

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
TENNESSEE

David Robertson et al. v. Ryan Upchurch

No. 3:23-cv-00770 · No. No. 3:23-cv-00770 · Decided May 7, 2026

SUMMARY

The United States District Court for the Middle District of Tennessee denied Defendant Ryan Upchurch’s pretrial motion seeking application of Tennessee procedural law to California substantive law and related rulings concerning defamation and emotional-distress claims. The court reserved the choice-of-law issue, held that the statute-of-limitations defense was waived because it was not timely pleaded or raised, and declined to decide other dispositive issues on the eve of trial.

CASE DETAILS

COURT	United States District Court for the Middle District of Tennessee
WRITING FOR THE COURT	William L. Campbell Jr.
JURISDICTION	United States District Court for the Middle District of Tennessee
DECIDED	May 7, 2026
DOCKET	No. 3:23-cv-00770
DISPOSITION	other
PROCEDURAL POSTURE	Defendant moved before trial to have Tennessee procedural law applied to allegedly applicable California substantive law and sought rulings concerning the characterization and timeliness of Plaintiffs' claims and the legal sufficiency of several tort claims. The court denied the motion.
STANDARD OF REVIEW	The court applied the procedural rules governing preservation and waiver of affirmative defenses and exercised discretion to decline untimely dispositive rulings that would prejudice the opposing party on the eve of trial.
PRECEDENTIAL VALUE	unpublished district court opinion

TOPICS

- waiver
- affirmative defenses
- statute of limitations
- civil procedure
- defamation

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the court should determine before trial that Plaintiffs' claims are slander rather than libel and decide which California substantive law applies.
2. Whether Defendant waived a statute-of-limitations defense by failing to plead it in his Answer, failing to include it in the Proposed Joint Pretrial Order, and raising it only on the eve of trial.
3. Whether the court should decide on the eve of trial Defendant's challenges to Plaintiffs' false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress claims.

HOLDINGS

1. The issue was premature, and the court reserved ruling on which substantive law applies and whether the statements should be treated as slander until the proof is presented at trial and the jury charge conference.
2. Defendant waived the statute-of-limitations defense by failing to raise it in his Answer or Proposed Joint Pretrial Order and by waiting until the eve of trial to assert it.
3. The court declined to decide the proposed dispositive challenges on the eve of trial and would address the issues if necessary during trial.

KEY QUOTATIONS

“Actions for slanderous words spoken shall be commenced within six (6) months after the words are uttered.”
(at 2)

“Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, a defense based upon a statute of limitations is waived if not raised in the first responsive pleading.” (at 3)

FACTUAL BACKGROUND

Plaintiffs sued Defendant over statements that Defendant characterized as slanderous and that Plaintiffs treated as supporting claims including defamation, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendant identified September 7, 2022, as the date of his most recent comment and relied on a six-month Tennessee limitations period for slander. Defendant had admitted in his Answer that the claims were timely under a tolling agreement, but he had not pleaded a statute-of-limitations defense or identified it in the Proposed Joint Pretrial Order. Defendant raised additional substantive challenges three days before trial, after the dispositive-motion deadline had expired.

PROCEDURAL HISTORY

Plaintiffs brought claims arising from allegedly defamatory statements. After the pleadings were superseded by the Proposed Joint Pretrial Order and the dispositive-motion deadline had passed, Defendant filed a pretrial motion three days before trial seeking rulings on choice-of-law, statute-of-limitations, and substantive claim

issues. The court reserved the choice-of-law issue for the jury charge conference, held that the statute-of-limitations defense was waived, declined to decide the remaining dispositive issues on the eve of trial, and denied the motion.

DISPOSITION

other

CASES CITED

- Haskell v. Washington Township, 864 F.2d 1266, 1273 (6th Cir. 1988)
- Wallace v. Coffee County, 852 F. App'x 871, 875 (6th Cir. 2021)

OPINION

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION DAVID ROBERTSON, ET AL.,)) Plaintiffs,)) NO. 3:23-cv-00770 v.)) JUDGE CAMPBELL RYAN UPCHURCH,) MAGISTRATE JUDGE HOLMES) Defendant.) MEMORANDUM AND ORDER Pending before the Court is Defendant's Pretrial Motion to Apply Tennessee Procedural Law to the Appropriate California Substantive Law (Doc.

No. 98). Plaintiffs filed a response opposing the motion (Doc. No. 99). For the reasons discussed below, Defendant's motion (Doc. No. 98) is DENIED. I. ANALYSIS A. California Substantive Law Defendant first contends that Plaintiffs' claims should be treated as slander, not libel, under California law because Plaintiffs' Complaint, proposed jury instructions, and proposed verdict form are "grounded in elements that arise under Cal. Civ.

Code § 46 for slander." (Doc. No. 98 at 4). Defendant asks the Court to issue a ruling that the statements at issue are treated as slander under California law and to determine which California substantive law applies in this case.

In support of his argument, Defendant relies on numerous allegations in the Complaint. (Doc. No. 98 at 5-6). Defendant is reminded that the Proposed Joint Pretrial Order submitted by the parties supplanted the pleadings. (Doc. No. 71 at 1).

The Court notes that the Proposed Joint Pretrial Order fails to address which substantive law should apply or identify this as an issue for the Court. Nonetheless, this issue is premature at this stage, and the Court will reserve ruling on which substantive law applies until hearing the proof at trial.

The Court will take this up with the parties at the jury charge conference. B. Statute of Limitations Defendant next argues that if the Court determines Plaintiffs' claims are slander and slander per se, they are time barred by the statute of limitations pursuant to Tenn. Code Ann. § 28-3-103, which

provides that: “[a]ctions for slanderous words spoken shall be commenced within six (6) months after the words are uttered.” Defendant states that his most recent comment about Plaintiffs was on September 7, 2022, the original Complaint was filed on July 28, 2023, and the Amended Complaint was filed on August 1, 2023, which falls outside the 6 month limitations period.

(Doc. No. 98 at 8). Defendant also references a tolling agreement entered into between the parties on March 20, 2023, and argues that the tolling agreement fails to revive Plaintiffs’ claims as it only tolled claims that had not already expired as of March 20, 2023, at which point Defendant contends Plaintiffs’ claims had already expired.

As Plaintiffs correctly observe, Defendant admitted in his Answer that Plaintiffs’ claims were timely. (See Pl. Compl., Doc. No. 7 ¶ 28, “Suit is timely filed pursuant to a tolling agreement agreed to by all parties on February 13, 2023” and Def. Ans., Doc. No. 37 ¶ 28, “Mr. Upchurch admits the allegations contained in Paragraph 28 of the First Amended Complaint.”).

Defendant also failed to plead the statute of limitations as an affirmative defense in his Answer, as required by Fed. R. Civ. P. 8(c). See generally Doc. No. 37. Nor did Defendant reference a statute of limitations defense in the aforementioned Proposed Joint Pretrial Order. (Doc. No. 71). Sixth Circuit law is clear that a statute of limitations defense is waived if not raised in the first responsive pleading even if a party or his counsel were unaware of possible limitations defense.

Haskell v. Wash. Twp., 864 F.2d 1266, 1273 (6th Cir. 1988) (citation modified) (“Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, a defense based upon a statute of limitations is waived if not raised in the first responsive pleading. It is of no importance that a party and/or his counsel were unaware of a possible statute of limitations defense.”); Wallace v. Coffee Cnty., 852 F. App’x 871, 875 (6th Cir.

2021) (“Wallace is correct that [a] response to a pleading must set forth any matter constituting an affirmative defense. Failure to plead an affirmative defense in the first responsive pleading to a complaint generally results in a waiver of that defense. This applies to a statute of limitations defense.”).

Because Defendant failed to raise the statute of limitations defense in his Answer or the Proposed Joint Pretrial Order, file any dispositive motions addressing this issue, or raise this issue at any point before the eve of trial, the Court finds that he waived the defense.

Accordingly, the Court need not rule on the applicability of the tolling agreement or whether Plaintiffs timely filed their claims. C. False Light Invasion of Privacy, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress Defendant also contends that Plaintiffs’ claims for false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress fail as a matter of law.

Specifically, Defendant argues that the oral statements at issue in this case cannot form the basis of the false light invasion of privacy claim, that the false light claim must meet the requirements of defamation and Plaintiffs' slander claims fail under Tenn. Code Ann. § 28-3-103, and that a false light tort requires a statement that is "highly offensive to a reasonable person." Defendant argues that Plaintiffs' intentional infliction of emotional distress claim fails because it is substantially based on the same allegations of defamation and if the defamation claims are barred, this claim fails as a matter of law.

Defendant also argues that negligent infliction of emotional distress is not a separate cause of action under California law and that if the defamation claims are time barred, then this claim fails as a matter of law.

The Court is unpersuaded by Defendant's argument and finds it concerning for several reasons. First, Defendant raises these issues for the first time on the eve of trial, which has likely caused surprise or confusion to Plaintiffs.

Moreover, a ruling on these issues now – three days before trial is set to begin – would almost certainly prejudice Plaintiffs as the dispositive motion deadline has long passed, Plaintiffs would need an opportunity to respond to the issues raised by Defendant, and Plaintiffs have likely already fully prepared this case for trial based on the discovery, pre-trial filings, and defenses raised by Defendant up to this point.

Further, the dispositive motion deadline was on June 10, 2025, and Defendant failed to raise these issues before now. Nor does Defendant offer any reason why he did not move for summary judgment at an earlier date on these claims or seek additional time to file dispositive motions. While Defendant frames his motion as a "pretrial motion," it appears Defendant seeks various dispositive rulings from the Court on substantive issues that should have been raised well before now.

The Court declines to do so and will address these issues if necessary as they come up during trial.

II. CONCLUSION For the reasons stated above, Defendant's motion (Doc. No. 98) is DENIED. In light of the flurry of recent filings made by the parties on a number of evidentiary and other procedural and substantive issues, the Court reminds the parties to focus on trial preparation and encourages the parties to communicate with one another before any subsequent filings and adhere to the trial conduct and local and procedural rules discussed during the Pretrial Conference to minimize confusion, streamline the issues for trial, promote efficiency, and preserve judicial resources.

Finally, the Court entered a separate Order ruling on the Plaintiffs' public figure status. (Doc. No. 102). In light of that ruling, counsel for the parties are ordered to meet in person on or before

Monday, May 11, 2026, to engage in good faith discussions regarding a resolution of this case. It is so ORDERED. MV Le X CHIEF UNITED STATES DISTRICT JUDGE

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