

IN THE SUPREME COURT OF OHIO

**JAMES G. JACKSON,**

**Appellant,**

**v.**

**CITY OF COLUMBUS, et al.**

**Appellees.**

**Case No. 06-2096**

**On Appeal from the Franklin County  
Court of Appeals, Tenth Appellate  
District**

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**REPLY BRIEF OF APPELLANT JAMES G. JACKSON**

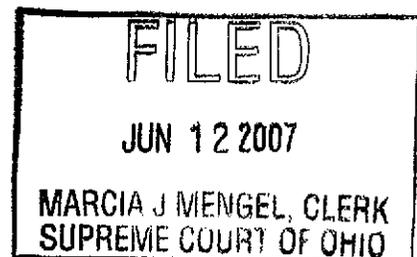
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## ARGUMENT

**A. Appellee's report of the false allegations of Keith Lamar Jones to the public is not protected by Ohio's "public interest" privilege.**

**1. Appellee is not entitled to application of the qualified privilege because he did not publish the allegations in a proper manner, to a proper party, and he did not limit his publication to the purpose of upholding his stated interest.**

In order to invoke the defense of qualified privilege, the defendant must establish each element of the defense. *Hahn v. Kotten* (1975), 43 Ohio St. 2d 237, 246. The privilege protects "communications 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, . . . [if such communication is] made to a person having a corresponding interest or duty . . . [.]” *Id.*

Specifically, to fall within the protection of the privilege, the defendant must establish that:

- (1) he acted in *good faith*;
- (2) there was an *interest* to be upheld;
- (3) the statement was *limited in its scope to the purpose of upholding that interest*;
- (4) the *occasion* was proper; and
- (5) the publication was made in a *proper manner* and *only to proper parties*.

*Id.* See also *A & B-Abell Elevator Co. v. Columbus / Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St. 3d 1, 8 (a qualified privilege to make the publication exists if the following elements can be shown: “good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.”).

Appellee maintains that he had a duty and obligation to accurately report to the Mayor the results of his Section 63 investigation into allegations that included police involvement in

prostitution, including what allegations were investigated, the investigators' conclusions regarding those allegations, and recommendations for further action, thus the statements *to the Mayor* qualified for the "public interest" privilege like statements contained in any other investigative report. He maintains that the public has an interest in ensuring that statements made in an investigative report be protected so that allegations can be properly investigated and the public can be assured that allegations made against its public officials are fully addressed.

However, Appellee has not shown that his republication of the false statements of Keith Lamar Jones in the 1997 Mayoral Investigative Report was "limited in its scope to the purpose of upholding that interest," as he must prove to invoke the privilege. The Report was *184 pages long*, replete with Rice's personal commentary about the conduct of the Chief of Police – not just his "conclusions" as to the investigation's results, but his personal beliefs and "opinions" regarding the Chief's "failures" as Chief. The entire report was stuffed with exaggeration, misstatements and mistruths about, not only the Chief, but others as well, resulting in several other defamation lawsuits against him.

To fall within the privilege, Rice must have shown that he limited his statements in the Report to meeting his stated purpose *to inform the Chief about of the results of his investigation*. Had Rice merely wanted to meet his duty *to the Mayor* to tell him how his investigation went, to report *to him* on allegations made and investigated, he could have done so in a much narrower manner. Surely it was not necessary for Rice to produce the tome of allegations and commentary which he included in his Report in order to assure the Mayor that he had done his job. Nor was it necessary for him to use inflammatory language or to include in the Report each unproven and unbelieved allegation lodged against the Chief. It was equally unnecessary for Rice to include in

the Report his exaggeration of the allegations of Keith Lamar Jones' statements and his commentary that those statements, however implausible, might still be believed.

As noted earlier, Rice did not merely report that the allegations of Keith Lamar Jones *had been made* against the Chief. Nor did he report that the allegations had been *investigated* or state his conclusions following that investigation. Indeed, no real "investigation," other than interviewing Keith Lamar Jones, appears to have taken place. And, Rice admits there was no other evidence whatsoever to support Jones' allegations. Yet, Rice stated in his "Executive Summary" that "[t]he allegations included in this report are those which were most serious in nature and where substantial evidence was discovered to support the existence of the allegation." (Suppl. 10). Moreover, although he knew Jones was a "liar" and a "scam artist," and that there was no reason whatsoever to believe Jones' ridiculous allegations, Rice nonetheless stated in the Report that "[a]llegations were made about the relationship of Chief Jackson and a juvenile. Photos were included. The allegations and photos were forwarded to the Vice Squad for further investigation." (Suppl. 11) Rice failed to mention in the Report that the "photos" were only of the purported child, not of the prostitute and the Chief together, as the statement implies.

Finally, rather than merely report that the allegations *had been made*, as Rice contends here that he did, and despite his knowledge of the implausibility of the allegations, Rice nonetheless argued in the Report for the *credibility* of Keith Lamar Jones, suggesting that the allegations might still be true, and that somehow, the allegations might yet be proven. Rice stated:

Keith Jones' deception during the polygraph examination makes his statements suspect *but not completely invalid*. [The polygraph examiner's] opinion is that Jones did not tell the complete truth. *That is not to say there isn't some truth in the allegations. In Keith Jones' favor* is the fact that he could not have obtained the information from other law enforcement sources.

*In fact, Jones has repeatedly told his story to various officials by letter and by phone. The . . . allegations against Jackson are unproven at this time and are dependent on evidence in the future from new sources or places.*

(Suppl. 181) (emphasis added).

This is far from reporting in a routine investigative report that allegations *had been made*. Rice's additional commentary, and the occasion and circumstances in which the allegations were repeated, takes the statements well outside the privilege asserted by Rice. As this Court made clear in *A & B-Abell*, a qualified privilege to make a publication exists only where the defendant has shown the following elements: "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." *A & B-Abell*, 73 Ohio St. 3d at 8. Here, the statements Rice made in his Report, including repetition of the false allegations of Keith Lamar Jones, were not limited in scope to Rice's purported interest to inform the Mayor about his investigation.

More importantly, as has been pointed out, the 1997 Mayoral Investigative Report was not limited as a report *to the Mayor*. It was also Rice's report *to the public*, informing *the public* of the investigation and the allegations that had been lodged against the Chief of Police (whether those allegations were founded or not). And it is *this* publication, not the publication internally to other members of the department, that is at issue in this lawsuit. Appellant is not challenging the "ability of the Director of Public Safety to report to his superior, the Mayor, serious accusations made against the Chief of Police," as Rice contends, he challenges Rice's report of the preposterous allegations *to the public*.

The *public* was not a "proper party" to the limited communications permitted between an investigating officer and his superior (or other officers) "expected to take official action of some kind for the protection of some interest of the public." *A & B - Abell*, 73 Ohio St. 3d at 9. *Cf*

*Black v. Cleveland Police Dep't*, 96 Ohio App. 3d 84, 89 (1994) (statements were made “between law enforcement officers and concern matters in which the officers have a common interest,” statements were not made to the public); *Burkes v. Stidham* (1995), 107 Ohio App. 3d 372, (statements made to “supervisor or supervising body” with the power and duty to investigate the allegations are privileged; statements were not made to the public); *Vanderselt v. Pope* (Oregon App. 1998), 155 Or. App. 334, 346, 963 P.2d 130 (defendant reported third-party allegations to “other top managers,” “in order to determine if something should be done about them,” not to the news media or to the public). Here, the communications at issue in the 1997 Mayoral Report were communications between Rice *and the public*. Those communications are not privileged.

Indeed, it was not even expected that *the Mayor* would take any “official action . . . for the protection of some interest of the public” regarding further investigation of the allegations of Keith Lamar Jones. As Rice contends, those allegations were purportedly referred to the Vice Squad for further investigation. At any rate, it was certainly not expected that *the public* would take any official action, or that Rice needed to report the allegations to the public in order to meet his stated interest of assuring *the Mayor* that the investigation was complete. Thus, Rice’s statements in the Report were not “limited in . . . scope to the purpose of upholding [Rice’s purported] interest.”

Nor does the public have any legitimate interest of its own in learning of the false allegations of Keith Lamar Jones. Rice’s contention that a public interest exists in his reporting of the allegations *to the public* so the media would not report that Rice had swept the allegations under the table is insufficient to bring the statements within the qualified privilege applicable to investigative police reports, or any other privilege. As Rice contends, the media was already

aware of the allegations, thus there was no need to repeat the allegations in the Report to the public. Moreover, Rice's purported interest in protecting his own reputation with the media was an insufficient interest to justify repeating the false allegations to the public at large. Even if such an interest were legitimate, the uninvestigated, unproven allegations could have been addressed in some other manner with the media than to repeat the allegations *verbatim* in the Report along side Rice's commentary that the statements might yet be believed and might yet be proven. If Rice did, in fact, know that Jones' allegations were "more likely than not" false, as the trial court found, he should not have republished them. He could have said something else in the Report to address the media's concerns. For example, he could have said: "Investigation into the allegations of Keith Lamar Jones, which have been the subject of some media attention of late, were deemed inconclusive by the investigatory team, and thus are not repeated here. Those allegations have been forwarded for further investigation." The Report *to the public* did not need to reiterate the details of the defamatory statements, lend them credibility, and then allow them to become the subject of an excruciatingly litigated defamation lawsuit.

This argument was raised to the trial court, after which the court ordered reconsideration of the issue, stating in its June 16, 2005 *Decision and Entry*, that:

In the final paragraph on Page 11 of Plaintiff's memorandum in support of his motion for reconsideration, Plaintiff suggests that the government's interest in avoiding false perceptions that its own investigations are defective could have been served in some other fashion than by including the allegations of Keith Lamar Jones *verbatim* in the report. Plaintiff makes the suggestion as to what Mr. Rice could have said. Modifying that suggestion slightly . . . it is suggested that Mr. Rice could have said, "Investigation into the allegations of Keith Lamar Jones \* \* \* were deemed inconclusive by the investigatory team, and thus are not repeated here. Those allegations have been forwarded for further investigation." *The issue which remains to be decided, and which Mr. Rice is being offered an opportunity to brief, is whether, in light of this possibility suggested by Plaintiff, the*

*Court should alter its finding* that “inclusion of Mr. Jones’ allegations in the report was probably the reasonable thing to do, but even if such inclusion might be arguably unreasonable, reasonable minds can reach but one conclusion that it was not so highly unreasonable as to be [clearly and convincingly] reckless.” *Doing so would most likely result in a finding that a genuine issue of material fact exists as to actual malice.* That would require vacating the summary judgment granted to Mr. Rice on Plaintiff’s claim that he was defamed by the inclusion of Mr. Jones’ allegations in the report.

(Suppl. 64-65) (emphasis added).

Rice never briefed the issue and the Court never reconsidered it. Instead, following the parties’ *Stipulation of Leave to Amend the Complaint*, filed August 29, 2005, to remove allegations regarding allegations made by two prostitutes, the Court put on a Judgment Entry simply stating that:

The August 29, 2005 amendment to the Complaint has rendered the November 5, 2004 Decision and Entry and the May 19, 2005 Decision and Entry dispositive of all claims in Plaintiff’s Amended Complaint.

For the reasons stated in the November 5, 2004 Decision and Entry and May 19, 2005 Decision and Entry, Final Judgment is entered in favor of Defendants on all claims in the Amended Complaint. This is a Final Appealable Order.

(Appx. 61). Appellant raised the trial court’s failure to reconsider the scope and manner in which Appellee reported the allegations of Keith Lamar Jones to the public as its third assignment of error to the 10th District Court of Appeals. The Court of Appeals found that the trial court had impliedly overruled Appellant’s motion for reconsideration of the issue when it entered final judgment without reconsidering the issue. (Appx. 18.). As the issue goes directly to the question whether Appellee repeated the allegations of Keith Lamar Jones “in good faith, in a proper manner and to a proper party only,” the issue should be reconsidered here.

Finally, Rice’s contention that his report of the allegation to the public at large was within the scope of the qualified privilege enjoyed by investigating officers, because the allegations

might have been released to the public anyway under the Public Records Act, is merely a distraction. Rice made the same argument to the trial court when he argued that he had an “obligation” to include the false allegations in the report under R.C. 149.351(A) and 149.43(B)(1). The trial court properly rejected this argument, stating that “[t]his Court does not understand how those sections would *obligate* Mr. Rice to include the alleged defamatory statements in the Mayoral Report.” (Appx. 80).

The trial court explained that, while R.C. 149.351(A) “would prevent Mr. Rice from unlawfully removing, destroying, mutilating, transferring, or otherwise damaging or disposing of any records of the allegations made by Mr. Jones . . . it does not appear to *obligate him to republish* them in the Mayoral Report *or otherwise release them [...] to the public.*” *Id.* (emphasis added). The Court also noted that R.C. 149.43(B)(1) “concerns the duty to make public records available for inspection by any person,” but “[i]t does not dictate the *content* of any particular public record such as the Mayoral Report at issue here.” *Id.* (emphasis added).

Thus, the Court found:

. . . R.C. 149.43(B)(1) did not, by itself, obligate Mr. Rice to include the allegations of Mr. Jones . . . in the Mayoral Report. At best, this subsection suggests a public policy in favor of making “public records” *available for inspection. That policy does not speak to the question of whether a public official would be obligated to republish the defamatory content of one public record in another public record expected to garner wide attention.* More importantly, such a public policy in favor of making public records available for inspection *does not speak to whether a public official would be obligated to republish in a “public record” the defamatory contents of a “confidential law enforcement record” that is not a “public record.”*

(Appx. 80-81) (emphasis added).

The trial court then went on to note that “confidential law enforcement investigatory records” are specifically excluded from the definition of “public records” in the Public Records Act, and concluded that:

The exclusion of records, which identify a suspect who has not been charged, from the definition of “public records” suggests that the public policy of Ohio recognizes that *some records regarding unfounded criminal accusations might be so defamatory that they should be excluded from the mandatory disclosure requirement that applies to “public records.”*

(Appx. 81-82) (emphasis added).

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Whether the Report itself, once produced, would have been subject to the Public Records Act, without redaction of certain materials deemed “confidential law enforcement investigatory records,” is unknown. However, the fact that the Mayoral Report *may* have become the subject of a public records request under the Public Records Act, or *may* have, in whole or in part, been deemed a “public record” at some point, following such a request, did not entitle Rice to a qualified “privilege” to report the false allegations of Keith Lamar Jones in his Report to the public.

There is simply no “public interest” privilege for Rice to Report the false allegations *to the public*. As the trial court found in its November 5, 2004 Decision, the public has no legitimate interest “in knowing the contents of defamatory remarks by known liars and other unreliable persons . . . when such persons are not prominent parties to the public controversy.” (Appx. 38). That is, unless the fact that the statements were made is, itself, “newsworthy” (i.e., where the speaker of the allegations is also a public figure, such that the fact that he made such an allegation would, in itself, be “newsworthy”), the public has no need to learn that the allegation was ever made. With no legitimate interest in learning that the allegation was made, the public is equally lacking in any legitimate interest in learning what was done about the

frivolous allegation. Put simply, the *public* does not have a right to know every allegation ever made against a public official regardless of its merit. While he may have had a privilege to repeat the allegations *to the Mayor*, or some other internal department for the purpose of conducting further investigation, Rice had no such privilege to repeat the allegations to the public at large and he should be held liable.

**2. Even if Appellee were entitled to application of the “public interest” privilege, the privilege is defeated by evidence of Rice’s actual malice.**

Ohio’s “public interest” privilege, even as applied to official investigative reports, is a *qualified* privilege that can be overcome by a showing of actual malice – that is, by showing that the defendant published the statement with knowledge of its probable falsity or despite serious doubts as to the veracity of the statement or its source. *Hahn*, 423 Ohio St. 2d at Syllabus ¶ 1 (former agent had a “right of recovery” only “in the absence of proof of falsity and actual malice,” defined as “knowledge that the statements are false or with reckless disregard of whether they were false or not.”); *Jacobs v. Frank* (1991), 60 Ohio St. 3d 111, Syllabus ¶ 2 (“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 . . . defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.”); *A & B-Abell*, 73 Ohio St. 3d at 11-12 (“that privilege can be defeated . . . by a clear and convincing showing that the communication was made with actual malice.”); *Black*, 96 Ohio App. 3d at 90 (regarding statement in internal police report, “plaintiff could overcome the qualified privilege with a showing of ‘actual malice.’”). put simply, “[c]ommunications made with the knowledge of their untruthfulness cannot be privileged.” *Jacobs*, ¶ 2 of Syllabus.

Actual malice in the qualified privilege context has also been defined as “ill will, spite, grudge or some ulterior motive.” *Hahn*, 43 Ohio St. 2d at 248. *See also McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St. 3d 139, 147 (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).

Both the trial court and the Court of Appeals agreed that Rice’s knowledge regarding the probable falsity of the statements of Keith Lamar Jones was sufficient to meet the “actual malice” standard required in public figure defamation cases, defined as “knowledge that the statements are false or with reckless disregard of whether they were false or not standard.” 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.” (Appx. 94) (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.” (Appx. 12) (emphasis added). Yet, given the purported “public interest” in Rice being allowed to report third-party allegations in an investigative report to the Mayor, both courts found Rice nonetheless “privileged” to make the communication to the

Mayor, despite his knowledge of the probable falsity of the allegations (lowering the “actual malice” standard in this particular context).

Neither Court properly justified, however, Rice’s report of the allegations *to the public*, a communication *not* governed by the privilege to report third-party allegations in an investigative report. Even if Rice’s report *to the Mayor* was privileged (i.e., not beyond the scope of the stated interest to be protected and done in a proper manner), and this Court is willing to grant Rice an exception to the actual malice standard for third-party statements contained in such reports (i.e., that knowledge of the probable falsity of the statements is irrelevant), Rice’s actual intent to defame the Chief of Police – that is, his “ill will, spite, grudge or some ulterior motive,” should not be ignored. Put simply, a defamation defendant should not be entitled to hide behind the veil of a qualified privilege in the face of clear and convincing evidence that he had an actual intent to defame the plaintiff, such that his sole reason for including the defamatory statement in the report was to ruin the reputation of the plaintiff. In other words, where the republication of a third-party’s allegations is not made in “good faith,” either the privilege should not apply, or actual malice should be found to defeat the privilege. See *A & B-Abell*, 73 Ohio St. 3d at 8 (a qualified privilege to make a publication exists only where the defendant has shown the following elements: “*good faith*, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.”); *McKimm*, 89 Ohio St. 3d at 148 (to determine the existence of actual malice, “[t]he finder of fact must determine whether the publication was indeed made in *good faith*.”).

Yet, even if the actual malice standard is lowered by this Court with regard to third-party statements in official investigative reports, where the allegations are repeated solely for the purpose of determining “if something should be done about them,” *Vanderselt v. Pope* (Oregon

App. 1998), 155 Or. App. 334, 346 (relied upon by Appellee), the standard cannot be lowered for similar statements made *to the public* where the privilege does not apply. Instead, the existing standard for defining actual malice in such contexts must continue to apply.

That standard makes clear that 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 or where there were “obvious reasons to doubt the veracity of the informant or his reports.” *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 732. Accord *Harte-Hanks Communications v. Connaughten* (1989), 491 U.S. 657 (“recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports”); *Burns*, 157 Ohio App. 3d at 639 (“Where a report is made of a third party’s allegations, ‘recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’”) (quoting *St. Amant*, 390 U.S. at 732).

Where a qualified privilege does not apply (as with Rice’s publication to the public) there is no need to create an exception to the actual malice standard to account for such privilege. Rice’s report to the public was not privileged, thus his knowledge of the probable falsity of the statements he republished is sufficient to find actual malice for purposes of public figure defamation and sufficient to hold him liable. In addition, evidence of his “ill will, spite, grudge or ulterior motive” – evidence abundant at the trial court level – should equally apply to prove Rice’s actual malice.

**B. The holding in *Varanese* is inapplicable.**

Appellee contends that, even without application of the qualified privilege, he cannot be held liable for defamation in this case because he only admitted that he knew the allegations of Keith Lamar Jones “might” be false, he never admitted that he knew they were “probably” false,

thus Appellant has not proven “actual malice.” Plaintiff cites this Court’s decision in *Varanese v. Gall* as dispositive on this issue. See *Varanese v. Gall* (1988), 35 Ohio St. 3d 78.

This Court’s decision in *Varanese* is not dispositive here. In *Varanese*, the plaintiff sued a newspaper for a campaign advertisement allegedly containing falsehoods about her record as a county treasurer. She claimed the statements in the ad were false and that the newspaper should be held liable because it doubted the veracity of the statements in the ad, but published them anyway. To prove the newspaper had such doubts, plaintiff relied primarily upon the statement by the editor of the paper that the ad was “bullshit,” which the Court found was meant to indicate the editor’s concern that *if* the statements turned out to be false, the paper might be sued for libel.

Far from finding that this statement *disproved* actual malice, the Court in *Varanese* merely found that the admission was not sufficient, without more, to find actual malice. The Court held that the statement, standing alone, was insufficient to conclude that the editor had a “high degree of awareness of . . . [the] *probable* falsity’ of the published statements.” *Varanese*, 35 Ohio St. 3d at 82 (emphasis in original). The Court noted that there was no other evidence that the editor actually had any reason to believe the statements were false, only that he was worried about a libel suit if the statements turned out to be false. Thus, because “a high degree of awareness of the *probable* falsity of the statements” was required, the editor’s statement that he thought the advertisement “might” be false, “could not be deemed to have established actual malice with ‘convincing clarity.’” *Id.* at 82.

In contrast here, Appellant provided more than Rice’s own statements that he thought the allegations made by Jones “might” be false. He provided those statements *and more*. Rice admitted, “I recognized that the allegations might be false.” (Suppl. 248-249, Rice’s Aff’d, ¶ 11). *In addition*, Appellant provided other statements by Rice, as well as other admission in the

Report itself, from which a reasonable juror could conclude that Rice did not merely have “some” doubt as to the veracity of the allegations, or believe the allegations might *possibly* be false, but that he had actual knowledge that the statements were “*probably*” false. In addition to Rice’s own admission that he personally believed the statements might be false, Appellant also provided evidence that Rice knew at the time he republished the false allegations of Keith Lamar Jones that this source was not credible. He knew Jones was known to his colleagues as “a liar” who “built stories based on prior interviews with various law enforcement agencies.” (Suppl. 182). He knew Jones failed a polygraph examination on other allegations (Suppl. 181), and he knew Jones refused to submit to a polygraph examination on the topic of these allegations. (Suppl. 182). He knew Jones was “not reliable” because “he uses information to his advantage.” (*Id.*). He admits there was no evidence whatsoever to support Jones’ allegations. (Suppl. 404, Tr. 313). *And*, he admits he knew at the time of publication that the allegations of Keith Lamar Jones “might be false.” (Suppl. 248-249, Rice Aff’d ¶ 11).

In contrast to the facts presented in *Varanese*, this Court has before it, not only Appellee’s own admission that he believed the statements “might be false,” but additional evidence to prove that Rice in fact entertained serious doubts as to the veracity of Jones’ statements, but published them anyway. Accordingly, *Varanese* is inapplicable.

**C. Whether Appellee acted in “good faith” for purposes of applying the qualified privilege, and his subjective state of mind for purposes of determining the existence of actual malice, are matters better left to the jury.**

Whether Rice acted in “good faith” in publishing the false statements of Keith Lamar Jones, such that the qualified privilege may apply, and Rice’s subjective state of mind, to determine whether actual malice existed to defeat that privilege, are matters better left for the jury. “The existence of a qualified privilege in a defamation action is a *mixed question of law and fact.*” *Black*, 96 Ohio App. 3d at 89. *See also Akron-Canton Waste Oil, Inc. v. Safety-Kleen*

*Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601 (“Properly understood, the existence of a privilege to make an otherwise defamatory statement, whether absolute or conditional, is a mixed question of law and fact. An examination of the circumstances surrounding the pertinent communication is always required. Genuine disputes over material facts must be resolved by the jury.”).

Moreover, as this court held in *McKimm v. State Elections Comm’n*, the defendant’s subjective state of mind must be examined by the trier of fact to determine whether the actual malice standard has been met to defeat the privilege if it applies, and defendant’s self-serving statements that he acted in good faith and for a good purpose are insufficient to defeat evidence to the contrary. This Court stated in *McKimm* that:

[St. Amant] certainly requires evidence of the defendant’s subjective state of mind in order to satisfy the actual-malice standard. But [St. Amant] also *explicitly limits the ability of defendants to subvert the standard with self-serving testimony*. . . The finder of fact must determine whether the publication was indeed made in good faith.

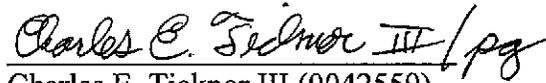
*McKimm*, 89 Ohio St. 3d at 148 (emphasis added).

Hence, whether Rice acted in “good faith,” as his self-serving affidavit purports, or whether his grudge against the Chief of Police led him to republish the false statements in an effort to defame the Chief, is a fact-intensive credibility determination which should be resolved by a jury. See *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120 (where reasonable minds may differ as to whether the plaintiff has demonstrated actual malice with convincing clarity, and where there are issues of fact or credibility, summary judgment is inappropriate); *St. Amant*, 390 U.S. at 732 (the issue whether the defendant entertained serious doubts as to the truth of his publication is a question of fact for the jury and may be inferred from the circumstances surrounding publication).

**CONCLUSION**

This Court should reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellant James G. Jackson was served via regular U.S. mail, postage prepaid, this 12th day of June, 2007, upon the following:

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