

IN THE SUPREME COURT OF OHIO

JAMES G. JACKSON : CASE NO. 06-2096
: :
Appellant, : On Appeal from the
: Franklin County Court of Appeals
v. : Tenth Appellate District
: :
CITY OF COLUMBUS, *et al.*, : Court of Appeals
: Case No. 05 APE09 1035
Appellees. :

MERIT BRIEF OF APPELLEES THOMAS W. RICE, SR.
AND THE CITY OF COLUMBUS

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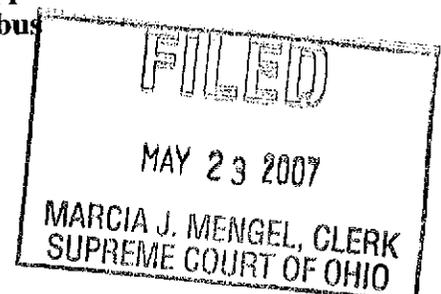


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STATEMENT OF FACTS

Statement of the Case

This appeal involves a defamation claim by the Chief of Police of the City of Columbus, Appellant James G. Jackson. Jackson claims that he was defamed by Appellees when, as Safety Director for the City of Columbus, Appellee Thomas W. Rice, Sr. included certain allegations made by Keith Lamar Jones in Rice's official Report to the Mayor that detailed the results of Rice's investigation into allegations of police involvement in prostitution-related activities and other forms of misconduct ("Mayoral Investigative Report").

Following issuance of the Mayoral Investigative Report, Jackson sued, claiming numerous statements in the Report in addition to Jones' statements defamed him. With the exception of one claim involving allegations by two street prostitutes which Jackson voluntarily dismissed by filing a Stipulation to amend his Complaint (Second Suppl. 1), all of his other claims were dismissed in response to Appellees' motions for summary judgment. Jackson chose to appeal only with respect to his claim relating to the republication of Jones' allegations. (Appx. 1, Notice of Appeal.)

In the Mayoral Investigative Report, Rice reported to the Mayor that Jones, a then-incarcerated inmate who had provided useful information to law enforcement authorities in the past, had alleged that Chief Jackson had fathered a child with a juvenile prostitute, allegations that Rice and his investigative team ultimately dismissed in the Report as "unproven at this time and are dependent on evidence in the future from new sources or places." (Suppl. 180-82, Report 156-158.)¹ Consequently, Jones' allegations were referred back to the Columbus Division of Police for possible further investigation. (Suppl. 10-11.) In addition, the Report also

¹ Due to a printing error these pages should be read out of order. They should be read as follows: page 158, the last two paragraphs of page 156, and then page 157.

expressly stated how these allegations had come to the investigative team's attention; what efforts had been made to determine the truth of these allegations; and, critically, concerns that Rice and his investigative team had regarding Jones' credibility, including that some law enforcement officers viewed him as a "scam artist," a "liar," and "very knowledgeable but not reliable as he uses information to his advantage." (Suppl. 180-82.)

As he now argues to this Court, Appellant argued to the Court of Appeals that, even as so limited, the republication of Jones' allegations in the Report coupled with Rice's express reservations regarding Jones' credibility established that Rice published those allegations with a "high degree of awareness of the probable falsity of those statements," and hence, with "actual malice."

In its decision issued September 29, 2006, the Court of Appeals held that even assuming for purposes of appeal that Director Rice and his investigators were "substantially aware of the likely falsity" of the Jones allegations, inclusion of those allegations in the Report was protected by Ohio's public interest privilege because they were republished only as allegations that were investigated, and not as true, in an official report detailing the results of an official investigation and, further, the investigators' concerns regarding Jones' credibility were appropriately disclosed. (Appx. 12.)

On February 28, 2007, this Court granted jurisdiction to hear the case and allowed the appeal on Appellant's first proposition of law only, which raises the issue whether under these circumstances, in the context of an official governmental investigation and report, the republication of such allegations as allegations is defamatory if published with "a high degree of awareness of the probable falsity of those statements."

The Mayoral Investigation and Report

The June 30, 1997 Mayoral Investigative Report was the culmination of the efforts of the Mayor of the City of Columbus, and Thomas W. Rice, Sr., its then-Director of Public Safety, to investigate allegations of misconduct within the highest levels of the Division of Police, up to and including the Chief of Police, Appellant James G. Jackson. The investigation summarized in the Report started as an administrative investigation concerning Jackson's failure to render what Rice considered was appropriate discipline to Commander Walter Burns at the conclusion of an Internal Affairs Bureau investigation (IAB #95-21) which focused on Burns' mishandling of evidence during a significant prostitution investigation. The administrative investigation thereafter was expanded by order of the Mayor, acting pursuant to Section 63 of the Charter of the City of Columbus, into a Mayoral Investigation of broader concerns, including not only prostitution-related activities but also favoritism to or by police employees and "other actions of misfeasance, malfeasance or nonfeasance." (Second Suppl. 4-5, Rice Aff. ¶¶ 5-9.)

Both phases of the investigation were headed by Assistant Safety Director David Sturtz. (Second Suppl. 5-6, Rice Aff. ¶¶ 9-10.) Like Rice – who was a former Superintendent of the Ohio State Highway Patrol – Sturtz had been employed by the Ohio State Highway Patrol for many years before joining the City of Columbus' Department of Public Safety, and had received extensive training on how to conduct an investigation. (Second Suppl. 11, Sturtz Aff. ¶ 1.) Sturtz also served as the Inspector General for the State of Ohio, conducting and supervising investigations of public official misconduct for six and one-half years. (Second Suppl. 11, Sturtz Aff. ¶ 1.) Rice had known Sturtz for more than 30 years. Rice was aware of Sturtz's excellent reputation and trusted him to carry out the investigation in a careful, skilled and impartial manner. (Second Suppl. 6, Rice Aff. ¶ 10.)

Sturtz was assisted in the investigation by Commander D. James Dean, who at the time headed the Internal Affairs Bureau of the Division of Police. (Second Suppl. 15, Dean Aff. ¶ 1.) Sturtz and Dean selected the remaining members of the Mayoral Investigative Team. (Second Suppl. 6, Rice Aff. ¶ 11.) All the members of the team were experienced investigators employed by the Columbus Division of Police. All reported directly to Sturtz and Dean. (Second Suppl. 12, Sturtz Aff. ¶ 3.) In creating the team, Sturtz and Dean selected officers they believed were truthful, honest and impartial. (Suppl. 300, Sturtz Dep. at 188.) Rice received regular reports from the team throughout the investigation but played no role in their daily investigative activities. (Second Suppl. 6, Rice Aff. ¶ 12.)

In April 1997, Sturtz presented Rice with a report summarizing the allegations that had surfaced during the investigation, what the investigators had done to investigate the allegations, and the conclusions the investigators were able to draw (the "April Report").² Dean testified that in drafting the April Report it was a "given" that the team would be fair and impartial. (Deposition of D. James Dean at 74.) Rice had no role in the preparation of the April Report. (Second Suppl. 7, Rice Aff. ¶ 14.)

After reading the April Report, Rice decided that it should be restructured and edited to better conform to the issues listed in the Mayor's letter authorizing the Section 63 Investigation, to focus on the management concerns raised by the allegations or facts summarized by the investigators, and to address the actions and responsibilities of command officers in addition to Chief Jackson. (Second Suppl. 6, Rice Aff. ¶ 14.) This decision to better focus the Mayoral Report on the larger management concerns was entirely appropriate given that Rice was the one

² A complete copy of the April Report, with all Report references, is attached as Appendix Volumes I-III to Rice Motion for Summary Judgment, R. 115; copies of pages 133-135 of the April Report and the materials referenced in the associated Endnotes are included in the Second Supplement.

responsible for the regulation and government of the Division of Police, and given that the purpose of the Mayoral Report was to report back to the Mayor any concerns and recommendations for the management of the Division of Police. (Suppl. 7-8.)

Rice asked Assistant Safety Director Robbie Hartsell and Gayle Connor, his Executive Assistant, to work with him to restructure and edit the April Report. (Second Suppl. 8, Rice Aff. ¶ 15.) He wanted Hartsell and Connor involved because they had good writing skills and experience with management reporting. (*Id.*) Rice also wanted Sturtz involved as a resource person because he was the lead investigator and had the greatest familiarity with the investigatory files. (Second Suppl. 8, Rice Aff. ¶ 15.) Rice specifically instructed Hartsell that he wanted the edited Mayoral Report to be accurate and thorough, and that all information in the Mayoral Report was to be supported by factual documentation in the Report endnotes. (Second Suppl. 8-9, Rice Aff. ¶ 17.)

The Mayoral Report was issued June 30, 1997. The text of the Report contains 340 numbered “endnotes” or “Report References.” These Report References provide a cross reference to a 969 page compendium of the supporting documentation referenced in the endnotes. In preparing and issuing the Mayoral Report, Rice relied on the information provided in the April Report, Sturtz’s familiarity with the investigation and the investigative materials, and Hartsell’s review and check of the documentation in the endnotes. (Second Suppl. 6-8, Rice Aff. ¶¶ 12, 14-17.)

The allegations about which Jackson complains are included in the Mayoral Report at pages 156-58, under the topic heading “Other Related Matters Considered” (Suppl. 180-82), and are referenced on page 6 of the Mayoral Report, at paragraph 4, as one of the “concerns

identified during [the Mayoral Investigation] that were forwarded to either the Division of Police or an external agency for further action” (Suppl 11.).

The Mayoral Report carries over from the April Report with minor editing Dean’s and Sturtz’s report of their investigation into allegations by Keith Lamar Jones, a prisoner at Chillicothe Correctional Institute, that Jackson had had a sexual relationship with a minor prostitute and impregnated her. Rice thought Jones’ allegations were significant enough to warrant investigation because the mayoral investigators had been specifically directed by Mayor Lashutka to investigate “allegations of police misconduct relating to prostitution enterprises....” (Suppl. 245, Rice Aff. ¶ 2.) Indeed, concern about Jackson’s failure to appropriately discipline Commander Walter Burns for his actions compromising the investigation into Anthony Mennucci’s prostitution enterprises was a catalyst for the mayoral investigation. (Suppl. 247, Rice Aff. ¶ 8.) During the course of the investigation, additional concern was raised in several areas relating to the enforcement of prostitution laws and there was concern that Jackson’s involvement with Charlynn English, a former prostitute, had compromised his ability to effectively discipline Commander Burns who was aware of that relationship. (*Id.*) Thus, the Jones allegations were related directly to a central issue of the investigation.

The text and endnotes of the April Report included the results of Dean’s and Sturtz’s investigation into the allegations including: the background check performed on Jones; Dean’s meetings with Narcotics Sergeant Greg Kulis and others to discuss Jones’ reputation; the fact that the polygraph examiner did not examine Jones about the Jackson allegations because Jones did not have personal knowledge of them; that the examiner found Jones not to be completely truthful regarding other areas of questioning; and the fact Jones provided Dean and Sturtz with photographs of the minor with whom he alleged Jackson had had a sexual relationship. (Second

Suppl. 19-21 (Report), 22-71 (Endnotes.) The April Report notes the problems with Jones' credibility and expressly states the investigators' conclusion that the Jones allegations were unproven based upon the evidence available to them, and were forwarded to the Vice Squad for possible further investigation. (Second Suppl. 19-21.)

The Mayoral Report as issued by Rice in June 1997 incorporates the investigators' factual information, perceptions and conclusions. Rice did not investigate the Keith Lamar Jones allegations himself. As with the rest of the Mayoral Report, he relied on the investigation performed by the team of professional investigators as reported to him in the April Report. (Second Suppl. 6-7, Rice Aff. ¶ 12; Suppl. 246, Rice Aff. ¶ 5.)

At the time the Mayoral Report was published, Rice was aware that Jones had repeated his allegations in a letter to a news reporter, Carol Luper of Channel 6 Television. He was concerned that if the Report did not address these allegations it could leave the impression that the allegations had been ignored or hidden. (Suppl. 248, Rice Aff. ¶ 9.) Thus, although the Mayoral Investigation was winding down and there was not time to fully investigate these allegations, he decided that the information regarding the investigation into the Jones allegations should be included. Consistent with the April Report, the Mayoral Report states what the allegations were; how they arose; what was done to investigate them; issues related to Jones' credibility; and the investigators' conclusion that the allegations were unproven based upon the evidence available to them and therefore forwarded to the Vice Squad for possible further investigation. (Second Suppl. 19-21; Suppl. 180-82.)

Rice believes that the Mayoral Report accurately repeats the allegations made by Jones about Chief Jackson. (Suppl. 249, Rice Aff. ¶ 12.) He also believes that the Mayoral Report accurately sets forth all the information his investigative team had about the credibility of these

allegations and the witness who made them (Suppl. 248-49, Rice Aff. ¶¶ 10-12.) This includes both the negative information stated in the Report's narrative at pages 156-158, and evidence that Jones had provided useful information to law enforcement authorities in the past, which appears only in the supplemental documentation referenced in Endnotes Number 321 and Number 323 (Second Suppl. 103, 108)³.

As the Mayoral Report indicates, and as Rice's Second Supplemental Affidavit confirms, while Rice recognized that the Keith Lamar Jones allegations might be false, the evidence was simply too equivocal for him to conclude either that they were certainly or probably true or certainly or probably false. (Suppl. 248-49, Rice Aff. ¶¶ 11, 15.)

Despite the equivocal nature of the evidence, Rice included the Keith Lamar Jones allegations in the Mayoral Report because he believed he had a duty to do so. (Suppl. 245-49, Rice Aff. ¶¶ 3-12.) Rice believed it was his duty to prepare a written report for Mayor Lashutka of the allegations that had been made which related to the subject areas outlined in the Mayor's letter ordering the investigation to be commenced, what efforts had been made to investigate those allegations, the results of the investigation and his recommendations for further action. (*Id.*) He believed it was his duty to provide Mayor Lashutka with the candid professional opinion of the team of professional investigators about the merits of the various allegations and the evidence supporting or undermining the allegations based upon the information developed by the investigative team. (*Id.*) Consequently, where the investigative team believed the evidence uncovered was sufficient to prove or disprove an allegation, that is stated in the Mayoral Report; where, as here, however, the investigators could not reach a firm conclusion and believed further investigation might be required, that is stated as well. (*Id.*) Particularly because Jones had

³ Extensive materials relating to Keith Lamar Jones were included in the supplemental documentation referenced in the Endnotes. (See Second Suppl. 72-128.)

already alerted the news media to his allegations, Rice was concerned that if the Report did not address these allegations it could leave the impression that the allegations had been ignored or, worse, that they had been covered-up and hidden from public scrutiny. (Suppl. 248, Rice Aff. ¶ 9.)

ARGUMENT

Appellees' Proposition of Law:

The truthful and accurate reporting of a third party's allegations investigated in the context of a governmental investigation is protected by Ohio's public interest privilege. Knowledge that the allegations themselves are false or likely to be false will not establish "actual malice" sufficient to defeat the privilege in the context of an official investigation when the republished allegations are stated as allegations, and not as true. (*Jacobs v. Frank* (1991), 60 Ohio St. 3d 111, A & B-*Abell Elevators Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St. 3d 1, applied; *St. Amant v. Thompson* (1968), 390 U.S. 727, *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, distinguished.)

Appellant's Proposition of Law asks this Court to adopt a very broad proposition of law that will impose liability on anyone who, under any circumstances, publishes the defamatory statements of a third party for any purpose whatsoever, provided only that the publisher has a "high degree of awareness of the probable falsity of those statements," a standard derived from First Amendment jurisprudence beginning with the United States Supreme Court's decision in *New York Times v. Sullivan* (1964), 376 U.S. 254.

By contrast, Appellees' proposed Proposition of Law asks the Court to recognize and apply only a very limited privilege – the privilege to report allegations as allegations in conducting and/or reporting on the conduct of an official investigation. As recognized by the Court of Appeals in this case, though the rule of law embodied in Appellant's Proposition of Law may be appropriate for the more typical defamation action against media defendants, different public policy interests are implicated when the republication of a third party's allegations occurs in the context of a governmental investigation, and recognition of a narrow

privilege tailored to serve and protect those unique interests is consistent with and encompassed by the public interest privilege identified in this Court's prior decisions.

A. Ohio Recognizes a Public Interest Privilege for Statements Published in the Performance of a Duty, As Well As Where the Communication is Made to Those Who May Be Expected to Take Official Action of Some Kind to Protect the Public Interest.

The Court of Appeals' decision was based on the qualified public interest privilege which has been previously adopted by this Court. As stated in *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, and followed in *Jacobs v. Frank* (1991), 60 Ohio St.3d 111:

"A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do. This general idea has been otherwise expressed as follows: 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, and although this duty is not a legal one, but only a moral or social duty of imperfect obligation. . . ."

Jacobs v. Frank, 60 Ohio St.3d at 113-14 (emphasis added).

The Court of Appeals appropriately determined that the public interest privilege was applicable to the facts in this case. In *Jacobs v. Frank*, in holding that the privilege exists for communications to a licensing board or peer review committee, this Court recognized that in such circumstances "an obvious need exists for candor;" that "[t]he public has a right to feel secure in the knowledge that the professional services it receives are rendered by competent and qualified practitioners;" that there was a need "to receive a frank straightforward appraisal from those in positions to judge;" and that "[m]ore important, the evaluators must be free to make

truthful professional judgments . . . without fear of retaliatory lawsuits.” *Id.* at 116. Obvious parallels exist in the present case where what is involved is an official report of an investigation into possible police misconduct at the highest levels of the Division of Police.

Moreover, in *A & B-Abell Elevators Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, this Court explicitly recognized the privilege found to exist in *Jacobs v. Frank* to be only one instance of a “‘public interest’ privilege,” which “involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public.” 73 Ohio St.3d at 9 (citing *Prosser & Keeton, The Law of Torts*). The Court there held that “[p]ublic policy dictates . . . that those who provide information to government officials who may be expected to take action with regard to the qualifications of bidders for public-works contracts be given a qualified privilege, thereby improving the quality and safety of public work.” *Id.* at 9-10. Again, the importance of a Safety Director providing information to a Mayor regarding issues of possible misfeasance, malfeasance and non-feasance in the Division of Police hardly can be deemed to have lesser importance.

Under this Court’s precedents, whether a privilege attaches is to be determined with reference to the occasion, so that “[w]here [as here] the circumstances of the occasion for the allegedly defamatory communications are not in dispute, the determination of whether the occasion gives the privilege is a question of law for the court.” *A & B-Abell Elevators Co.*, 73 Ohio St.3d at 7-8. Therefore, as this Court further explained in *A & B-Abell Elevators*:

In determining whether an occasion is privileged . . . we are not concerned with the motive of a particular defendant. * * * If we were to make the existence of a qualified privilege dependent upon the innocent motive of a defendant, we would effectively allow the privilege to be defeated by a showing of something less than actual malice, thereby circumventing the protections afforded by *Jacobs*[.]

Id. at 10-11.

Here, where it is uncontroverted that Rice as the Director of Public Safety believed he had a duty and obligation to report accurately to the Mayor the results of his Section 63 investigation into allegations that included police involvement in prostitution, his report of the allegations investigated and conclusions reached regarding those allegations qualifies for the “public interest” privilege under the standards thus articulated in *Hahn, Jacobs v. Frank*, and *A & B-Abell Elevators*, and so the Court of Appeals appropriately held in its decision (Appx. 10.)

B. Statements in Investigative Reports are Covered by a Qualified Privilege Under Ohio law.

As the Court of Appeals recognized in arriving at its decision, there is square Ohio appellate authority that statements in investigative reports are covered by a qualified privilege under Ohio law. (Appx. 34, citing *Black v. Cleveland Police Dept.* (1994), 96 Ohio App.3d 84, *appeal not allowed* (1994), 71 Ohio St.3d 1421, *cert. denied* (1995), 514 U.S. 1115.) *See also Davis v. City of Warrensville Hts.* (Jan. 15, 1998), Cuyahoga App. No. 72722, 1998 WL 12337.

In *Black*, the officer stated in his report that he believed the alleged victim “to be mentally unstable” and “his facts not believable re this alleged incident” and that “this report made as alleged only; no material evidence to prove any of the allegations.” 96 Ohio App.3d at 85-86. The Court of Appeals affirmed the summary judgment entered on behalf of the officer on the grounds that the statements in question were qualifiedly privileged. The court noted that “the existence of a qualified privilege has been recognized in cases involving allegedly defamatory statements made during the course of criminal or governmental investigations.” 96 Ohio App.3d at 89 (citing *Atkinson v. Stop-N-Go* (1992), 83 Ohio App.3d 132; *Gaumont v. Emery Air Freight Corp.* (1990), 62 Ohio App.3d 220; and *Barnes v. Mosack* (June 7, 1984) Cuyahoga App. No. 47575, 1984 WL 5033.) The court continued:

In the present case, we agree that 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. *See Smith v. Klein* (1985), 23 Ohio App.3d 146. Additionally, this 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. *See Hahn v. Kotten* [43 Ohio St.2d at 244.]

Id.

Admittedly, none of these decisions actually involve a claim that the republication of a third person's allegations in an investigative report defamed the subject of those allegations, as is the case here. However, in recognizing the necessity for extending at least a qualified privilege to statements in investigative reports in general, these decisions are fully consistent with this Court's precedents, common sense and the public interest, and should be equally applicable to the Mayoral Investigative Report at issue in this case.

C. Consistent with the Public Interests Intended to be Protected by the Qualified Privilege for Statements in Investigative Reports, the Privilege Must Protect the Republication of a Third Party's Allegations, as Allegations and Not as True, Even Where the Investigators Know or Believe the Allegations are False or Likely to Be False.

Before the courts below, and again in this Court, Appellant has relied upon First Amendment jurisprudence derived from the United States Supreme Court's decision in *New York Times v. Sullivan* (1964), 376 U.S. 254, and, in particular, *St. Amant v. Thompson* (1968), 390 U.S. 727, and *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, to argue that the republication of a third party's allegations with a "high degree of awareness of the probable falsity of those statements" constitutes "actual malice" sufficient to overcome any public interest privilege under Ohio law. And it is true that in *Jacobs v. Frank and A & B-Abell Elevators*, this Court "borrowed" the *New York Times v. Sullivan* definition of "actual malice"

for purposes of analyzing whether the statements at issue in those cases fell within the qualified privilege this Court held to be implicated under those particular circumstances.

Critically, however, neither any of the First Amendment cases relied upon by Appellant, nor any of the qualified privilege decisions rendered by this Court, involve the republication of third party allegations in the context of an official governmental investigation and the unique duties and interests implicated thereby.

The Court of Appeals appropriately recognized that application of the public interest privilege to a claim of defamation in the context of an official investigation must be distinguished from a more “conventional action against, for example, a media defendant publishing defamatory statements under more typical circumstances.” (Appx. 14.) The Court of Appeals further recognized that under these unique circumstances, and as a matter of simple common sense, the investigators must be free to report on the allegations investigated, and to republish those allegations as allegations, even if they ultimately concluded that they were false or probably false. The Court of Appeals cogently explained its reasoning as follows:

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. . . . [D]uring the course of the investigation, many persons of questionable repute 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 those statements in the resulting Mayoral report, even with knowledge that some were likely to be complete fabrication, 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 plaintiff’s contentions, the Report’s disclosure of concerns or credibility problems regarding a source displays a lack of actual malice rather than malice.”

(Appx. 14-15, quoting *Burns v. Rice*, 157 Ohio App.3d 620, at ¶ 50, 2004-Ohio-3228, which involved the identical allegations in the Report.)

Continuing, the Court of Appeals further explained why the public interest privilege had to be applied differently to the republication of a third person’s allegations in the context of a governmental investigation like this one, involving as it did investigation of police officers’ and commanders’ possible involvement in prostitution-related activities, corruption and favoritism, than in the more conventional contexts present in the cases relied upon by Appellant:

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.

(Appx. 16-17.)

Put even more simply, where the only, or the most likely, witnesses to the conduct under investigation are prostitutes and criminals, to exclude their allegations or the investigators’ conclusions regarding those allegations from the investigators’ report would not be consistent with the investigators’ duties, or the public interest. Hence, consistent with the investigators’

sense of what their duties demanded, and the Court of Appeals' recognition of the important public policies implicated thereby, the court held that in this unique context there must indeed be a privilege to republish a third person's allegations, as allegations, even where there exists a high degree of awareness of their probable falsity.

On the other hand, adoption of Appellant's proposed Proposition of Law – which would impose liability for any republished statement known or believed to be false or likely false, regardless of the context in which, or the purpose for which, the statement was republished – would lead to manifestly absurd results when applied in the context of investigations generally, and governmental investigations in particular. For under Appellant's proposed rule of law, no investigator could ever report to a superior or any other legitimately interested party that certain allegations made by a third person had been investigated and were “found (or believed) to be false” or were “unbelievable” or, as in this case, “unproven,” without thereby being rendered automatically liable for defaming, not the accuser whose allegations the investigator rejected, but the accused whom the investigator's report vindicates.

This cannot be the law of Ohio, and were it to become the law of Ohio, it would hardly foster the public interests this Court identified as being protected by the public interest privilege in its seminal decisions in *Jacobs v. Frank* and *A & B-Abell Elevators*, such as the need for “candor;” the need “to receive a frank straightforward appraisal from those in positions to judge;” and the freedom “to make truthful professional judgments . . . without fear of retaliatory lawsuits.” *Jacobs v. Frank*, 60 Ohio St.3d at 116. This is especially true with regard to cases like the present one, involving an official government investigation of a high-level public official and matters of great public importance, where the investigators owe a duty not only to their superiors, but to the public, to be thorough, accurate, complete and candid about every aspect of

their investigation, including their account of the allegations investigated, the evidence uncovered, and their “truthful professional judgments,” again, “without fear of retaliatory lawsuits.”

Significantly – and despite Appellant’s repeated attempts to mis-label it as such – the privilege thus recognized by the Court of Appeals and that which Appellees ask this Court to uphold is most assuredly not the “neutral reportage privilege,” which is limited by definition to media defendants, and which this Court has not recognized. *See Young v. Morning Journal* (1996), 76 Ohio St.3d 627. To the contrary, as the Court of Appeals’ Decision makes plain, the privilege it found to be applicable in this case is a privilege narrowly tailored to “the context of the public interest privilege as applied to an official investigation.” (Appx. 15.)

Yet while the public policy reasons for recognizing such a privilege are particularly compelling in the context of a governmental investigation, it is worth noting that a number of courts have recognized a similar public policy based privilege to republish a third party’s allegations, as allegations, in the context of a private investigation, regardless of the republisher’s beliefs as to the truth of the allegations.

For example, in *Burkes v. Stidham* (1995), 107 Ohio App. 3d 363, the court recognized that under certain circumstances even a private citizen may have an affirmative duty to report a third person’s allegations of misconduct to a supervisor or supervising body “as allegations” despite having substantial reason to doubt their accuracy.

In *Burkes*, the Court of Appeals for the Eighth District upheld the award of summary judgment to defendant Ronald Adrine on the plaintiff’s claim that Adrine, a Vice President of the Cleveland NAACP Chapter, had defamed him by repeating to the Chapter’s Executive Committee a third party’s allegations that Burkes had attempted to engage in influence peddling,

which could have brought discredit or even legal liability on the Chapter. After first holding that Adrine's repetition of these allegations was qualifiedly privileged under these circumstances, the court rejected Burkes' contention that that qualified privilege was defeated because Adrine allegedly acted with "actual malice" by republishing the allegations about what Burkes had allegedly said to the third person accuser when Adrine had substantial reasons for doubting their accuracy, reasoning:

Adrine's publication to the Executive Committee was not presented as truth that the statements [by Burkes] were made. Adrine stated that the remarks were "allegedly" made and it was clear Burkes denied making the statements. Appellants never explain how Adrine was reckless with regard to the truth or falsity of the publication when Adrine did not represent the statements as being true anywhere in appellant's transcript of the meeting. Adrine did not act with actual malice if the statements are not represented as being true.

107 Ohio App. 3d at 374-75 (emphasis added.)

A similar result was reached in *Vanderselt v. Pope* (Oregon App. 1998), 155 Or. App. 334, 963 P.2d 130, *review denied* 328 Or. 194, 977 P.2d 1172 (1998). In *Vanderselt* the plaintiff claimed that he had been defamed prior to his termination when Pope, the president of the company, shared with several other top managers a letter received from Bellafronto, a disgruntled former employee, accusing Vanderselt of misconduct. As in *Burkes*, the *Vanderselt* Court of Appeals affirmed the grant of summary judgment to the defendant, holding that the president had a qualified privilege to share the allegations in Bellafronto's letter with his managers despite his belief that the allegations were false. The court noted that Section 602 of the Restatement (Second) of Torts recognizes that in circumstances like these the publication of even a defamatory "rumor or suspicion" may be privileged, "even if [the publisher] knows or

believes the rumor or suspicion to be false.” See 155 Or. App. at 346-47. The court therefore concluded as follows:

Pope discussed Bellafronto’s accusations against plaintiff with management in order to determine if something should be done about them. Rather than presenting Bellafronto’s accusations as fact, Pope indicated to those to whom he communicated that he did not believe the accusations against plaintiff . . . If merely repeating an accusation that had been made in the context of determining what should be done about it constituted defamation, then employers would be severely crippled in their abilities to verify rumors and accusations by employees about management, or about employees by management, for that matter.

155 Or. App. at 346 (emphasis added.)

The *Vanderselt* court’s recognition that employers would be severely crippled by adoption of a rule such as that urged by Appellant in this case – pursuant to which the repetition of a third person’s allegations that are believed to be false would necessarily constitute defamation even if the allegations had been repeated “in the context of determining what should be done about it” – is at least equally true when applied in the context of public employers and public servants, and of far greater consequence to the public as a whole.

After all, what Appellant is challenging in this case is the ability of the Director of Public Safety to report to his superior, the Mayor, serious accusations made against the Chief of Police, whose conduct they were duty-charged with supervising, and his conclusions regarding the credibility of those allegations. To adopt the rule of law urged on this Court by Appellant not only would punish Rice for carrying out what he believed to be his duty to report allegations regarding his subordinate to his superior “in the context of determining what should be done about it,” but would severely cripple the ability of all public employers in the future to candidly share equally serious or more serious allegations of misconduct about their subordinates for the

purpose of determining what should be done about them. If, for whatever reason, the third person's allegations are believed to be false or likely false, or "unproven," the solution cannot be to prohibit the discussion of the allegations altogether as Appellant proposes, but rather, as was done here, to also communicate the reasons why the allegations are believed to be false, or unproven, so that those reasons for discounting the allegations can be assessed as well in determining, ultimately, what should be done about them.

D. Contrary to Appellant's Argument, Releasing the Mayoral Investigative Report to the Public Does Not Negate the Public Interest Privilege.

Surprisingly, Appellant argues that although Rice may have been privileged to communicate the allegations at issue to the Mayor because of their corresponding interests or duties, the fact that the Report was released also "to the public," "the citizens of Columbus," "the people of Columbus," defeats Appellee's claim of privilege because Rice owed no such duty to them, nor did they share any "corresponding interest." (Appellant's Brief at 25-26, original emphasis). In so arguing, Appellant ignores or misconceives both Ohio's Public Records Law and the fundamental nature of public service itself, the bedrock principle of both being that public servants are fully and directly accountable to the public for what they do in the public's name, and with the public's money.

Under Ohio's Public Records Law, Ohio Revised Code §149.43, even if Rice had wanted to, or thought it appropriate or politic to do so, he could not lawfully have issued any "secret" report to the Mayor, or have limited distribution of the Report that was issued only to the Mayor or other public officials. Indeed, under the Public Records Law, many if not all of the source documents upon which the Report was based, including witness statements and the investigators' notes of interviews, were themselves "public records" within the meaning of the law, and

required to be made available for public inspection upon request, and without delay, regardless of whether any formal Report was issued or not. *State, ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St.3d 185 (“Internal Affairs Bureau investigations, Chain of Command investigations and other like records” held to be public records subject to no exemption from disclosure.)

Moreover, as Rice’s affidavit reflects, he believed that given the importance of these issues and the effort invested by his investigative team to get to the bottom of these issues to the extent they could, he did indeed have a duty not only to the Mayor, but to the public, to report what was done to investigate the issues he had been directed by the Mayor to investigate, and his conclusions and recommendations regarding these issues. (Second Suppl. 7, Rice Aff. ¶ 13.) Any construction of the public interest privilege that would deprive a public servant of its protections because he felt duty-bound to report to the public matters of such public importance involving high-ranking public officials must be rejected. To hold otherwise would subvert the very principles that led to the recognition of the privilege in the first place, and would undermine the accountability that the laws and the very nature of public service demand of those in public service.

In addition, it should be remembered with respect to the Jones allegations in particular that Rice was aware that Jones’ allegations about Chief Jackson had been separately sent by Jones to the media, specifically to TV news reporter Carol Luper. Rice was concerned that should his Report not even address these allegations, his failure to do so could leave the impression that the allegations had been ignored or, worse, that they had been covered-up and hidden from public scrutiny. (Second Suppl. 5-6, Rice Aff. ¶ 9.)

Finally, it should be noted that release of the Report to the public served yet another important purpose. With allegations like the Jones allegations left “unproven” but not “disproved” by the evidence uncovered during the investigation, and perhaps with those believed to be “disproved” or “proved” as well, release of the report of such allegations and the investigators’ conclusions to the public conceivably would allow members of the public who might have knowledge or information regarding any of these allegations to come forward to support, confirm or disconfirm the investigators’ reported conclusions with respect to such allegations. Suppression of any mention of allegations that the investigators believed to be false or likely to be false would, of course, foreclose this possibility, and not be consistent with the public interest.

E. To Defeat the Qualified Privilege to Republish Allegations as Allegations in the Context of a Governmental Investigation, the Plaintiff Should be Required to Show by Clear and Convincing Evidence that the Republisher Republished the Allegations with “Actual Malice,” in This Context Meaning that the Republisher Knew that it Was False or Likely False that the Allegations Had In Fact Been Made.

In *Jacobs v. Frank* this Court expressly repudiated suggestions in earlier decisions that the “malice” sufficient to defeat a qualified privilege under Ohio law referred to the common law malice standard of ill will, spite or ulterior motive; instead, this Court squarely held: “[W]hen a defendant possesses a qualified privilege regarding statements contained in a published communication, that privilege can be defeated only by a clear and convincing showing that the communication was made with actual malice. In a qualified privilege case, ‘actual malice’ is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.” 60 Ohio St.3d at 115-16. As justification for adopting this “more

onerous” definition of “actual malice” over the common law standard in the context of peer reviews, this Court cited, *inter alia*, the importance of safeguarding the interests of the “evaluators [to] be free to make truthful professional judgments . . . without fear of retaliatory lawsuits” and the public’s interests in the competency of the professionals being evaluated. *Id.* at 116. In *A & B-Abell Elevators*, this Court then applied the same standard for much the same reasons in the context of a private citizen’s provision of information about another private citizen to a governmental agency, despite strong reasons to believe that an ulterior motive was involved. 73 Ohio St.3d at 9-12.

Similar but even more compelling interests are implicated in the context of governmental investigations, especially those like the one at issue in this case, involving the competence and integrity of a city’s police officers and commanders, up to and including the Chief of Police himself. However, for all the reasons advanced in the preceding sections of this Brief, governmental investigators must be free to republish a third person’s allegations as allegations in the course of conducting or reporting on the conduct of their investigation even if they ultimately conclude the allegations themselves are false or likely false; therefore, the *Jacobs v. Frank* actual malice standard cannot apply to the republisher’s knowledge of the truth of the allegations themselves without totally vitiating the privilege and the important interests furthered thereby.

But it is entirely consistent with both *Jacobs v. Frank* and the important public policy interests served by the privilege to apply the same actual malice standard to whether the allegations at issue were republished with knowledge not that the allegations themselves were false or likely false, but, rather, that it was false or likely false that the allegations had actually

been made in the first place. This standard would appropriately protect the ability of investigators to repeat and report on third party allegations that they investigated, but would deprive them of any claimed privilege if these so-called allegations were actually fabricated by them, or if they otherwise knew that it was false or likely false that such allegations had actually been made. As so understood and appropriately applied to the publication of purported allegations, this test is fully consistent with Ohio and federal definitions of “actual malice.” *See, e.g., A & B-Abell Elevators Co., supra*, 73 Ohio St.3d at 13 (“Reckless disregard, however, is likely to be found ‘where the story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.’ [citing *St. Amant v. Thompson* (1968), 390 U.S. at 732].”)

Under this test of actual malice, there is no evidence in the record, let alone, clear and convincing evidence, that Rice or his investigative team fabricated the Jones allegations, or they were a product of their collective imagination, or that they were republished as being Jones’ allegations based wholly on any “unverified anonymous telephone call.” To the contrary, Jones’ allegations were made directly to Sturtz and Dean in a personal interview, were written up and provided to Rice in the April Report, and were carried forward by Rice in the June 30, 1997 Report to the Mayor. “Unproven” they may have been, but a total fabrication on the part of Rice and his investigators, certainly not.

The Court of Appeals in this case did not, at least explicitly, apply this “more onerous” standard for proving actual malice derived from *Jacobs v. Frank*. Instead, it (and the trial court before it) appeared to apply a less exacting standard for proving malice much like that suggested in Section 602 of the Restatement (Second) of Torts as being appropriate for the republication of “a defamatory rumor or suspicion . . . even if [the republisher] knows or believe the rumor or

suspicion to be false.”⁴ Even so, the Court of Appeals held that Appellant had failed to adduce sufficient evidence to survive summary judgment even under this less exacting standard. (Appx. 16-17.) In any event, the Court of Appeals was certainly correct in recognizing that, as it had previously held in Commander Burns’s case with respect to the very same allegations: “[C]ontrary to plaintiffs’ contentions, the Report’s disclosure of concerns or credibility problems regarding a source displays a lack of actual malice rather than malice.” (Appx. 15, *citing Burns v. Rice*, 157 Ohio App. 3d 620, at ¶ 50, 2004-Ohio-3328.) After all, had Rice truly intended to defame Chief Jackson by republishing Jones’ allegations about him as if they were true or likely true, it would have been easy enough to omit from the narrative of the Report what the Court of Appeals called the “array of qualifying doubts as to their reliability,” or to consign these qualifying doubts to the supplementary materials referenced in the Endnotes. Instead, as actually published by Rice, it was evidence of Jones’ past reliability as an informant that was consigned

⁴ Section 602 of the Restatement (Second) of Torts provides as follows:

§602 Publication of Defamatory Rumor

One who upon an occasion giving rise to a conditional privilege publishes a defamatory rumor or suspicion concerning another does not abuse the privilege, even if he knows or believes the rumor or suspicion to be false, if

- (a) he states the defamatory matter as rumor or suspicion and not as fact, and
- (b) the relation of the parties, the importance of the interests affected and the harm likely to be done make the publication reasonable.

However appropriate this analysis might be in the context of reporting a mere “rumor or suspicion” and/or in reporting such matters by individuals in the private sector and/or to persons in the private sector, it is not demanding enough to be applied in the context of governmental investigations because, for the reasons recognized by this Court in *Jacobs v. Frank*, it would not adequately safeguard either the interests of investigators who have a public duty to report on allegations they investigate, or the interests of the public to have such allegations reported.

to the supplementary materials and which received no mention in the narrative of the Report itself. (Second Suppl. 72-128.)

F. The First Amendment Also Protects the Public's Right to Receive Information Regarding a Public Official's Official Conduct and Anything Else that Might Touch on His Fitness for Office.

In *Soke v. The Plain Dealer* (1994), 69 Ohio St.3d 395, this Court recognized that “[t]he right to sue for damages to one’s reputation pursuant to state law is not absolute. Instead, the right is encumbered by the First Amendment to the United States Constitution.” 69 Ohio St.3d at 397. Relying upon the United States Supreme Court’s decisions in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, and subsequent cases, this Court further recognized in *Soke* that the First Amendment not only “delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct” (*citing New York Times Co. v. Sullivan*), it also “protects statements made about public officials when those statements concern ‘anything which might touch on an official’s fitness for office’ . . .” (*citing Garrison v. Louisiana* (1964), 379 U.S. 64). 69 Ohio St.3d at 397. Significantly for purposes of the present case, the Court also expressly held that police officers are “public officials” for purposes of the protections afforded by the First Amendment to critics of their conduct or fitness for office. *Id.*

In *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, *cert. denied*, 488 U.S. 870, this Court similarly held that the First Amendment protected the republication of allegations made by an admitted former drug dealer and thief that a Captain in the County Sheriff’s Department had supposedly solicited him to run drugs for him. According to this Court: “The airing of such charges is precisely the type of publication which the First Amendment does and must protect.” *Id.* at 219.

Where, as here, the publisher of the statements at issue is himself a public official as well, the public’s interest is heightened rather than diminished. As the United States Supreme Court

observed in the context of attempting to balance the First Amendment rights of public employees to speak on matters of public concern against the interests of the State in regulating such speech: “[W]ere they not able to speak on these matters, the community would be deprived of informed opinions on important public issues [citing *Pickering v. Bd. of Education* (1968), 391 U.S. 563, 572.] The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.” *San Diego v. Roe* (2004), 543 U.S. 77, 82 (*per curiam*) (emphasis added).

Given the undeniable importance of the public’s interest in and right to receive information regarding their public officials’ fitness for office, it would be anomalous in the extreme to hold that the First Amendment does not protect their right to know of serious allegations made against a Chief of Police, the results of an official investigation into such allegations, and the investigators’ conclusions regarding the credibility of such allegations.

Again, unless the First Amendment is going to be interpreted to hold such investigators automatically liable for publishing in a report of their investigation, as allegations, those allegations actually investigated and found or believed to be false, or probably false, or “unproven,” the *New York Times Co. v. Sullivan* test of “actual malice” cannot be applied to the investigators’ knowledge or belief as to the truth of the allegations themselves; rather, it can only apply to whether they knew or believed it to be false that the allegations had been made in the first place.

G. Alternatively, Under this Court’s Decision in *Varanese v. Gall* (1988), 35 Ohio St.3d 78, Because Rice Was Aware Only that Jones’ Allegations Might Be False, Not That They Were False or Likely False, Summary Judgment in Appellees’ Favor Should Be Upheld.

The Court of Appeals in this case never held that there was sufficient evidence in the record to allow reasonable jurors to conclude that there was clear and convincing evidence that

Rice published the Jones allegations with knowledge of their falsity or a high degree of awareness of their probable falsity. Instead, the court “assume[d] 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.” (Appx. 12.)

In fact, Rice’s affidavit testimony filed in support of his motion for summary judgment that, while he recognized the possibility that Jones’ allegations might be false, there was too little evidence for him to conclude definitively that the allegations were certainly false or probably false, is uncontroverted. (Suppl. 248-49, Rice Aff. ¶¶ 11, 15.)

The trial court nevertheless believed that any alleged involvement on Jackson’s part with a prostitute was so “inherently improbable” that a reasonable jury could conclude Rice had to know of its probable falsity even when measured against a clear and convincing evidence standard. (See Appx. 83, 94.) This reasoning was never adopted by the Court of Appeals and must additionally be dismissed as incredibly naïve given the number of even very prominent persons, public officials and police officers in Columbus and elsewhere who have found themselves thus compromised. It is also wholly at odds with the record evidence in this case. One of the focuses of the investigation as directed by the Mayor was allegations of police misconduct relating to prostitution enterprises, precisely because there was concern that police officers and commanders, including Chief Jackson, had become compromised by their involvement with prostitutes. Moreover, during the course of the investigation itself additional allegations regarding Appellant’s involvement with prostitutes were brought forward and, to some extent, confirmed. (Suppl. 247-48, Rice Aff. ¶ 8.) Against this backdrop, Rice could hardly simply dismiss Jones’ allegations as being so “inherently improbable” as to be patently false, nor did he do so in fact. Though he recognized that the allegations might be false, he and

his investigators had insufficient information to conclude definitively that they were certainly false, or probably false, and therefore reported them as “unproven.” (Suppl. 248-49, Rice Aff. ¶ 11.)

In this Court’s decision in *Varanese v. Gall* (1988), 35 Ohio St.3d 78, this Court held that where, as here, the publisher is aware only of the possible falsity of the published allegations, this is insufficient to raise a triable issue of actual malice.

In *Varanese* the allegations at issue were contained in a political advertisement appearing in the defendant’s publication. The statements at issue were attributed to various sources by footnotes within the advertisement. 35 Ohio St.3d at 79. The plaintiff relied most heavily on deposition testimony of Robert Curran, the publication’s editor, that, upon seeing the political advertisement prior to its publication, he had remarked to the general manager that it was “bullshit,” by which, he explained during his deposition, he meant to express “his concern that if the ad were false,” his company would be exposed to suit. This Court reinstated summary judgment that had been issued to the defendant by the trial court, explaining:

Curran never stated that he knew the charges were false, or that he entertained any doubt whatsoever as to their probable falsity. He merely expressed concern that the charges might be false, and if they were, then appellant might be sued. The fact that Curran may have entertained doubts as to the possible falsity of the ad is immaterial. For liability to attach, a defendant must proceed to publication despite “a high degree of awareness of . . . [the] probable falsity” of the published statements. *Garrison v. Louisiana* [(1964), 379 U.S. 64] at 74. Given Curran’s explanation that his remark was not an expression of falsity or serious doubt as to the probable falsity, his statement cannot be considered probative of actual malice, and certainly cannot be deemed to have established actual malice “with convincing clarity.”

Id. at 82 (emphasis in the original). See also *Lieberman v. Gelstein* (1992), 80 N.Y.2d 429, 438, 605 N.E.2d 344, 590 N.Y.S.2d 857 (“[T]here is a critical difference between not knowing

whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action.”)

The fact that Keith Lamar Jones was a person of questionable reputation is not enough to raise a triable issue of actual malice either, as is made plain by this Court’s decision in *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, *cert. denied*, 488 U.S. 870.

In *Perez*, this Court reinstated summary judgment for the defendant despite the fact that the defendant republished uncorroborated allegations by Ferren, an admitted former drug dealer, that, while he was in jail for committing a theft, he was solicited by Perez, who was then a Captain in the Sheriff’s Department, to sell illegal drugs for him. Perez claimed that while he did solicit Ferren, he did so in an attempt to recruit him as an undercover agent, but this was not how it was presented during defendant’s broadcast “investigative report.” This Court held that neither Ferren’s unsavory reputation nor the fact that the defendant chose to present only one of the reasonable interpretations of the known facts was sufficient to raise a genuine issue of actual malice under the applicable clear and convincing evidentiary standard. In so holding, this Court emphasized the importance of reporting such serious allegations, and concluded:

Unfairness is inevitable whenever the facts which form the basis of a charge, made against an official, are subject to two or more interpretations. Here, two interpretations may reasonably be made of the Ferren information. The court of appeals recognized such when it identified its first disputed issue of fact. The dispute supports (rather than precludes) the issuance of summary judgment.

35 Ohio St.3d at 219.

Hence, neither Rice’s recognition that Jones’ allegations might be false nor Jones’ reputation is sufficient to raise a triable issue of fact under this Court’s precedents. In fact, given Jones’ record of having provided useful information on occasion to law enforcement in the past,

Rice probably had more reason to think that his allegations might be true than did the defendants in *Varanese* and *Perez*. In any event, unlike the defendants in those cases, the fact that Rice at least was explicit in disclosing reasons why the allegations in question might indeed be false surely must redound to Rice's benefit rather than be counted as clear and convincing evidence of actual malice.

CONCLUSION

The issue in this case is not – and has never been – whether this Court should adopt a “neutral reportage privilege.” The issue in this case is whether the Court should apply the public interest privilege already recognized in *Jacobs v. Frank*, and other cases, to the truthful and accurate reporting of third party allegations raised and investigated in the context of a governmental investigation. And, if so, is this qualified privilege defeated merely because the investigator knows that the allegations might be false?

This case presents a compelling exemplar for why the privilege must apply to governmental investigations and why in this limited context the privilege is not defeated merely because the investigator fully appreciates that the allegation might be false. The Mayoral Investigative Report was published in June 1997 and this case was first filed in October 1997. For almost ten years, Tom Rice and the City of Columbus have shouldered the burden of responding to Appellant's claim that the Mayoral Investigation was a malicious witch hunt, culminating in a Report allegedly “replete with half truths and outright lies.” Appellant's Brief at 2-3. Now ten years from the date of publication, Appellant's case has melted down to a single claim – the republication of one allegation, coupled with full disclosure of the reasons why the allegation might be false, and stamped with the investigators' conclusion that it was “unproven.” And Appellant's attempt to avoid summary judgment hinges on the fact that Rice candidly stated

that, of course, given the credibility of the source of the allegation, he appreciated the fact that the allegation just might be false.

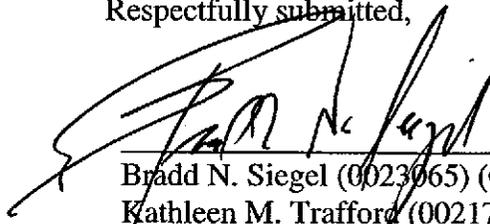
If the privilege does not apply to such investigations, or if the privilege is lost merely because the allegation is probably false, the losing party is the public. The public must rely on its officials to investigate allegations of wrongdoing – even allegations that on their face may be implausible or come from questionable or unsavory sources. The public has a right to know that such allegations have been made, what was done to investigate them and the investigators' opinions as to their possible truth or falsity, in order to evaluate the allegations, and the investigators.

If Appellant's position prevails, however, the public will never again have confidence that allegations of official misconduct are investigated properly. The inevitable consequence of Appellant's position is that whenever the investigator has reason to doubt the truth of an allegation, the allegation – and the fact that it was ever made – must not be recorded. Or worse, the unscrupulous or faint-hearted investigator will have a court-sanctioned excuse to purge their reports of defamatory allegations, even if the allegation might be true.

The Court need not make new law to protect the public's right to know when allegations about public officials are made and to what end. It need only apply the existing Ohio public interest privilege to protect the reporting of allegations of official misconduct, as allegations, even when the investigator knows the allegation might be false. This application of the privilege

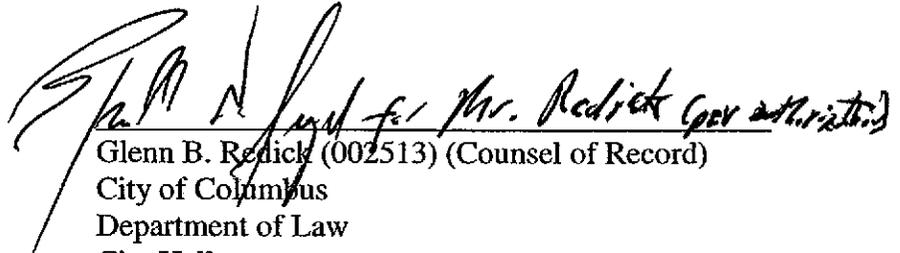
is neither novel nor extreme; it is an obvious application of the privilege, compelled by sound public policy and consistent with prior applications of the privilege.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellees

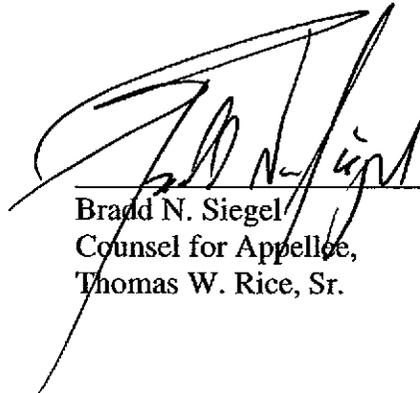
Thomas W. Rice, Sr. and the City of Columbus was served via regular mail, postage prepaid, this

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