

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. :

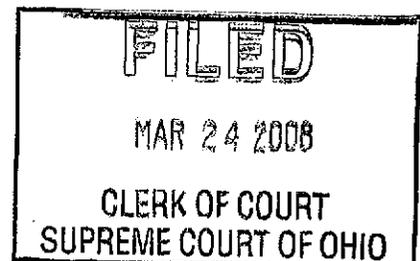
MOTION FOR RECONSIDERATION OF APPELLEE THOMAS W. RICE, SR.

Bradd N. Siegel (0023065)
(Counsel of Record)
Kathleen M. Trafford (0021753)
L. Bradfield Hughes (0070997)
PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
Columbus, Ohio 43215
Phone: (614) 227-2000
Fax: (614) 227-2100
E-mail: bsiegel@porterwright.com
Counsel for Appellee
Thomas W. Rice, Sr.

Glenn B. Redick (002513)
(Counsel of Record)
CITY OF COLUMBUS
DEPARTMENT OF LAW
City Hall, 90 West Broad Street
Columbus, Ohio 43215
Phone: (614) 645-07385
Fax: (614) 645-6949
E-mail: gredick@columbus.gov
Counsel for Appellee
City of Columbus

Charles E. Ticknor III (0042559)
(Counsel of Record)
BUCKINGHAM, DOOLITTLE, &
BURROUGHS, LLP
191 W. Nationwide Blvd., Suite 300
Columbus, Ohio 43215-8120
Phone: (614) 221-8448
Fax: (614) 221-8590
E-mail: cticknor@bdblaw.com
Counsel for Appellant
James G. Jackson

Eva C. Gildee (0072685)
THE LAW OFFICE OF EVA C. GILDEE, LTD.
503 S. High St., Suite 205
Columbus, Ohio 43215
Phone: (614) 564-6500
Fax: (614) 564-6555
E-mail: egildee@gildeelaw.com
Counsel for Appellant
James G. Jackson



I. INTRODUCTION

The Court's opinion has very disconcerting consequences for the public's right to know. The majority opinion tells public investigators, who are required to investigate allegations of wrongdoing by public officials, that they dare not record that an allegation has been made if there is reason to doubt that the allegation is true. Because if they do record the allegation, and it turns out to be false, they may be personally liable for having done nothing more than make the initial record that the allegation was made.

The majority opinion exposes public investigators to claims of defamation, potentially years of litigation, and the prospect of personal liability not because they act outside the scope of their duties or in bad faith, but rather because they do their duty – record that an allegation of misconduct was made against a public official – and the law makes that record a public record. Whether it was the Court's intent or not, the natural consequence of the Court's decision is that public investigators will be less likely to record allegations of official misconduct in doubtful cases. That means the public will never learn that an allegation was ever made, and even worse, the allegation may never be investigated because it is hard to imagine how one can investigate an allegation of official misconduct if one is not allowed to write down what the allegation was.

The outcome of the case appears to have been influenced by a belief that the allegation made by Keith Lamar Jones about Chief Jackson was facially implausible and/or gratuitously published by Director Rice. But, as recent events dramatically underscore, allegations that officials have engaged in inappropriate – potentially criminal – misconduct should not be summarily dismissed merely because they seem improbable. The investigator who first heard Governor Spitzer was consorting with prostitutes likely thought it seemed improbable. So, too, the investigator who first

heard Governor McGreevey had a sexual relationship with a male employee likely thought that seemed improbable. The Court would be naïve in thinking that allegations about sexual misconduct by public officials should be summarily dismissed as so improbable as not to be worth even recording the allegation in the investigative file.

Because the Mayoral Report and the underlying investigative materials upon which it was based are all public records, the majority decision stands in irreconcilable conflict with this Court's public-records jurisprudence and its longstanding tradition of supporting the public's right to know how the public's business is conducted and to hold accountable its public officials for the manner in which they conduct it. If allowed to stand, the decision will cause even the most diligent public investigator to self-censor or sanitize chain-of-command reports and other investigatory records that are critical to the public interest out of fear that even if he truthfully and accurately records an allegation and his own doubts as to the informant's credibility, he may be held liable merely for recording the allegation in the public record. Indeed, under the majority's analysis, paradoxically, the more candid the investigators are in expressing doubt as to the ultimate validity of the allegations in question, the greater is their risk that they may be found to have published the allegations with "actual malice."

If allowed to stand, the decision also gives the unwilling investigator a license to whitewash an investigation by discarding allegations he does not find worth the trouble to investigate or by purposefully not recording allegations to protect a sympathetic suspect, friend, mentor or political supporter. In other words, a reluctant investigator now can easily justify sweeping allegations under the rug by proclaiming to have doubts about whether the allegations are true and pointing to this Court's holding that he should not record an allegation if he subjectively thinks it might be false.

The decision also creates an odd dichotomy between law enforcement investigations of private parties and investigations of public official misconduct. Investigators assigned to law enforcement investigations will remain free to record allegations and their impressions about those allegations because their investigative records are protected from public disclosure until such time as the subject of the allegation is charged with a crime. R.C. 149.43(A)(1)(h). Investigators assigned to conduct internal affairs investigations, chain-of-command investigations and similar types of investigations into the conduct of public officials, however, are admonished by this Court not to record doubtful allegations because their investigative notes and the reports they must write are a matter of public record, regardless of the outcome of the investigation or their personal evaluation of the informant's credibility. The Court's opinion has a chilling effect on investigations of public officials, and makes it harder for the public to know about such investigations, even though investigations of public official misconduct are of the utmost importance to the public.

The Court frequently reminds litigants and counsel that its role is not to change the outcome of a particular case, but rather is to mind how the law is articulated or clarified for future cases. This case stands as a stark departure from that philosophy. The Court has changed the outcome of this case, by disagreeing with the lower courts' evaluation of whether Tom Rice abused his qualified privilege to report to Mayor Lashutka on the allegations that surfaced during his investigation. Before doing so, it did not conduct any analysis of whether, and if so how, the traditional "actual malice" standard – publishing with a "high degree of awareness of probable falsity" -- as written to govern gratuitous publications by private parties logically applies to investigatory records required to be created and maintained by public investigators. Nor did it stop to

consider the important public-policy implications of extending this standard into the area of public investigations, where there is a duty to investigate allegations and the records of investigation are subject to the Ohio Public Records Law. Nor, assuming that traditional "actual malice" is to be the standard for determining whether there is a privilege for recording allegations in investigatory records, has it given the lower courts and public investigators guidance as to when doubts about the credibility of informants or witnesses means an allegation should not be recorded, and therefore, not investigated.

Pursuant to S. Ct. Prac. R. XI, Section 2, Appellee Rice therefore respectfully urges the Court to reconsider its unprecedented and far-reaching decision in this case.

II. THE COURT SHOULD RECONSIDER ITS DECISION IN THIS CASE TO CLARIFY THE CIRCUMSTANCES UNDER WHICH A PUBLIC OFFICIAL ABUSES HIS OR HER QUALIFIED PRIVILEGE TO RECORD POTENTIALLY DEFAMATORY ALLEGATIONS IN CHAIN-OF-COMMAND INVESTIGATIVE REPORTS AND OTHER PUBLIC RECORDS.

A. The majority opinion makes new law by expanding the *St. Amant* definition of actual malice into an entirely different context, but does not address whether that expansion comports with Ohio's public policy.

The majority opinion purports not to make new law. On its face, it simply follows the proposition of law established in *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 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." *Jackson v. Columbus*, Slip Opinion No. 2008-Ohio-1041, ¶ 8, citing *St. Amant*. The majority then construes the evidence in favor of Chief Jackson and holds that the lower courts improperly granted summary judgment in this instance

because a jury might find actual malice based on the fact that Rice published the Jones allegation about Chief Jackson without interviewing Jackson. Slip Opinion, ¶ 12.

While the Court's application of *St. Amant* and decision to send this case back for trial may not seem to make any new law, it clearly does. The majority opinion makes new law because it takes what is the reasonable and well-settled definition of actual malice that applies when a publisher gratuitously publishes a defamatory statement about a public official and extends it for the first time into a context where the publisher is a public official who has a duty to investigate allegations of public official misconduct and make a record of his investigation, which by law then becomes a public record. The *St. Amant* definition of actual malice has never been applied in this context, and should not be, for compelling public-policy reasons.

A public investigator – a policeman, a sheriff, a fraud investigator, an ethics investigator or other public official who has a duty to investigate allegations of wrongdoing by another official – is in an entirely different situation than a gratuitous publisher – someone who publishes for profit or personal gain. A public investigator, by definition, is duty-bound to listen to, write down, and evaluate allegations made about another person. And when the investigation involves topics such as prostitution or police misconduct, the allegations he writes down are likely to be defamatory, (even salacious) and are likely to come from the mouths of questionable (even unsavory) sources. In this context, *more often than not*, the investigator will have reason to doubt the truth of what he is being told, and his degree of doubt may well be “high.” The *St. Amant* definition of actual malice makes no sense in this context and gives far too little protection to the public official who is simply trying to do his job. It forces the investigator into having to choose between fulfilling his public duty to record a

defamatory allegation he may doubt is true and risking personal liability down the road when the allegation is disclosed, as it must be under the public records law.

If the *St. Amant* definition of actual malice controls here, as the majority in this case determined, the investigator cannot properly do his job. If *St. Amant* is to be the standard governing a public investigator's personal liability for recording defamatory allegations, any time the investigator has an awareness that an allegation may be false, he dare not write it down for fear that he may be held personally liable for its publication. He dare not write it down, even though he contemporaneously records the reasons why he believes the allegation may not, in fact, be true. As a result, the fact the allegation was made will never be known and, of course, it never will be properly investigated. The Court indeed is making new law and it is very disconcerting law from the standpoint of the public's right to have its laws vigorously enforced, to have its officials held to the highest standards of accountability, and to have complete, accurate public records maintained and available for public inspection.

B. The Court's directive that public investigators must purge their records of defamatory allegations brought to their attention because they think the allegations may be false is completely at odds with Ohio's Public Records Act.

Chief Jackson's position in this case, a position the majority opinion accepts and encourages, was that Tom Rice should have expunged the Jones allegation from the Mayoral Report because it was too salacious to ever be disclosed to the public. Given this Court's strong tradition of supporting transparency in public affairs and the public's right to know how its business is being conducted, it is difficult to understand the basis for this sharp turn in course. Does the Court really believe it is appropriate for public officials to self-censor or alter public records because the information contained in the

record is defamatory and might be false? That is what the Court is saying here by suggesting that Tom Rice should have excised this material from the Mayoral Report, and presumably ordered his investigators to excise it from the draft they presented to him and to destroy any investigative notes that mentioned this allegation, because these documents also record the Jones allegations about the Chief. All of these documents – the final report, the draft report, the investigators’ notes, the Jones letter, and the material provided by Jones to the investigators – were public records under this Court’s holding in *Lashutka*; records which “clearly belong[ed] to the public.” *State ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St. 3d 185, 186.

The majority opinion completely ignores the fact that the Public Records Act of Ohio makes this case different than the gratuitous publication cases that informed the *St. Amant* definition of actual malice. See *St. Amant*, 390 U.S. at 731, citing *New York Times v. Sullivan* (1964), 376 U.S. 254 (action against a gratuitous publisher, not a public official submitting a public record); *Garrison v. Louisiana* (1964), 379 U.S. 64 (action against a district attorney who accused judges of laziness at a press conference); and *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130 (actions against the Associated Press and Saturday Evening Post). Ohio’s public records law recognizes that public offices must document the “organization, functions, policies, decisions, procedures, operations and other activities” of their office in written records. R.C. 149.011(G). The law requires these records to be maintained in an unaltered form; public records may not be “removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of,” except as provided by law. R.C. 149.351. The law requires the public’s records to be preserved and available for public inspection, precisely because the public has a right to know what their officials are doing, even when what they are doing is investigating

salacious allegations about a high-ranking public official. See *Lashutka*, 72 Ohio St. 3d at 186.

While the law recognizes that some limited public records may contain scandalous allegations about innocent private parties and exempts that information from public disclosure, the exception for such “confidential law enforcement records,” R.C. 149.43(A)(1)(h), does not apply to police internal-affairs investigations, chain-of-command investigations, and other like records under this Court’s unequivocal holding in *Lashutka*. *Lashutka*, 72 Ohio St. 3d at 186. But, despite its adamant holding in *Lashutka*, the Court now holds that defamatory information in such records should be excised from public view if the officeholder has reason to think the information is probably false.

Justice Pfeifer, author of the majority’s Opinion here, joined Justice Douglas’s strongly worded majority opinion in *Lashutka* reaffirming the fundamental principle that chain-of-command investigative reports (such as the one Rice edited and presented to Mayor Lashutka in this case) “belong to the public.” *Lashutka*, 72 Ohio St.3d at 187-88. For that reason, Justice Pfeifer’s Opinion in this case is all the more vexing, for it surely increases the likelihood that chain-of-command reports crucial to the investigation and supervision of our state’s public officials will be self-censored, redacted, sanitized, or otherwise obscured by public investigators wary of costly defamation suits before they are made available to the public they serve.

The majority opinion does not acknowledge, let alone address or attempt to reconcile, these important public-policy considerations. As a result, reconsideration is warranted under this Court’s precedent. *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St. 3d 381 (“reasons of public policy” justified reconsideration of

decision regarding the number of signatures needed to place a proposed charter amendment on the ballot); see also *Buckeye Community Hope Found. v. City of Cuyahoga Falls* (1998), 82 Ohio St. 3d 539 (reconsidering a prior decision that had mischaracterized certain municipal action as “legislative” rather than “administrative”); *State ex rel. Gross v. Industrial Comm.* (2007), 115 Ohio St. 3d 249 (granting reconsideration to address “the confusion and misunderstanding” generated by the Court’s initial decision).

C. The Court gives no guidance to public officials as to how to apply the “high degree of awareness of probability falsity” standard to allegations they record during the course of an official investigation of public misconduct.

The majority opinion strongly suggests that public officials conducting official investigations record *at their peril* allegations of salacious conduct by other public officials—and that they do so under the very real threat of a defamation suit. Given the Court’s stalwart support of the Public Records Act, it is difficult to imagine that the Court truly intended to encourage public officials to self-censor chain-of-command reports or other critical public records out of a fear of personal liability. But if this is what the Court intends – that public officials either never record defamatory allegations they doubt are true, or that they excise any such allegations recorded by their subordinates – should the Court not, at a minimum, have told public investigators who must now conform their conduct to the Court’s ruling *how* they should judge when an allegation is too defamatory to be recorded?

What about an allegation that the President of the United States personally ordered an illegal break-in at an opponent’s offices? An allegation that a President of the United States had sexual relations with a young female employee in the Oval Office?

An allegation that a member of the House of Representatives took bribes from lobbyists? An allegation that a city council member had sex with a prostitute? An allegation that a county clerk of court embezzled county funds? An allegation that a Governor of New York repeatedly used the service of a high-end prostitution service?

Each of these allegations accuses a public official of scandalous conduct or a crime. When first heard, these allegations likely seemed highly improbable, yet we now know each was true. But, what if the investigators who first heard these allegations appreciated that they might well be false and, therefore, never recorded them for further investigation, because of a legitimate concern that under the *St. Amant* standard this Court now extends to public investigators they could be held personally liable for publishing the allegation – as only an allegation – precisely and solely because they believed at the time it probably was false? Because the Court applies the *St. Amant* definition of actual malice generally to defamatory statements published by public investigators, it has the potential of casting a veil of secrecy over any allegation critical of a public official's personal or professional misconduct, not just those allegations that are singularly salacious.

So, too, if the Court intends public investigators to not record in, or to excise from, the public record defamatory allegations whenever the investigators have a “high degree of awareness of their probable falsity,” should not the Court at least give these public servants some better guidance as to what level of doubt is acceptable, and when an awareness that an allegation may be false rises to an impermissibly “high degree of awareness of its probable falsity”? The Court is asking Ohio's public investigators to make this call at the risk of personal liability for error.

Consider this case. Tom Rice has had to endure eleven years of litigation and must now go to trial on the issue of whether he defamed Chief Jackson because, after being told by the Mayor (pursuant to Section 63 of the city charter) to investigate "allegations" of police misconduct and report back to him at the conclusion of the investigation (Second Suppl. 5), Rice reported, consistent with the Mayor's directive to him, that Keith Lamar Jones had made a scandalous accusation against the Chief. Tom Rice now faces personal liability for reporting that this allegation had been made even though he also disclosed in the report that Jones was known by some to be a "liar" and "scam artist" and stated that the allegation was "unproven" but was being referred for further investigation should new evidence come to light.

While Rice has always acknowledged that he knew the Jones allegation "might be false," he also testified why he could not totally discount the allegation altogether. (Rice Affidavit at ¶ 8, Supp. 247-48.) He could not be sure that the Jones allegations was false or probably false because it was not the only allegation related to Chief Jackson or the police and prostitution that surfaced during the Mayoral Investigation. There also had been allegations that the police were protecting a prostitution enterprise known as Elite Escorts, that Jackson's predecessor had deep-sixed records concerning escorts services, that Chief Jackson was involved with Charlynn English, a former prostitute, as well as allegations by two street prostitutes that Chief Jackson was known to cruise the area looking for prostitutes. (Id; Supp. 85-86.) Tom Rice did not include these allegations in the Mayoral Report because he harbored ill-will toward Chief Jackson. Tom Rice allowed all these allegations to be included in the Mayoral Report, and to stand intact in the investigative files, because he was charged by his superior, the Mayor, with the task of conducting an official investigation into allegations about police involvement in

prostitution or with prostitutes. He could not report on the investigation without saying what allegations were made. Nor could his investigative team conduct the investigation without writing down the allegations being investigated.

Both the trial court and the appellate court held there was no genuine issue for trial, but this Court reverses. A public investigator reading this decision would have to conclude, and rightfully so, that he should *not* record any defamatory allegation he reasonably doubts. This is the reasonably foreseeable consequence of the majority's opinion and it is a consequence completely at odds with the Court's long tradition of allowing the public to know what is being done by their servants to conduct the public's business. It is ironic that this tradition should be broken at the point where the public's business is the investigation of defamatory allegations against a public official. It would seem that this is the point at which there should be the greatest transparency, not the least.

D. The Court should reconsider this case and hold that, when a public investigator records a defamatory rumor or suspicion in documents prepared during or at the conclusion of a public investigation into public official misconduct, no abuse of privilege occurs, provided the rumor or suspicion is identified as such, even though the public investigator has a high degree of awareness that the allegation is probably false.

The Court took this appeal to review the proposition of law 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." As a general proposition of law, this proposition is indisputable. It was adopted by the United States Supreme in *St. Amant* and was adopted by this Court in *Jacobs v. Frank* (1991), 60 Ohio St. 3d 111. There was no reason for this Court to take this case to review

this proposition of law in general. The only reason for the Court to take the case was to evaluate specifically whether this general proposition of law makes sense in the context of a report of an official investigation into potential police misconduct, including involvement in prostitution, where the allegations to be investigated are very likely to be defamatory and to be made by doubtful sources, and where any report of the investigation is by law a public record. Yet, the majority opinion contains no such evaluation as to why this general proposition of law makes sense in this narrow context, or whether it is consistent with the Court's long tradition of protecting the public right to know, even when disclosure makes other persons uncomfortable or works against their personal interests. See, *e.g.*, *Lashutka*, 72 Ohio St. 3d 185 (emphasizing that records of internal affairs investigations and chain-of-command investigations "belong to the public").

With hindsight it is possible to see how the Court, through no fault on its own part, failed to complete the analysis to test whether this very general proposition of law made sense in this context. In their respective briefs, the parties devoted much attention to arguing about the proper characterization of the privilege at issue, with Appellant Jackson claiming that the courts below erred in applying the heretofore rejected neutral reporting privilege and Appellee Rice arguing for a specific public-interest privilege tailored to this unique context.

Perhaps, because all members of the Court quickly recognized the privileged nature of the Mayoral Report, the parties did the Court a disservice by not paying more attention to the narrower issue of when the privilege may be abused in this context. Appellee Rice briefly discussed this issue, arguing that in this context the privilege should not be defeated unless the public investigator publishes an allegation knowing

that it was likely false that the allegation had been made in the first place. Appellees' Merit Brief at 22-25. Appellant Jackson addressed this narrower issue in his Reply Brief, arguing that any public-interest privilege should be defeated by either a showing that Rice had a high degree of awareness of the probable falsity of the Jones' allegation or evidence of his ill-will toward Jackson. Appellant's Reply Brief at 10-13. Both parties alluded to Section 602 of the Restatement 2nd of Torts, the position adopted by the dissenting opinion, but neither party expressly urged its adoption as the standard to be applied in this context. See Appellant's Merit Brief at 21; Appellees' Merit Brief at 25.

1. **The Section 602 standard urged by the dissenting Opinion at least gives some protection to public investigators whose job duties require them to record allegations of misconduct, even when the allegations are improbable and come from irresponsible parties or questionable sources.**

The dissenting opinion at ¶ 33 urges the adoption of Section 602 of the Restatement of Torts, 2d and the following holding:

[I]n instances where an allegedly defamatory statement has been published on the occasion of a qualified privilege, no abuse of the privilege occurs when the statement has been identified as rumor or suspicion rather than fact and when publication is reasonable in view of the relationship between the parties, the interests involved, and the harm likely to result from publication.

While this is not the standard Appellees proposed, it at least gives some protection to the public and to public investigators, who by the very nature of their assigned duties, must record allegations of official misconduct in the public record, even when the allegations are inherently improbable. There are too many examples of inherently improbable allegations being proven true over time for the Court to suggest, as the majority opinion clearly does, that such allegations be stricken from the public record before publication simply because they are inherently improbable. The majority

opinion does not sufficiently protect the public's right to know that allegations have been made and what was done about them. The standard urged by the dissenters appropriately allows the allegations to be made part of the public record. It also gives at least some protection to the public investigator, confronted with the quandary of what to do upon hearing improbable allegations about a public official, although in some cases it still leaves the investigator exposed to potential liability in the event he misjudges either the interests involved or the harm likely to result from publication.

The standard proposed by the dissenting opinion certainly is an appropriate standard to be applied generally in cases involving the republication of rumors and suspicions by the media, by private parties, by competitors and political opponents, or other private or public parties. There certainly are circumstances in which the privilege to republish rumors or suspicions should depend on further inquiry into the Section 602(b) factors, including "the relation of the parties, the importance of the interests affected and the harm likely to be done" by the republication. See Restatement § 602(b). For example, it likely is not appropriate to republish a rumor or suspicion, even as such, when the rumor is about a private individual, the reason for the publication is purely personal gain or revenge, the rumor is repeated to a media organization, and it is likely that the person will suffer extreme emotional distress or loss of employment. On the other hand, it would seem to be appropriate for a public employee to report to his superior a rumor or suspicion that another employee is accepting lavish gifts from an agency vendor, even though there may be a history of animosity between the employees. See Restatement §602, Comment b ("[A] servant may be justified in reporting to his master even his suspicions of the honesty of a fellow employee, whereas a stranger would have no justification for the communication.")

2. **The qualifications for maintaining the privilege expressed in Section 602(b) are largely self-evident when a public investigator is charged with the duty to investigate allegations of official misconduct.**

The real question, though, is the extent to which inquiry into the Section 602(b) qualifications is even necessary in the case of a public investigator investigating another public official at the direction of his superior, and, if so, how the privilege may be abused in this context. It certainly would be appropriate for the Court to conclude in this circumstance that the Section 602(b) qualifications for maintaining the privilege should be largely self-evident. As the United States Supreme Court recognized in *Gertz v. Welch* (1974), 418 U.S. 323, 344, there are contexts within the law of defamation in which some bright-line rules are needed in order to avoid “unpredictable results and uncertain expectations. * * * Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.” *Id.*

While Appellee is not suggesting that public investigators have an *absolute* privilege to publish allegations, Rice is suggesting that in applying Section 602 to public investigators there should be a rule “of general application” giving significant recognition to the fact that their recordation of allegations is an essential aspect of their assigned job duties. There should be some presumption that the Section 602(b) qualifications for maintaining the privilege exist with respect to chain-of-command investigations by a public official; a presumption that can be overridden only by clear and convincing evidence that the investigator abused the privilege in some other way. A brief discussion of the three 602(b) “factors” shows why this is so.

a. The public investigator's relationship to his supervisor and to the public is defined by law.

The first Section 602(b) factor is the "relation of the parties." In the case of a public investigator investigating allegations of official misconduct at the direction of his superior, like Tom Rice here, the relation of the parties is such that the republication of the allegations to the superior is *per se* reasonable. As noted in Comment b to Section 602:

The fact that the person who publishes the defamatory rumor does so in response to an inquiry apparently made in good faith by a person having a legitimate interest to protect is of importance in determining whether the publication is a reasonable and proper one. The circumstances may be such that the person making the request may properly expect a response that indicates not only the reasonable and well-founded beliefs that the other may entertain, but also any information he may have, whether derived from irresponsible and unidentified sources or as reasonable inferences from facts known to be true. In this case, the person to whom the request is made may pass on such information as he may have for what it is worth, if he does so in an honest response to the request. In doing so, however, he must not mislead the other to the disadvantage of the person defamed by communicating as facts within his own knowledge matter that is only hearsay.

In this case, for example, the Mayor directed Rice pursuant to Section 63 of the city charter to investigate allegations of police involvement with prostitution. Rice understood that he was expected to report back what the allegations were as well as what was done to investigate them. (Second Suppl. 7). It would have been expected by both Lashutka and Rice that information about police involvement in prostitution might come from irresponsible or unidentified sources. Rice reported the Jones allegation, as a "for what its worth" allegation, by taking care to point out that the source was reputed to be a "liar" and "scam artist," and that the allegation was "unproven." Though Rice did not question Jackson personally about the allegation, he did refer it to the Vice Squad

“for what it was worth” so that they could follow up as appropriate should other information come to light from other sources.

- b. The Legislature and the Court have determined that the public has a legitimate and compelling interest in having the records of internal-affairs investigations, chain-of-command investigations and other similar investigations available to the public.**

The second Section 602(b) factor addresses “the importance of the interests affected.” In the case of an investigation of a public official, the most important interest affected is the public’s right to have allegations investigated and the results reported so that the public will know it is being protected. Thus, in such cases the republication of the allegation to the investigator’s superior should be presumptively reasonable. Jackson’s counsel conceded in briefing and argument that it would have been reasonable for Rice to report the Jones allegation about Jackson to Lashutka orally or in a private memo. Jackson nevertheless seeks to hold Rice personally liable because the Mayoral Report, with this allegation included, was released to the public. But Rice did not gratuitously release the Mayoral Report to the public; the reason it was released to the public was that it undeniably was a public record under this Court’s holding in *Lashutka*. It is beyond cavil that if the media had asked for a copy of the Mayoral Report (or the underlying investigatory interviews and notes) and Rice refused to produce it (or them), the media would have come directly to this Court under the Ohio Public Records Law to compel disclosure. The media would have won that contest hands down, and no doubt Rice and Lashutka would have received a stinging admonishment not unlike that delivered by Justice Douglas in *Lashutka*.

This lawsuit is not about Rice’s excessive publication of the Jones allegation. Rice reasonably, indeed necessarily, reported the allegation to Lashutka (a report

Jackson concedes would have been appropriate); the law required that report to be publicly available. While the majority appears motivated by a genuine concern about the publication of allegations of public official misconduct to the public when the allegations may be false, the majority opinion clearly deviates from the Court's usual judicial restraint by not recognizing that concerns over whether information acquired and maintained by a public office should be available for public viewing is a matter for the legislature. While this case is not a public-records case, the result the majority reaches is an anti-public-records result. The majority opinion is saying that public investigators should not put information they acquire during the course of their investigation into the public record if they have serious doubt whether it is true. Typically it is the legislature's job to decide what information the public will see or not see, but the Court now makes it the individual investigator's job to make or not make a public record and admonishes him to err on the side of *not* making the record at the risk of personal liability.

c. A public official has a more realistic opportunity to counteract the potential harm of rumors and suspicions.

The third Section 602(b) factor relates to the "harm likely to be done" by publication of a defamatory rumor or suspicion. The harm likely to be done when a public investigator republishes an allegation about another public official is mitigated because the public official will be able to rebut the allegation and tell his side of the story, either in the media or through generally available due-process avenues. As the United State Supreme Court recognized in *Gertz*, the public-official defamation plaintiff's easier access to rebuttal opportunities is a key fact that distinguishes such plaintiffs from private defamation plaintiffs, and the existence of this distinction was

one of the predicates for imposing a heightened burden of proof on public-official defamation plaintiffs:

The first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Gertz, 418 U.S. at 344-345 (internal citation omitted).

The other predicate for making it more difficult for public-official defamation plaintiffs to sue was society's interest in how public officials conduct their personal life, as well as how they discharge their official duties, because their personal conduct also might touch upon their fitness for office.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana*, the public's interest extends to "anything which might touch on an official's fitness for office" . . . [.]

Id.

3. **Even if refined to recognize the unique circumstances of the public investigator acting in the public's interest, Section 602 would not become an absolute or unqualified privilege.**

Appellee Rice urges the Court to consider, on reconsideration, not only whether the Section 602 standard urged by the dissenting opinion is the more appropriate standard to apply, but also whether that standard should be honed even finer to reflect

the very unique circumstances of the public investigator's duty, and the public's right to know, when allegations are made about public officials. The public investigator is entitled to greater protection than Section 602 provides, as that Section of the Restatement is generally written to apply to all defamation defendants, because he is required to deal with allegations of official misconduct as an essential component of his job and because his investigatory records, including the reports required by his superior, are by law public records. A public investigator is not a gratuitous publisher, and does not have the choice of ignoring allegations simply because they may be improbable or because they come from questionable sources.

More finely honing the Section 602(b) qualifications for preserving the privilege to republish allegations, as allegations, to accommodate the unique demands the public places on public investigators will not result in a *de facto* absolute privilege. As the dissenting opinion notes at ¶ 32, Section 602 does not immunize any statement labeled as an allegation and it does not stand alone. The privilege would still be qualified and could be defeated by republishing allegations as fact or without sufficient "for what its worth" disclaimers, as recognized by the Comment to Section 602. The privilege also could be abused (and therefore defeated) by publication solely for an improper purpose (*e.g.*, under the ruse of an official investigation never properly authorized by a superior), as recognized by Section 605. It could also be defeated by publication "solely from spite or ill will," as suggested by Section 603, Comment a.

E. The majority Opinion places too much weight on the fact that Rice did not require his investigative team to interview Jackson about the Jones allegation.

The Court also should reconsider the weight it appears to have given to the fact that Rice did not ask Jackson to comment on the Jones' allegation before including it in

the Mayoral Report. Even under the *St. Amant* definition of actual malice, the failure to investigate further does not establish bad faith. *Id.*, 390 U.S. at 733. As this court has noted, “even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice.” *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St. 2d 116, 119. At most, it is circumstantial evidence that the defendant may have doubted the truth of what was published. Here, however, the Mayoral Report itself discloses that there were good reasons for Rice – and for the reader – to doubt the Jones allegation.

Had Jackson been asked about the allegation (and assuming he cooperated in responding) he would have denied the allegation, but that denial would not have avoided the publication of the allegation. The Report likely would have included Jackson’s denial, along with the other statements about Jones’ credibility, and still concluded that the allegation was “unproven.” (Supp. 180-82, Report 156-158.) The allegation with Jackson’s denial might or might not have been referred to the Vice Squad, together with Jones’ remaining allegations about Sgt. Blackwell. (*Id.*) While Rice and the investigators may be accused of “passing the buck” for referring the allegation to the Vice Bureau without first interviewing Jackson, the failure to interview Jackson is not significant in terms of whether the allegation should have been included in the Report. Public investigators should not be encouraged to excise allegations of official misconduct from the public records – even highly improbable allegations – just because the subject denies the allegations or the investigation shuts down without a definitive resolution.

III. CONCLUSION

For the foregoing reasons, the majority opinion in this case seriously compromises the ability of Ohio's public officials to record, investigate, and report fully and fairly on allegations of misconduct without also subjecting themselves to personal liability for defamation. To avoid undermining the qualified privilege that protects our public officials from personal liability for statements made in the course of their public duties, and to vindicate the public policy of transparency enshrined in Ohio's Public Records Act, the Court should reconsider this case and hold that when a public investigator records a defamatory rumor or suspicion in documents prepared during or at the conclusion of a public investigation into public official misconduct, no abuse of privilege occurs, provided the rumor or suspicion is identified as such, even though the public investigator has a high degree of awareness that the allegation is probably false. As this Court rightly determined more than two decades ago:

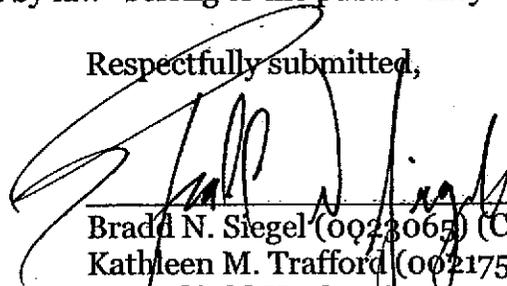
Summary [judgment] procedures are especially appropriate in the First Amendment area. "The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself. *** Unless persons *** are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

Dupler, supra, 64 Ohio St. 2d at 120-21, quoting *Washington Post Co. v. Keogh* (C.A.D.C. 1966), 365 F.2d 965, 968. The majority's reversal of summary judgment in this case will lead to precisely the form of self-censorship that the *Dupler* court sharply warned against.

While the Court grants reconsideration only sparingly, and for good reason, the Court has recently granted reconsideration in significant matters of compelling interest

to the State of Ohio. See, e.g., *State ex rel. Ohio General Assembly v. Brunner*, 2007 Ohio 4460, 115 Ohio St. 3d 103; *Gross, supra*, 2007 Ohio 4916, 115 Ohio St. 3d 249. Appellee Thomas Rice respectfully submits that this case, too, urgently merits the Court's reconsideration. The public officials of our state must know with certainty the circumstances under which they may record allegations against other officials, fulfill their investigative duties with respect to those allegations, and report the results of those investigations in records that by law "belong to the public" they serve.

Respectfully submitted,



Brad N. Siegel (0023065) (Counsel of Record)
Kathleen M. Trafford (0021753)
L. Bradfield Hughes (0070997)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
(612) 227-2000

Attorneys for Appellee Thomas W. Rice, Sr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Reconsideration of Appellee Thomas W. Rice, Sr. was served via regular mail, postage prepaid, this 24th day of March, 2008, upon the following:

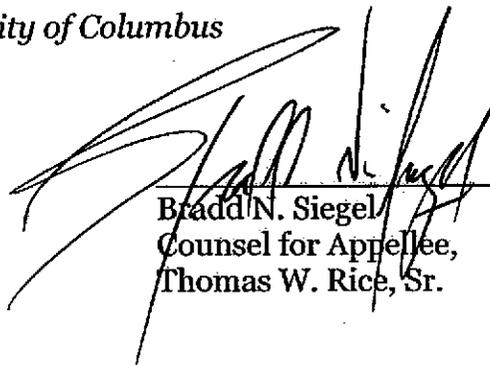
Charles E. Ticknor III
Buckingham, Doolittle & Burroughs, LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215

Eva C. Gildee
The Law Office of Eva C. Gildee, Ltd.
503 S. High St., Suite 205
Columbus, OH 43215

Counsel for Appellant James G. Jackson

Glenn B. Redick
City of Columbus
Department of Law
City Hall
90 West Broad Street
Columbus, Ohio 43215

Counsel for Appellee City of Columbus



Bradd N. Siegel
Counsel for Appellee,
Thomas W. Rice, Sr.