim is not seriously disputable. It is a libel of title claim. They say it repeatedly. They don't ask for -- there was some commentary, some discussion between the Court and opposing counsel about rehabilitating the value of the property. That is not what this Complaint says. Paragraph 28, rehabilitate the title of Plaintiff's property.

And I'm simply going a step further as to why this matters so much. Now, Your Honor aptly noted there is no claim about damages related to people backing out of contracts mentioned anywhere in this Complaint. The reason, of course, is that they learned, in response to our TPPA petition, that they had a really big problem with their libel of title claim, which has no hope of surviving. So within the past two weeks, they have determined that this Court should ignore everything they

wrote, ignore what's in the agreed order, and then treat this as something else entirely, but that's why this wasn't asserted here, because they have never been asserting an injurious falsehood claim from the get-go.

But when I said I was going to go a step further, Your Honor, this is a Chancery case. Your Honor would not even have jurisdiction to adjudicate an unliquidated damages claim for injurious falsehood. The only reason a Chancery Court, where this was filed, would have jurisdiction over this Complaint as filed is because they were seeking to rehabilitate title. That's equitable relief related to clearing a cloud of title and it's also why attorney's fees are permitted in libel of title actions specifically, because if somebody, for instance, announces that they own property that, in fact, I own and I sue them for libel of title and seek an equitable declaration that I have clear title to my property, the only reason I had to do that is because announcing some cloud on a plaintiff's title requires you to come to court to avoid an adverse possession claim down the road. Libel of title is unique. The cases say that repeatedly. And they cannot sustain libel of title.

They have also never argued, until this moment here today, that this Court should construe their libel of title claim as a different tort. What they argued instead is that libel of title and injurious falsehood are the same tort. That's what they argued in their briefing and it is not correct. Again, Your

Honor, Tennessee law settles this. I don't have to go to a 1926 restatement. I can just look at what the Tennessee Court of Appeals has said, and the elements of these torts are different.

Bottom line, Your Honor, they asserted a libel of title claim. They cannot sustain that libel of title claim. They know they can't sustain the libel of title claim. They haven't attempted to defend it. What they have attempted to do instead is say, we can sustain an injurious falsehood claim that our Complaint does not assert, that is mentioned nowhere in our agreed scheduling order, that the other side did not brief, but we are begging you, Your Honor, to be treated just as a pro se litigant who handwrote a Complaint would and just discern, divine some cause of action to avoid the sanctions that they are due. Your Honor should regret the -- reject the invitation. It is totally improper for this Court to deprive us of notice for something that we briefed almost five months ago at this point.

Regarding overlapping terms, these torts are not overlapping. In fact, injurious falsehood is a broad category. It's an umbrella category with a bunch of different torts within it. Some of those torts have been recognized under Tennessee law. Some have not. Libel of title has been recognized under Tennessee law. Other torts within this umbrella have not, but they are not the same thing. What the Tennessee Court of Appeals has said repeatedly is that one is a species of the other. It is a narrower subset that has very specific elements, one of which

is false statements about the title to the property. They cannot meet that element. They don't even attempt to. This case is over as a result.

I do want to make a slightly broader point as to why the Tennessee Public Participation Act is necessary, why this case is as important as the defendant states. My client, Mr. Kennedy, did a public service. They brought attention to the fact there are abandoned underground mines on this property the plaintiff was selling to prospective buyers who apparently had no idea that they were there. That is important. The first amendment protects the right to convey that information to the public. But unsurprisingly, I don't think anyone is surprised, actually, to be here, because this has been true for decades, and the Tennessee Court of Appeals has explained why the Tennessee Public Participation Act is necessary to protect defendants just like my client.

This is from Nandigam Neurology. Happens to be my case. The first case the Tennessee Court of Appeals ever issued on the TPPA. And they state, quote, The paradigm SLAPP suit is one filed by developers unhappy with public protest over proposed development filed against leading critics in order to silence criticism of the proposed development. That is exactly what happened here. This multibillion-dollar development on top of a mountain that is pocked with underground coal mines is angry at the leading critics of that development for bringing public

attention to the fact that they are building homes on top of abandoned underground mines. That is absolutely his right, the law protects that right, and it is no surprise that the plaintiff, the multibillion-dollar developer here would come here and seek to silence it. Tennessee Public Participation Act forbids them from doing so.

I heard him say that this should never have been -- should not be killed in the bed. Your Honor, this should never have been filed at all. The Tennessee Public Participation Act contains robust provisions to deter plaintiffs from doing exactly what they are doing here, abusing the legal process, abusing the legal process to silence criticism like Mr. Blevins', which is totally protected by the First Amendment and which they have absolutely no basis for doing.

I'm going to ask this Court to expedite a decision here. I'm going to ask for a decision today, if possible. From Nandigam, the Court of Appeals has been clear, expedient resolution is contemplated under the TPPA. They have succeeded in delaying adjudication for months now and then two weeks ago pretend that they asserted a different tort entirely and this case should be extended as a result. Your Honor, this case should end today. I'd like Your Honor to hold step one is conceded. Step two fails because they cannot establish the libel of title claim that they actually asserted.

The only other thing that I wanted to clarify, Your

Honor, I believe you asked me when I was first up here as to whether you can consider these things that are appended to their response, that are appended to our briefing. I answered a question, then I realized later, when Mr. Harbison was presenting, we were probably -- I was probably answering a different question than the one you had. The correct answer is this. Yes, you can consider the exhibits, right, that we have appended to our memorandum, that they have appended to theirs, at least where there are no objections to admissibility. You can consider those for the purposes of the TPPA analysis, but what you cannot do is consider briefing for purposes of determining what their cause of action is. They said what their cause of action is. They said it in the Complaint.

The Complaint that they filed is incompatible, incompatible with the claim of injurious falsehood because they talk repeatedly, at least twice, about rehabilitating title, which is irrelevant to an injurious falsehood claim. Rehabilitating title is unique to a libel of title claim, which is what they asserted, which is what they came to court a month ago and submitted an agreed order claiming that they assert it, only to realize afterward they have got no chance, no hope of prevailing under a libel of title claim, so they better come here and ask this Court to, you know, give them a break and pretend that they asserted something else entirely. This Court should not do it. But for all of these reasons, this Court should grant

this TPPA petition today.

If you have any questions, I'd be happy to answer them.

THE COURT: Thank you.

MR. HARBISON: Another, I think, telling quote from the Nandigam Neurology case, Your Honor, that talks about what SLAPP suits are and what's the motivation behind them and how Courts are supposed to deal with them, I'll just read you the quote. A SLAPP suit is, quote, one discouraging exercise of constitutional rights, intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff's actual rights. That is this case.

A few points, and I may be a little scattered here. On the argument that this case -- you know, the kind of half argument that this case doesn't implicate the TPPA at all, we're at step one, again, they've conceded it. I agree with Mr. Horwitz. I don't know what they are going to try to do later, but the McQueen case, my own case from the Tennessee Supreme Court from six weeks ago, was also a case about a development and speaking out against problems with the development, and it fits -- it fits perfectly, and the Supreme Court so held that the TPPA -- that step one of the Anti-SLAPP Act fits, so I don't really know what they're going to do about that.

On this injurious falsehood piece, Mr. Horwitz obviously has taken the laboring oar there and he touched on

this, but I want to point out something that I just realized. I agree, you know, injurious falsehood, if that is what they're suing for, which it's not, it contains an element of intent under the restatement. Their response brief, on Page 9, cites the Restatement § 623A. "One who publishes a false statement harmful to the interest of another is subject to liability for pecuniary loss resulting to the other if: a) he intends for the publication of the statement to result in harm," et cetera, et cetera.

Then, on Page 10 of their response, they say, Properly framed, the elements of our claim are, and then they use all the elements of a libel of title case claim, except that they swap out the -- about title in Element 2 and say defendants published false and disparaging statements about that land. They swap out about -- they swap out title -- land for title when they -- when they kind of re-cast the elements here. They don't cite any authority here on Page 10 of their brief that these are the elements of their injurious falsehood claim because they're not.

I may have a little bit of trouble articulating this, but they're -- to me, it really seems like they're trying to have it both ways. If we're in injurious falsehood land and we're relying on the restatement, that has an element of intent, period. They've never alleged intent. They've never tried to meet that burden under step two. There's no evidence of intent for Mr. Kennedy or Mr. Blevins. So it's another reason the Court

should grant our anti-SLAPP petitions, even if we are playing in their sandbox, even if we are dealing with injurious falsehood. They -- they try to, you know, mold the elements of their claim to their proof, which, of course, they're not allowed to do.

You heard a lot about the supposed lack of discovery. There's legions of cases that talk about this, Nandigam Neurology being a good one, but there are plenty of others. That's the entire point of the Anti-SLAPP Act, is when you have a wealthy or monied interest on one side and a guy that lives on (sic) a trailer in the other side and they're trying to beat them into submission with discovery and depositions and everything, and what is the defendant supposed to do? How are they supposed to, you know, deal -- deal with that when they're going up against a Goliath? It -- the whole point of these cases is to not have any discovery unless they show good cause.

There was a comment that we were going to be adjudicating the discovery motion today. I've never -- that's news to me. I don't think there's ever been any communication like that. It certainly isn't set on the Court's docket. It's not in the file. So I don't -- I don't really know what that meant.

A question that I have that I think the Court cannot answer based on this record, where -- there's an assertion that Mr. Kennedy was re-posting things from Mr. Blevins stating it was undeniable that the mountain was dangerous. There is in the

record -- I can go find it -- something where Mr. Kennedy re-posts something that Mr. Blevins says where Mr. Blevins uses the word "undeniable," but it's the -- it's the last clause of that sentence that I'm going to take issue with, stating that the mountain is dangerous. Mr. Blevins' comment there -- let's find it. Mr. Blevins' comment there doesn't say anything about that. It doesn't say the mountain is dangerous. It's literally a link to a -- to a newspaper article about -- it may even be one that -- one of the ones that doesn't have anything to do with this. I'm not going to be able to locate it, but it's in our brief, it's in our response. And for them to claim that -- that Mr. Kennedy is re-posting things from Mr. Blevins claiming that it's dangerous is just simply not correct. I'm not going to be able to get it. I apologize.

Swiss cheese. Let's talk about that some more. Here's a question that we can't answer, and I think it compels granting of our petition. Was Mr. Kennedy the first to say that? Was he the origin of that comment? We don't know. Was he repeating it from someone else? We don't know. So if somebody else said it before him, which is entirely possible, they haven't met their burden. You know, sure, there's people -- sure, there's people who have been latching onto that comment, but if -- he might have latched onto it, too. We don't know. We don't know where that came from originally. It's their burden to include it and they haven't done that.

A question that I would love to know the answer to, and I think it kind of -- this whole case rather, frankly, begs the question, and Your Honor was kind of getting at that when you were talking about your -- their alleged damages here, their pecuniary loss. Why hasn't Thunder sued the Nashville Scene? Why hasn't Thunder sued the Chattanooga Times Free Press? They've got money. I'd love to know the answer to that question.

The UES report, there was some talk that they needed discovery from us somehow or they said they -- we need -- we can't interpret it. It's hard to interpret it. We need discovery. How is discovery from Mr. Ken -- well, they're not going to get a deposition from Mr. Kennedy anymore, sadly, but how is discovery from his estate or how is Mr. Blevins' deposition going to help them interpret the UES report? It's simply not. If they wanted testimony, if they wanted to put into the record to meet step two here and interpret it, they could have done that. Wonder why they didn't?

The maps. Let's talk about the maps. They say "Aetna Mountain" on them. I mean, they're trying to say we don't -- oh, we don't know what they are. They say "Aetna Mountain." They're authenticated easily. They're not hearsay under 802(16). 802(16) expressly says other things, other documents or instruments that affect an interest in property. There's a whole separate hearsay rule about deeds and other instruments. That's 802(14). So I think we were talking about two separate

things.

Malice. There's a lot of talk about self-serving declarations and self-serving testimony. The McQueen case, again, expressly says that a defendant's own statements can negate actual -- in McQueen, it was actual malice, which is, you know, knowledge of falsity, reckless disregard for the truth. Here we're talking about common law malice, hatred, ill will, and spite. Similar names, different concepts. But I think McQueen is informative here because, again, it says a defendant's own statements can effectively negate that element. That's exactly what has happened here.

There was a comment that Mr. Kennedy opposed the development at a commission meeting. Where is that in the record? There's a lot of generalities about Mr. Kennedy. And I apologize to Your Honor and to you all, frankly, if I'm getting a little heated about that, but I take issue with these broad, sweeping generalizations about Mr. Kennedy, not pointing to specific facts, specific documents. Where is it in the record that he opposed this development at a commission? If that happened, they could have put it in.

Again, there was some complaining that they needed discovery about the causation element of pecuniary loss. That's entirely within their own province. They could have gotten it if it existed. And then they do say, on Page 17 of their brief, that they lost 1.4 million dollars in income. It's a little

unclear whether they're actually seeking that for damages, but, at a minimum, it's tens of thousands of dollars and Mr. Kennedy living in a trailer at the bottom of the hill. That's all I have, Your Honor.

THE COURT: Thank you. Mr. Kinard, do you want to respond to any of that? I can give you a few minutes to do so if you'd like.

MR. KINARD: Couple of highlights, Your Honor. I won't get too far in the weeds.

THE COURT: Let's try to wrap it up around 1:30 here. Looks like you -- you've got about six minutes.

MR. KINARD: I can do it. Don't hold me to it. Well, I'll make it happen.

So when we're talking about construing this Complaint, we provided to you reported decisions from the Tennessee Court of Appeals and the Tennessee Supreme Court saying, how do you look at the titles and the labels in a Complaint and showing that that's the opposite of the way that the defendants are saying? They never responded to those cases. Brown vs. City of Daven (sic) -- City --

MR. HORWITZ: Objection, Your Honor. I did respond. I said it's not in their briefing and it's waived. That's -- I'm going to repeat that objection here. It's not something they have briefed. They're raising it for the first time during oral argument. You cannot do it. That's why we haven't responded.

They waited for oral argument and apparently surrebuttal to make this claim, so we object.

MR. KINARD: I've never been objected to when making an argument in front of the Court, so I apologize. If I need to -- Brown vs. City of Manchester is quoted and discussed in our brief, so -- I mean, let me find it. I can't believe I have to do this. And we attached it to our brief. I mean, it's -- that one is -- that one is reported, so I don't -- I don't think so.

THE COURT: You do agree that there are two separate claims? There's --

MR. KINARD: No, I don't --

THE COURT: There's libel of title and then there's the injurious falsehood.

MR. KINARD: Oh.

THE COURT: Those are two separate claims.

MR. KINARD: So here's my trouble with it, Your Honor, is that -- is libel of title an injurious falsehood that happens to involve a title or is it -- is it -- and it's just a name that you give it, a label you put on it? Like there are cases saying that. Right? There's also really strong authorities saying they're just -- they're just different words for the same thing. I'm going to go with the -- you know, Dean Prosser, who was the reporter for the second restatement, which has been cited by numerous Tennessee cases, that specific one, that says they're just names for the same thing.

It's really a completely academic question. It's, frankly, a legal philosophy question. Right? You know, it's like, what's the difference between these things? What matters is, you look at the underlying allegations in the Complaint. When you're trying to find out what's in the Complaint and what's been pleaded, you look at the allegations. The titles you put on it really don't matter, which is very frustrating as a defendant. I do a lot of defending and, by golly, I wish it were different when I was in the defendants' shoes, but that's what the law is. It -- Brown vs. City of Manchester, Page 20. So it is, in fact, described and discussed in our brief. We didn't identify more details about damages in the Complaint because you don't have to. It's not required.

They've mentioned, well, we're in Chancery Court, you know, and that's equitable power. Well, if we -- they want to move it to Circuit Court, they can file a motion asking for it to be in Circuit Court; otherwise, there's statutes saying you can just stay in Chancery Court. Plus we asked for damages very clearly, so that's -- I really don't understand what the connection was to our issues, but they mentioned it.

Both -- both the defendants spent a lot of time trying to cloak their -- their clients in the mantle of doing some public service. Maybe a jury ends up agreeing with them. We have put in front of the Court prima facie evidence that actually they are acting out of vindictiveness, Blevins because he was

denied a key to get across their property to the point that he was starting to call government agencies down on Thunder Air, which is shocking to me, and in Kennedy's scenario, he's -- he told Thunder Air representatives, these maps, this is my retirement, and Thunder Air said, we don't want to buy those from you. I think a jury could infer that he was upset by -- I mean, the evidence is that he was visibly upset when they refused to purchase those maps from him.

Mr. Harbison talked about the intent in injurious falsehood. Well, our Complaint specifically says that both the defendants, it identifies them, they acted with malice and spite and vindictiveness, so that's been alleged.

The talk about Swiss cheese, who came up with it, well, if you repeat a disparaging statement, then you're liable for that, as long as you are intending to say the substance of it. Now, why is it that Thunder Air didn't sue the Nashville Scene and the Chattanooga Times Free Press? Because they were reporting what other people said, most notably Mr. Blevins and Mr. Kennedy. They went to the source. Rather than suing the news sources that were repeating what other people were saying, they went to the people that were actually the ones that were responsible for promulgating the disparaging statements. That's why.

THE COURT: But they could still be sued for publishing something that's false.

MR. KINARD: It's -- it's -- they have a -- there's a defense that applies to if you're just reporting what somebody else said. If the Chattanooga Times Free Press or -- let me talk about the Nashville Scene. If the Nashville Scene, you know, just went out and started relaying a bunch of facts that were false and met all the elements, sure, but if they're saying, hey, this other person said this, then there's a privilege that covers that.

So it's -- it's the reason that -- that newspapers can report on trial proceedings. Right? This happened in this trial proceeding. This person said this. Even if that is provably false, even if that was perjury, well, that person did, in fact, say it. Right? But if, you know, the newspaper isn't purporting to be describing what, in fact, occurred or what this other person said, you know, then there's a privilege applicable to that. So that's why. You know, the source of the -- of the issue here, the source of the damage is coming from Mr. Blevins and Mr. Kennedy.

And then, finally, the claims that there was all sorts of discovery that's solely within Thunder Air's hands, and that's not the case, is that discovery on causation, what's the connection between the defendants' statements and the injury they've suffered, well, we can't take depositions of these other people because it's automatically stayed. We have to get good cause from the Court, or show good cause to the Court and the

Court has to permit it, or interrogatories. We can't get their, you know, evidence of malice or the private messages or text messages, anything like that. We're stuck. So that's -- there's a lot of things that we haven't been able to get because of the statute.

If there are no further questions from the Court, I appreciate the Court's attention.

THE COURT: Thank you very much.

MR. KINARD: Thanks.

THE COURT: The Court will take this matter under advisement, issue a ruling as quick as I possibly can.

MR. HORWITZ: Thank you, Your Honor.

MR. KINARD: Thank you, Your Honor.

THE COURT: Y'all be safe heading back.

(End of proceedings.)

REPORTER'S CERTIFICATION

STATE OF TENNESSEE)

COUNTY OF SEQUATCHIE)

I, Lana Y. Ewton, RPR, LCR #130, Registered Professional Reporter, Licensed Court Reporter, and Notary Public, in and for the State of Tennessee, do hereby certify that the above hearing was reported by me and that the foregoing 78 pages of the transcript is a true and accurate record to the best of my knowledge, skills, and ability.

I further certify that I am not related to nor an employee of counsel or any of the parties to the action, nor am I in any way financially interested in the outcome of this case.

I further certify that I am duly licensed by the Tennessee Board of Court Reporting as a Licensed Court Reporter as evidenced by the LCR number and expiration date following my name below.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 17th day of September, 2024.

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Lana Y. Ewton, RPR, LCR #130
LCR Expiration Date 6-30-2026
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CERTIFICATE OF THE COURT

The party tenders this, the Transcript of Proceedings, to the judgment of the Court, which Transcript of Proceedings is filed within the time allowed by law and rules of the Court and which is signed and sealed and ordered to be made a part of the record in this cause.

This _____ day of _____, 20__.

_____

JUDGE

APPROVED:

_____

FOR THE PLAINTIFF

_____

FOR THE DEFENDANT

_____

FOR THE DEFENDANT