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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case presents a critical opportunity for this Court to decide whether the “neutral reportage” privilege to defame will apply in Ohio.

The neutral reportage privilege is purportedly an exception to the “actual malice” standard in public-figure defamation cases involving the republication of the false allegations of third parties. The privilege immunizes the republication of false statements, even when made with knowledge of the statement’s falsity, if there is a “public interest” in learning of the allegations.

The lower courts in this case applied the privilege despite its being contrary to Ohio and U.S. Supreme Court defamation jurisprudence. The U.S. Supreme Court held in *New York Times v. Sullivan* that, in public figure defamation cases, actual malice may be shown where the defendant knew the statements he was publishing were false or where he was reckless with regard to whether the statements were true or false. *New York Times v. Sullivan* (1964), 376 U.S. 254, 279. The Court then held in *St. Amant v. Thompson* that “reckless disregard” for the truth can be shown where the defendant published the defamatory statement with a “high degree of awareness of its probable falsity” or where the defendant “in fact entertained serious doubts as to the truth of his statements,” but published anyway. *St. Amant v. Thompson* (1968), 390 U.S. 727, 731. The Court held that if the statement involves repetition of third-party allegations, reckless disregard could be shown where the defendant had “obvious reasons to doubt the veracity of the informant or his reports.” *St. Amant*, 390 U.S. at 732. The Court made clear that “[p]ublishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” *Id.* (emphasis added).

In this case, both the trial court and the Court of Appeals found that Appellee, former Columbus Safety Director Thomas W. Rice, Sr., was aware of obvious reasons to doubt the veracity of the statements of a third-party felon, Keith Lamar Jones, who alleged that the Chief of Police, Appellant James G. Jackson, had fathered an illegitimate child with a minor prostitute. The trial court found that “a reasonable juror could easily conclude that there were obvious reasons to doubt the veracity of the informants” and held that “reasonable minds might conclude that the evidence is *clear and convincing* that Mr. Rice would have had a *high degree of awareness* that the allegations were more likely than not false.” (5/19/05 Decision, at p. 17) (emphasis added). The Court of Appeals went so far as to “*assume for purposes of this appeal* that the investigating officers and appellee Rice were *in fact substantially aware of the likely falsity* of Keith Lamar Jones’ allegations regarding appellant.” (9/29/06 Decision, at p. 8) (emphasis added).

Yet, both courts allowed Appellee Rice to escape liability for republishing the false allegations of Keith Lamar Jones in a 1997 Mayoral Investigative Report, finding that the statements were a matter of “public interest” and that Rice had included his credibility concerns about the felon in the report, so there had been no “actual malice.”

In so holding, the trial court and the Court of Appeals were applying the “neutral reportage privilege.” Again, the neutral reportage privilege is an exception to the actual malice standard applied in some jurisdictions. It ignores the *private views* of the republisher regarding the truth or falsity of the statements, and holds that *even where the republisher may know the statements are false*, republication may nonetheless be “reasonable” if the statements are

newsworthy or a matter of legitimate public interest. See *Edwards v. Natl. Audubon Soc., Inc.* (2nd Cir. 1977), 556 F.2d 113 (first espousing the privilege).¹

This Court held in *Young v. Morning Journal* in 1996 that “this Court has never recognized the ‘neutral reportage’ doctrine and we decline to do so at this time.” *Young v. Morning Journal* (1996), 76 Ohio St. 3d 627, 629. Other jurisdictions have also rejected the exception because “holding . . . that whenever [allegations] are judged . . . to be ‘newsworthy,’ they may be [re]published without fear of a libel suit even if the publisher ‘has serious doubts regarding their truth,’ is contrary to the [U.S.] Supreme Court’s ruling in *St. Amant [v. Thompson]* (1968), 390 U.S. 727].” *Dickey v. CBS Inc.* (3rd Cir. 1978), 583 F.2d 1221, 1225.

If the decision of the Tenth District Court of Appeals in this case is allowed to stand, the “neutral reportage” privilege will apply in Ohio. If allowed to stand, public officials and the media, privy to allegations made against public officials by third parties, even those made by known liars such as Keith Lamar Jones, will be able to republish those false allegations with impunity, *despite actual knowledge that the statements are false*, as long as they claim some public interest in learning about the false allegations. Their actual intent to defame the public official will be ignored. This is contrary to Ohio and U.S. Supreme Court precedent and the decision should not be allowed to stand.

STATEMENT OF THE CASE AND FACTS

On June 30, 1997, Appellee Thomas W. Rice, Sr., then Safety Director for Columbus, Ohio, published a Mayoral Report. The Mayoral Report was the purported culmination of two historic investigations of Appellant James Jackson and the Columbus Division of Police. The investigations resulted in the Chief of Police being charged with a variety of improper conduct,

¹ See also *Stockton Newspapers, Inc. v. San Joaquin Superior Court* (C.A. 3d App. Dist. 1988) 206 Cal. App. 3d 966; 35 Ohio Jur. 3d, *Defamation and Privacy*, § 52 (2005).

and a hearing on those charges was held before the Civil Service Commission. Appellee's stated goal was to remove Appellant Jackson as Chief of Police. Appellee failed in his attempt to remove Appellant as Chief of Police, and this case involves Appellee's malicious publication of the Mayoral Report as retribution following that bitter failure.

In the trial court, Appellee had the audacity to testify that when he prepared the Mayoral Report it was his intention to include information that was exculpatory, i.e. favorable to Chief Jackson. This could not have been further from the truth. In fact, the record below is replete with false testimony from Appellee. The evidence established that while the Mayoral Report was a voluminous document, it was also a one-sided document that left out virtually all information and testimony that was favorable to Chief Jackson. For example, Appellee purported in the Mayoral Report to identify all of the critical witnesses who had testified at the Civil Service Proceedings. Yet, he completely failed to list the two most important witnesses for Chief Jackson: former Ohio Supreme Court Justice Craig Wright and former Safety Director Larry James. To be clear, it is not simply that Appellee failed to reference the content of these stellar and powerful witnesses, Appellee completely left them off the list of witnesses who had testified.

Appellee left out of the Mayoral Report the fact that he and his investigative team had been gathering and reviewing information on a number of prominent African-American citizens. These citizens included Michael Coleman and his wife, Frankie, Larry James, Jerry Hammond, Les Wright, Ben Espy, T.G Banks, Otto Beatty, and Charleta Tavares.

Appellee also failed to include critical information about his failures in the Mayoral Investigation. He did not reference the fact that as Director of Public Safety he proceeded with these two historic investigations of Chief Jackson without even bothering to *read* the underlying

file that supposedly caused him to launch the investigations in the first place. In this lawsuit we also learned, for the first time, that Appellee and his team withheld exculpatory and important evidence from Chief Jackson's lawyers at the Civil Service Commission. His conduct was and has been nothing short of outrageous, and Appellee's self-serving affidavit is not believable. The evidence at the trial court reflects that Appellee was simply not being truthful. His actions were part of a pattern of conduct designed to ruin Chief Jackson, and failing that, to smear his name. Appellee saved the ultimate smear for the end.

After preparing a blistering, incomplete, one-sided report, Appellee saved his most vicious assault for last. Near the very end of the Mayoral Report, Appellee inserted an allegation that Appellant James Jackson, the Chief of Police for Columbus, Ohio, had fathered an illegitimate child by a minor prostitute. The sole source of this allegation was a convict named Keith Lamar Jones. There is substantial, overpowering evidence that Appellee knew the allegation was false, and that Appellee republished the allegation anyway.

At the trial court, Appellee admitted that the one and only source of this allegation was the convict Keith Lamar Jones. There was no other source or information supporting the convict's claim. Upon learning of the existence of the convict's claim, Appellee took no immediate action to investigate it. Appellee acknowledges that there was immediate concern about the convict's lack of credibility. Appellee further acknowledged receiving many words of caution from others in law enforcement concerning the lack of credibility of this prisoner. Appellee's team further admitted that there was obvious reason to question the veracity of any convict and liar, and that they knew there were specific reasons to distrust the words of this prisoner.

Importantly, Appellee took no action to follow up on the allegation until after Appellee was unsuccessful in permanently removing Appellant from his position as Chief of Police. This failure is important when placed in context. The nature of the convict's allegations, the timing of Appellee's learning of the convict's allegations, and the decision to take no action in follow up is critical.

Appellee learned of the convict's allegations at the very moment in time that Appellee had an entire team of investigators, the Mayoral Investigative Team, gathering evidence about purported misconduct by Chief Jackson. In late Autumn of 1996, the City of Columbus had just emerged from a four-month administrative investigation of Chief Jackson that Appellee had initiated and directed. With no time gap, Chief Jackson was banished from his office and all City property, gagged from speaking on account of his race, and the City was plunged into a more high-profile Mayoral Investigation of Chief Jackson. The Mayoral Investigative Team, with Appellee as its appointed leader, was gathering evidence in an effort to remove the Chief of Police from office. It is undeniable that this was the most significant, high-profile investigation of a public official in the history of Columbus, Ohio.

It was in this environment that the convict's allegations were presented to Appellee. At this very moment in time, right in the middle of a wide-ranging, historic investigation, Appellee was presented with an allegation that the Chief of Police had fathered an illegitimate child by a minor prostitute. If there was any possibility that this convict's allegations were true, it would mean that Chief of Police was guilty of a felony. And yet, Appellee took no action. Appellee's position is that his investigative team was too busy with more pressing issues. He has admitted publicly that he was seeking the removal of Chief Jackson from the office of Chief of Police, yet

he did not follow up on allegations of a felony. The record reflects that the only reasonable conclusion is that Appellee did not believe the convict's allegations.

Appellee admits that he took no action to follow up on the convict's allegations until after Appellee was unsuccessful in permanently removing Appellant from his position as Chief of Police. It is a matter of public record as well as the record in this case that Appellee was seeking to remove Chief Jackson from his office. Appellee failed miserably.

Although Appellee and his team admit only disappointment over the results of the hearings before the Civil Service Commission and their failure to oust Chief Jackson, the record paints a clear picture of dejected bitterness. The record reflects that they were willing to blame their own lawyers for the failure. They were willing to blame the Civil Service Commission for bad decision-making. They were even willing to blindly blame unknown political pressures. But one thing is clear: they were not willing to abandon their pursuit of Chief Jackson.

Within days of failing to have Jackson removed as the Chief of Police, Appellee ordered his investigative team to go to the Chillicothe Correctional Institution and interview the convict, Keith Lamar Jones. Appellee's team arrived at the prison gates knowing that Jones lacked credibility. They had been told that he was unreliable. They had been told of his other ridiculous allegations that Charleta Tavares had observed cocaine use at one of her campaign functions, and that her campaign had been given drug money. They had been told by an overwhelming number of law enforcement contacts that he was a scam artist and he lacked credibility. They arrived at the prison gates knowing him to be a liar. And they arrived at the prison gates with a polygraph examiner in tow.

Upon arrival at the prison, they had the polygraph examiner conduct a polygraph test on the convict. According to Appellee's team, the convict failed the polygraph test. Unbelievably,

they did not have the polygraph examiner ask the convict about the Chief Jackson allegations during the administration of the polygraph examination. Despite learning that the convict had failed the polygraph test, and that the convict had not been asked about the Jackson allegations during the polygraph examination, Appellee's team did not instruct the polygraph examiner to go back into the room and ask the convict about the Jackson allegations while hooked up to the polygraph. Rather, Appellee's team sent the polygraph examiner away from the prison, and they never had the polygraph examiner come back and ask about the convict's allegations about Chief Jackson while on the polygraph. Never.

However, even though they now had even more reason to know that Keith Lamar Jones was indeed a liar and a scam artist, they did not leave the prison. Instead, they proceeded to conduct an interview of the convict. They asked the convict what he knew about Chief Jackson, and the convict allegedly reiterated his allegations about Chief Jackson fathering an illegitimate child by a minor prostitute. It is undisputed that the convict had nothing to support his allegation.

Following that interview and before publishing these horrendous allegations in the Mayoral Report, Appellee never asked Chief Jackson about the matter. As noted above, if the convict's allegations had been true, Chief Jackson would have been guilty of a felony. But Appellee never confronted the Chief before he gratuitously inserted the scurrilous, unsupported allegations in the Mayoral Report. If Appellee had asked Chief Jackson about the allegation or had checked the records of the Division of Police, he would have learned that the allegation was obviously untrue because decades before Chief Jackson had a vasectomy.

Even the trial court recognized that a jury could see right through Appellee's conduct. Appellee was even manipulating the words of the Mayoral Report itself to give the reader the

clear impression that the convict's allegations might actually be true. And he did so even though he had absolutely no reason to think they were true. Appellee's conduct is reprehensible and malicious, and the law should not be twisted to condone it.

The evidence below was clear. Appellee knew the convict's unsupported allegations were untrue. The trial court was correct when it determined that "reasonable minds might conclude that the evidence is clear and convincing that Mr. Rice would have a high degree of awareness that the allegations were more likely false than not." The trial court simply misapplied the law of defamation when it granted summary judgment, and the Court of Appeals did as well. We respectfully ask the Court to correct the error, and order this matter to proceed to trial.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A publisher commits defamation by publishing the defamatory statements of a third party when the publisher has a high degree of awareness of the probable falsity of those statements. [*St. Amant v. Thompson (1968)*, 390 U.S. 727, 731, approved.]

Established Ohio and U.S. Supreme Court defamation jurisprudence makes clear that a publisher may not republish the false allegations of a third party where he has a high degree of awareness of the probable falsity of those statements – *even* where the false allegations are a matter of *public interest*, and even where the publisher attempts to make the report “*neutral*” by reporting the credibility concerns of the original defamer.

Where a public-figure plaintiff claims defamation he may prove his claim with evidence that the defendant published the false statements with “actual malice – that is, with *knowledge* that [the statement] was false or with *reckless disregard* of whether it was false or not.” *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279. “Reckless disregard” can be proven with

evidence that the defendant published the defamatory statement with a “high degree of awareness of its probable falsity.” *St. Amant v. Thompson* (1968), 390 U.S. 727, 731. It may also be proven by showing that the defendant “in fact entertained serious doubts as to the truth of his statements” but published anyway. *Id.*

Where, as here, the statement involves repetition of third-party allegations, the plaintiff may prove “reckless disregard for the truth” by showing that the defendant had “obvious reasons to doubt the veracity of the informant or his reports.” *St. Amant*, 390 U.S. at 732. See also *Harte-Hanks Communications v. Connaughten* (1989), 491 U.S. 657 (stating that “recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports”). “Publishing with such doubts shows reckless disregard for truth or falsity and *demonstrates actual malice.*” *St. Amant*, 390 U.S. at 732 (emphasis added).

The focus is on defendant’s “attitude toward the truth or falsity of the statements made,” *Garrison v. Louisiana* (1964), 379 U.S. 64, 74 – that is, on whether “the publisher was *aware of the likelihood that he was circulating false information.*” *St. Amant*, 390 U.S. at 730 (emphasis added).

A publisher’s personal ill will toward the plaintiff and actual *intent* to publish falsely may also be considered. See *McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St. 3d 139, 147 (stating that although a jury may not infer the existence of actual malice from evidence of personal spite or ill will alone, it may consider “circumstantial evidence of the defendant’s actual state of mind – either subjective awareness of probable falsity or actual intent to publish falsely”); *Burns v. Rice* (10th Dist. 2004), 157 Ohio App. 3d 620, 638 (“Defendants’ *motives*, when combined with other circumstantial evidence, may amount to a showing of malice.”) (citing *Perk v. Reader’s Digest Assn., Inc.* (6th Cir. 1991), 931 F.2d 408, 411).

Here, the trial court found that “a reasonable juror could easily conclude that there were obvious reasons to doubt the veracity of the informants.” The trial court held that “reasonable minds might conclude that the evidence is clear and convincing that Mr. Rice would have had a high degree of awareness that the allegations were more likely than not false.” (5/19/05 Decision, p. 17). Yet, the court refused to hold Appellee Rice liable for defamation because of the *public’s interest* in learning of the allegations and because of Appellee’s alleged attempt to be *neutral* by reporting the credibility concerns regarding Keith Lamar Jones in the Report. (*Id.*, p. 18).

The Court of Appeals made the same mistake, evaluating whether actual malice might still be determined *not to exist* despite “full knowledge that these statements were more likely than not . . . false.” (9/27/06 Decision, p. 8). Indeed, the Court of Appeals went so far as to “*assume for purposes of this appeal* that the investigating officers and appellee Rice were *in fact substantially aware of the likely falsity* of Keith Lamar Jones’ allegations regarding appellant.” *Id.* Yet, the Court of Appeals likewise refused to hold Appellee Rice liable for defamation because of the alleged *public interest* in learning of the false allegations and because Appellee Rice reported the credibility concerns of Keith Lamar Jones in the report. In short, the Court found that, even assuming that “the investigating officers and appellee Rice were *in fact substantially aware of the likely falsity* of Keith Lamar Jones’ allegations regarding appellant,” the republication of his false statements was protected by the “public interest privilege.”

No such exception should exist in Ohio.

Proposition of Law No. II: Ohio does not recognize a “neutral reportage” privilege to defame.

Ohio's public interest privilege is a “qualified” privilege. It is not absolute. It is qualified by the actual malice standard. If the plaintiff shows that the defendant had a “high degree of awareness of the probable falsity” of the original defamer’s statement, the privilege *does not apply*. See *Jacobs v. Frank* (1991), 60 Ohio St. 3d 111, syllabus ¶ 2 (stating that “when a defendant possesses a qualified privilege regarding statements contained in a published communication, that privilege can be defeated . . . by a clear and convincing showing that the communication was made with actual malice”).²

Qualification of the public interest privilege applies equally to police officers and other public officials making official reports. See *Black v. Cleveland Police Department* (1994), 96 Ohio App. 3d 84, 90 (holding that plaintiff could overcome the qualified privilege with a showing of “actual malice”); *Davis v. City of Warrensville Hts.* (Jan. 15, 1998), Cuyahoga App. No. 72722, 1998 WL 12337, at *4 (holding that qualified privilege could be overcome by clear and convincing evidence that the officer made the report with “actual malice or recklessness, or in bad faith”).

Here, despite its assumption that Defendant Rice did in fact know that the statements he was republishing were probably false, the Court of Appeals granted him an exception, finding that the Court should weigh “all of the factors that make publication of the contested statements *reasonable or unreasonable*, including the *public interest* served by publication or impaired by suppression of the statements . . . and the extent to which the possible unreliability of the

² See also *A & B-Abell Elevator Company, Inc. v. Columbus / Central Ohio Building and Construction Trades Council* (1975), 73 Ohio St. 3d 1, 11-12 (stating that “a qualified privilege can be defeated only by a clear and convincing showing that the communication was made with actual malice”); *WorldNet Software Co. v. Gannett Satellite Info. Network, Inc.* (1st Dist. 1997), 122 Ohio App. 3d 499, 510 (“This qualified privilege can be defeated by a showing of actual malice on the part of the defendant.”).

republished statements was exposed and emphasized in accompanying narrative.” (Decision at pp. 11-12).

The only exception that allows a court to weigh the *public interest* in learning about the false allegations and the publisher’s attempts to make the report *neutral*, against the fact that the publisher had actual knowledge of the statement’s probable falsity, is the “neutral reportage privilege.” See 35 Ohio Jur. 3d, *Defamation and Privacy*, § 52 (2005) (“The neutral-reportage doctrine is a privilege that protects the accurate reporting of accusations that might be defamatory, but which are *newsworthy* and concern a matter of *legitimate public interest*.”) (emphasis added.) The privilege was first espoused in *Edwards v. Natl. Audubon Soc., Inc.* (2nd Cir. 1977), 556 F.2d 113, in which the Second Circuit Court of Appeals held that “regardless of the reporter’s private views regarding [an allegation’s] validity,” or the fact that the defendant had “serious doubts regarding their truth,” the “*public interest* in being fully informed about [the] controversies [at issue]” necessitated a finding that “the First Amendment protects the accurate and disinterested reporting of [third-party allegations].” *Edwards*, 556 F.2d at 120 (emphasis added). The privilege was later discussed in *Stockton Newspapers, Inc. v. San Joaquin Superior Court* (3d App. Dist. 1988) 206 Cal. App. 3d 966, in which the court held that a newspaper reporter did not need to have a belief one way or the other as to the truth or falsity of allegations he repeated in his report, and *even if he knew the allegations were actually false*, he could still republish them, because “an exception from the requirement of such belief arises in the case ‘where the *protection of the interests involved* may make it reasonable to report rumors or statements that the publisher may even know are false.’” *Id.* at 981.

Yet, *this* Court expressly rejected the privilege in *Young v. Morning Journal* (1996), 76 Ohio St. 3d 627, stating that “this Court has never recognized the ‘neutral reportage’ doctrine

and we decline to do so at this time.”³ The Court should continue to reject the privilege. As other Courts have recognized, because the privilege *ignores the publisher’s state of mind* (i.e., his actual intent to defame) and his *knowledge* regarding the falsity of the statements he is republishing, the privilege is contrary to U.S. Supreme Court precedent, particularly *New York Times v. Sullivan* and *St. Amant v. Thompson*. See *Dickey v. CBS Inc.* (3rd Cir. 1978), 583 F.2d 1221, 1225 (“holding . . . that whenever [allegations] are judged . . . to be ‘newsworthy,’ they may be [re]published without fear of a libel suit even if the publisher ‘has serious doubts regarding their truth,’ is contrary to the Supreme Court’s ruling in *St. Amant*.”).⁴

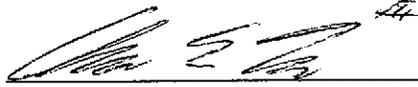
CONCLUSION

This Court should exercise its discretionary jurisdiction to review this case to determine once and for all whether there will be an exception in Ohio in public-figure defamation cases that allows a publisher to escape liability for repeating the false allegations of third parties despite actual knowledge of the falsity of the statements, or instead the well-established actual malice standard set forth by the U.S. Supreme Court will continue to govern such cases. Only this Court’s ruling on the issue can provide the necessary clarity Ohio now requires.

³ See also *Conese v. Nichols* (1998), 131 Ohio App. 3d 308, 320-321 (refusing to apply the “neutral reportage privilege,” relying on *Young*, applying instead the “actual malice standard” applicable in Ohio); 35 Ohio Jur. 3d, *Defamation and Privacy*, § 52 (2005) (“Ohio does not recognize the ‘neutral reportage’ doctrine.”).

⁴ Other states likewise reject the privilege, finding that the test set forth in *New York Times v. Sullivan* is sufficient, and explaining that the *Edwards v. Nat’l. Audubon Soc., Inc.* (which first espoused the privilege) noted the doctrine only in *dicta* and was contrary to earlier Supreme Court precedent. See *Norton v. Glenn* (Pa. Super. 2002), 797 A.2d 294, 297 (“no court is bound by the neutral reportage privilege enunciated in *Edwards*, because the privilege itself was obiter dictum,” “*Time, Inc. v. Pape* [relied upon by the *Edwards* court]. . . did not alter the law of defamation depending on who is speaking, and it did not espouse a rule that disregarded the private views of the reporter regarding the validity of what is reported,” “*Edwards* was an overly expansive interpretation of *Time, Inc. v. Pape* . . . [which] did not alter the longstanding rule enunciated in *New York Times v. Sullivan*”); *Dickey v. CBS Inc.* (C.A. Pa. 1978), 583 F.2d 1221, 1225 (“The apparent holding of *Edwards* that whenever remarks are judged by the press to be ‘newsworthy,’ they may be published without fear of a libel suit even if the publisher ‘has serious doubts regarding their truth,’ is contrary to the Supreme Court’s ruling in *St. Amant*”); *Englezos v. Newspress and Gazette Co.* (Mo. App. W.D. 1998), 980 S.W.2d 25, 32 (“Some courts have refused to follow *Edwards*, finding that it conflicts with the principles set out in *Gertz* and other United States Supreme Court cases”) (citing *Dickey v. CBS, Inc.*, 583 F.2d 1221 (3d Cir. 1980); *Hogan v. Herald Co.*, 84 A.D.2d 470, 446 N.Y.S.2d 836, 841-42 (N.Y. App. Div. 1982); *Catalona v. Pechous*, 83 Ill.2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350 (1980).

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was served via regular U.S. mail, postage prepaid, this 13th day of November, 2006, upon the following:

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IN THE COURT OF APPEALS OF OHIO

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TENTH APPELLATE DISTRICT

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James G. Jackson, :

Plaintiff-Appellant, :

v. :

City of Columbus et al., :

Defendants-Appellees. :

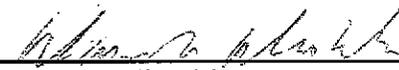
No. 05AP-1035
(C.P.C. No. 01CVC-07-6875)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on September 29, 2006, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

DESHLER, BROWN & McGRATH, JJ.

By 
Judge Dana A. Deshler

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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James G. Jackson, :
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 Plaintiff-Appellant, :
 :
 v. : No. 05AP-1035
 : (C.P.C. No. 01CVC-07-6875)
 City of Columbus et al., :
 : (REGULAR CALENDAR)
 Defendants-Appellees. :

NUNC PRO TUNC
D E C I S I O N¹

Rendered on October 3, 2006

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APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

¹ This Nunc Pro Tunc Decision was issued to correct a clerical error contained in the original decision released on September 29, 2006, and is effective as of that date.

{¶1} Plaintiff-appellant, James G. Jackson, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment for defendants-appellees, the City of Columbus and Thomas W. Rice, Sr.

{¶2} Appellant is the Chief of the Columbus Division of Police. Appellee, Thomas W. Rice, Sr., is the former Safety Director for the city and in that capacity was appellant's direct supervisor. This case arises out of an investigation conducted at the express direction of the Mayor of Columbus into allegations of misconduct and mismanagement in the division of police. This investigation concluded with presentation of a "Mayoral Investigative Report" (the "mayoral report"), presenting the findings of the investigation addressing the underlying allegations and making recommendations for reforms or improvements in the management of the Columbus Division of Police.

{¶3} After the mayoral report was presented in 1997, appellant began legal action claiming that he was defamed by numerous statements contained therein. Although appellant has, in this and companion cases, asserted that many aspects of the mayoral report contain defamatory statements published with actual malice by appellees in furtherance of a bitter personal and political feud between appellee Rice and appellant over control of the Columbus Division of Police, the only statements that remain directly pertinent to this appeal are the republished allegations of one Keith Lamar Jones who, at the time of the investigation, was an inmate at the Chillicothe Correctional Institution. In the course of interviews with the investigators developing the mayoral report, Jones alleged, inter alia, that appellant had fathered an illegitimate child by a minor prostitute, and this allegation is reported, with extensively expressed reservations as to its reliability,

in the final draft of the mayoral report. Certain comparable statements by two unnamed Columbus-area prostitutes were also included in the report, and although appellant's claims regarding these have been dismissed prior to this appeal, they are frequently referenced in connection with Jones' statement and thus mentioned here only to develop the procedural sequence of the rulings rendered by the trial court.

{¶4} The present case began with a re-filed complaint on July 17, 2001. On June 6, 2003, the trial court entered partial summary judgment in favor of the city, finding that the city would be immune from liability if the evidence established that the alleged defamation was intentional. The trial court denied, however, the city's motion for summary judgment to the extent that it found the city would not be immune if the alleged defamatory statements were made with reckless disregard for their falsity. The court noted that, if appellee Rice were to succeed in demonstrating that he had personally acted without such reckless disregard, the city would prevail on this issue as well.

{¶5} On November 5, 2004, the trial court entered a further summary judgment in favor of Rice on all claims in the complaint with the following two exceptions: the trial court found that summary judgment would be denied "with regard to Chief Jackson's claims that he was defamed by the republication of the statements of Mr. Keith Jones and the statements of two prostitutes." (November 5, 2004 trial court decision, at 1.) On May 19, 2005, the trial court granted a renewed motion for summary judgment by Rice on the republished allegations of Keith Lamar Jones, finding that there remained no genuine issue of material fact and that reasonable minds could not conclude that Rice had acted with actual malice when republishing Jones' allegations concerning Chief Jackson. On

August 29, 2005, appellant amended his complaint to delete all claims related to alleged defamation arising from republication of the statements made by the two prostitutes, thus leaving no claims from the complaint that had not been addressed by the trial court. In the interim, however, appellant had filed on June 7, 2005, a motion for reconsideration asking the trial court to revisit its grant of summary judgment in favor of Rice concerning republication of the defamatory statements by Jones. The trial court initially agreed to permit further briefing on one issue related to the motion for reconsideration, but ultimately entered final judgment for both the city and Rice without explicitly addressing the pending motion for reconsideration.

{¶6} Appellant has timely appealed and brings the following three assignments of error:

1. The trial court erred in its May 19, 2005 Decision and Entry by granting Rice's January 24, 2005 supplemental motion for summary judgment.
2. The trial court erred in its June 16, 2005 Decision and Entry by partially denying Chief Jackson's June 7, 2005 motion for reconsideration.
3. The trial court erred in its August 29, 2005 Judgment Entry by failing to rule on the "one remaining issue" it agreed to reconsider in its June 16, 2005 Decision and Entry.

{¶7} The city of Columbus attempts to bring a conditional cross-assignment of error:

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT PARTIALLY OVERRULED DEFENDANT-APPELLEE CITY OF COLUMBUS' MOTION FOR SUMMARY JUDGMENT. THE TRIAL COURTS ERROR IS REFLECTED IN ITS DECISION AND ENTRY OF JUNE 6, 2003, WHEREIN THE COURT RULED THAT "PUBLIC

FIGURE DEFAMATION IS NOT NECESSARILY AN INTENTIONAL TORT SINCE ACTUAL MALICE CAN BE PROVED BY PROVING RECKLESSNESS."

{¶8} Despite its presentation and briefing of this assignment of error, the city of Columbus did not file a notice of cross-appeal under App.R. 3(C) in this case. The proposed assignment of error submitted by the city, therefore, may be "considered only for the purpose of preventing a reversal of the judgment under review" *Parton v. Weilnau* (1959), 169 Ohio St.145, 170-171. "In other words, it may be said that an assignment of error by an appellee, where such appellee has not filed any notice of appeal from the judgment of the lower court, may be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sore to destroy or modify that judgment." *Id.* at 171. See, also, *Duracoat Corp. v. Goodyear Tire and Rubber Co.* (1983), 2 Ohio St.3d 160; R.C. 2505.22. We will therefore consider the city's proposed assignment of error only to the extent that it provides an alternative ground for affirming the judgment of the trial court, and not as a basis for reversal of any aspect of the trial court's judgment that the city wishes to alter.

{¶9} Appellant's first and second assignments of error in this appeal assert that the trial court erred in assessing the evidence and granting summary judgment for appellees. Summary judgment, under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern*

Indemn. Co. (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶10} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Patsy Bard v. Society Nat. Bank, nka KeyBank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶11} Ohio law follows federal law and the majority of other states in setting forth the elements of defamation where the object of the alleged defamatory statements is a public official. *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 218, certiorari denied, 488 U.S. 870, 109 S.Ct. 179. In Ohio, libel, the form of defamation at issue here, is defined generally as a false written publication, made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession. *Becker v. Toulmin* (1956), 165 Ohio St. 549, 553; *Cleveland Leader Printing Co. v. Nethersole* (1911), 84 Ohio St. 118, paragraph two of the syllabus.

{¶12} Statements addressing a public official's fitness for office are constitutionally protected speech and invoke a higher burden for the defamation plaintiff. *Soke v. Plain Dealer* (1994), 69 Ohio St.3d 395, 397, citing *Garrison v. Louisiana* (1964), 379 U.S. 64,

85 S.Ct. 209. Public officials or public figures must demonstrate "actual malice" with convincing clarity to remove the defamatory speech from constitutional protection and establish a defamation claim. *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280, 84 S.Ct. 710; *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, paragraph two of the syllabus. To show "actual malice," the plaintiff must prove that the statement was made "with knowledge that it was false, or with reckless disregard of whether it was false or not." *New York Times*, at 280. To establish reckless disregard, the plaintiff must present clear and convincing evidence that the false statements were made with a "high degree of awareness of their probable falsity," *Garrison*, at 74, or that "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323.

{¶13} Summary judgment procedures are particularly appropriate when addressing First Amendment free speech issues in a defamation matter. *Dupler*, at 120. "It is for this reason that the plaintiff's burden of establishing actual malice must be sustained with convincing clarity even when the claimant's case is being tested by the defendant's motion for summary judgment." *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80. Therefore, it follows that, when addressing a defendant's summary judgment motion in a defamation action brought by a public official, the trial court will consider the evidence and all reasonable inferences in a light most favorable to the plaintiff, as with other summary judgment proceedings, but with an eye to whether "the plaintiff presented affirmative evidence such that a reasonable jury could find actual malice had to been shown with convincing clarity." *Burns v. Rice*, 157 Ohio App.3d 620, at ¶24, 2004-Ohio-

3228, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 257, 106 S.Ct. 2505, and *Varanese*, at 81.

{¶14} In *Varanese*, the Supreme Court of Ohio extensively discussed the question of whether awareness of possible falsity would, of itself, create a genuine issue of material fact to preserve for trial the question of actual malice, and thus defeat a summary judgment motion. Accordingly, the parties and the trial court have given extensive attention and argument addressing the evidence in this case and the extent to which the investigating officers and their supervisors, including Rice, knew or should have known that the statements of Keith Lamar Jones were irredeemably unreliable and immaterial to the investigation and should thus have refrained from needlessly republishing them to the detriment of appellant's reputation. Because we adopt a slightly different analytical approach from that taken by the trial court, we focus less on quantifying the degree of residual belief in the reliability of Jones' statements that could reasonably have been entertained by the investigators, and more upon the propriety of including them in the mayoral report even with full knowledge that these statements were more likely than not to be proven false. We will accordingly view the evidence in the light most favorable to appellant as the non-moving party, and assume for purposes of this appeal that the investigating officers and appellee Rice were in fact substantially aware of the likely falsity of Keith Lamar Jones' allegations regarding appellant. We do not consider, however, evidence cited by appellant to support the contention that the statements have, since their publication, been definitively proven to be false, as actual malice must be measured as of the time of publication. *Dupler*, at 124.

{¶15} Our determination of whether a reasonable person could find in favor of appellant on the question of whether appellees acted with actual malice will, moreover, be guided by our initial determination that the statements contained in the mayoral report are protected by a public interest privilege, and whether actual malice can be shown is thus a question to be assessed in the context of the unique protections afforded by this privilege.

{¶16} Appellees do not claim the "absolute" or "unconditional" privilege afforded in Ohio to "legislative and judicial proceedings, and other acts of state." *Costanzo v. Gaul* (1980), 62 Ohio St. 2d 106, 108. Appellees invoke only the qualified or conditional public interest privilege recognized in Ohio. "A publication is conditionally or qualifiedly privileged where the circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to a certain other person to whom he makes such a communication in the performance of such duty, or the person is so situated that it becomes right in the interest of society that he should tell third persons certain facts, which he in good faith proceeds to do. * * * A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege would be actionable[.]" *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 113-114. The public interest privilege will involve " 'communications made to those who may be expected to take official action of some kind for the protection of some interest of the public.' " *A&B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 9, quoting Prosser and Keaton, *The Law of Torts*. If the public interest

privilege applies to protect otherwise actionable statements, it will be defeated in a defamation action only by a showing of actual malice. *Id.* The invocation of the public interest privilege therefore places non-public figures who bring a defamation action under the same burden as public figure plaintiffs in that they must demonstrate actual malice. While that is not at first blush a significant issue in the present case because appellant concedes that he is a public figure and thus must prove actual malice in any event, we believe that the indicia of actual malice in this defamation action are affected by the application of the public interest privilege and the evidence in such circumstances may be read differently than it would in a conventional action against, for example, a media defendant publishing defamatory statements under more typical circumstances.

{¶17} Actual malice in the cases falling under public interest privilege, particularly in the context of an official investigation, must be assessed in light of the possible need to republish some statements, even if known to be false, as necessary products of the investigation and support for its completeness and thus reliability. The mayoral report in the present case was undertaken at the express direction of the mayor operating under Section 63 of the city charter, was carried forward by the city's safety director with cooperation of division of police officials and the State Highway Patrol. Appellant was not, in fact, initially the primary focus of the investigation, which primarily centered on gambling enterprises and a suspected prostitution ring allegedly benefiting from police protection or laxity. As a result, during the course of the investigation, many persons of questionable reputation were given the opportunity to make statements, some choosing, inevitably if not necessarily truthfully, to take the opportunity to implicate various members

of the division of police in illegal or immoral activity. Reproduction of these statements in the resulting mayoral report, even with knowledge that some were likely to be complete fabrications, does not establish malice solely on the basis of the possible unreliability of some of the statements. With regard specifically to the statements by Keith Lamar Jones, the report, in any event, went some length to reflect the belief of various law enforcement personnel that the source was unreliable, and could be characterized as a "scam artist," although a corroborating history of occasional reliability as a police informant was also presented. As this court held in *Burns*, "contrary to plaintiffs' contentions, the Report's disclosure of concerns or credibility problems regarding a source displays a lack of actual malice rather than malice." *Id.* at ¶50.

{¶18} The administrative context of the mayoral report places it in the same light as an investigative report prepared by a police officer in a regular criminal matter, where the qualified privilege has been held to apply. *Black v. Cleveland Police Dept.* (1994), 96 Ohio App.3d 84:

In the present case, we agree that the statements made in the internal police communications are protected by a qualified privilege. The statements were made between law enforcement officers and concern matters in which the officers have a common interest. * * * [T]his court recognizes that the officers in question have both a legal and moral obligation to speak on matters involving the investigation of alleged criminal occurrences.

Id. at 89. (Citation omitted.)

{¶19} Mere republication of allegations that might be false, or even that more than likely are false, will not establish of itself actual malice in the context of the public interest privilege as applied to an official investigation. As set forth above, the republished

statements by the inmate were presented with an array of qualifying doubts as to their reliability, but with the ultimate conclusion that they could not be dismissed out of hand. In the context of a case applying the qualified public interest privilege, an assessment of a defamation, defendant's "reckless disregard for the truth," necessarily must include a review of all the factors that make publication of the contested statements reasonable or unreasonable, including the public interest served by publication or impaired by suppression of the statements, the availability of time and resources to verify or disprove the contested information within the constraints of the ongoing investigation, and the extent to which the possible unreliability of the republished statements was exposed and emphasized in accompanying narrative.

{¶20} We acknowledge that actual malice under the present circumstances might yet be inferred where allegation is piled upon allegation in an attempt to bury any possibility of disbelief on the part of the reader under a sheer volume of lies, no matter how many self-serving reservations accompanied the inaccuracies. Nor do we hold that a republisher may "defame freely by repeating the defamation of others and defending it as simply an accurate report of what someone else had said." *Gray v. St. Martin's Press, Inc.* (C.A.1 (N.H.), 2000), 221 F.3d 243, 250. The record in the present case does not demonstrate actual malice on that basis. The investigating officials, including appellee Rice, were charged by the mayor with going forward with a full investigative report. Refraining from pursuing and eventually accounting for certain allegations on grounds of unreliability might well have left the investigators short of fulfilling their duty to completely and fully investigate every known avenue of information to compile the best possible

assessment of the state of the division of police. The mayoral report, not only with respect to this particular inmate but many other interviewed sources, presents much evidence both for and against the credibility of the informants and witnesses, and in most cases notes that credibility could not be completely resolved without an extensive further investigation. Given the nature of the investigation and the type of witnesses encountered, to refrain from publishing any potentially defamatory allegation because of the unreliability of the informant might have left little to include in the mayoral report.

{¶21} We accordingly find that the trial court did not err in granting summary judgment on the remaining claims in favor of Rice and the City of Columbus. The statements in the mayoral report were protected by qualified privilege, and the trial court did not err in finding that no reasonable person could conclude from the evidence before the court that the plaintiff could show by clear and convincing evidence that the allegedly false statements were made with actual malice. Appellant's first and second assignments of error are overruled. This is dispositive of both the judgment granted in favor of Rice and in favor of the City of Columbus, and we do not further address the arguments raised in the City of Columbus' proposed cross-assignment of error.

{¶22} Appellant's third assignment of error addresses the procedural sequence followed by the trial court in arriving at the final grant of summary judgment in favor of appellees. The trial court, after initially indicating that it would consider a partial reconsideration of one of its interlocutory rulings granting partial summary judgment, and excepting briefing the issue, eventually entered the final judgment in this case without expressly ruling on appellant's motion for reconsideration. When a trial court enters final

judgment without expressly ruling upon a pending motion, the motion will be considered impliedly overruled. *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769. In declining to rule upon the pending motion for reconsideration, the trial court both impliedly overruled it and reaffirmed its prior interlocutory judgments in the matter. The merits of the matter were at every stage fully and finally addressed by the trial court, and failure to address a motion for reconsideration does not alter the posture or merits of the case as it appears before us. We accordingly find no prejudicial error on the part of the trial court in declining to address the pending motion for reconsideration. Appellant's third assignment of error is accordingly overruled.

{¶23} In accordance with the foregoing, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas granting summary judgment to appellees is affirmed.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
