

IN THE SUPREME COURT OF OHIO

ROBERT E. MURRAY, et al.,)	
)	Case No. 2015- <u>0127</u>
<i>Plaintiffs-Appellants</i>)	
v.)	Appeal from the Cuyahoga
)	County Court of Appeals,
CHAGRIN VALLEY PUBLISHING COMPANY, et al.)	Eighth Appellate District,
<i>Defendants-Appellees</i>)	Case No. 101394
)	

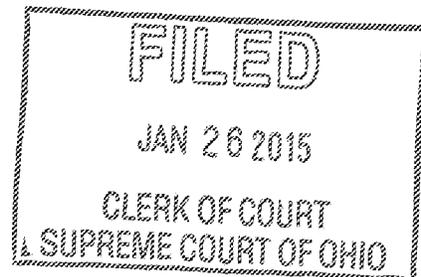
MEMORANDUM IN SUPPORT OF JURISDICTION OF
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INTERESTS OF AMICUS CURIAE

Amicus Curiae Bryan Felmet, Esq. is an active lawyer in good standing in the State of Ohio who resides in Steubenville, Ohio. A graduate of the Moritz College of Law at The Ohio State University, Mr. Felmet was first admitted to the practice of law in Ohio in November 1976. Mr. Felmet served in the Judge Advocate General Corps. of the United States Army from 1977-1998. From 2000-2004 Mr. Felmet served as the elected county prosecutor for Jefferson County, Ohio. For five years from 2005 to 2010, Mr. Felmet served as one of the three appointed, Republican members of the Ohio Elections Commission, having been appointed by former Governor Ted Strickland. In that capacity, Mr. Felmet reviewed numerous complaints filed under Ohio's political false-statement laws, R.C. 3517.21(B)(9)-(10). In the 2004 election for county prosecutor, which he lost, Mr. Felmet himself invoked the Commission's false-statement procedures to challenge certain statements made by his opponent that were published in the newspaper. The Commission's decision in Mr. Felmet's favor was affirmed on appeal to the Franklin County Court of Common Pleas.

Due to his prior years of service on the Ohio Elections Commission, and his own experience challenging false statements made about him in the context of a campaign, *amicus curiae* shares Appellants' interest in preventing false and defamatory assertions from tarnishing public debate on important issues. In light of a recent federal court's decision permanently enjoining the Commission from enforcing Ohio's political false-statement laws, *Susan B. Anthony List v. Ohio Elections Commission*, S.D. Ohio No. 1:10-cv-720, 2014 U.S. Dist. LEXIS 127382 (S.D. Ohio Sept. 11, 2014), *amicus curiae* believes that it is critically important for Ohio's common pleas courts and courts of appeal to ensure that juries (not judges too quick to enter summary judgment) will be able to decide disputed

questions of fact in defamation cases. *Amicus Curiae* believes that this appeal presents this Court with a critical and timely opportunity to clarify and confirm the contours of the defamation and false-light torts, and the summary-judgment procedures and burdens applicable to them, particularly now that the Ohio Elections Commission is no longer a forum in which defamed candidates can obtain expedited relief for violations of Ohio's political false-statement laws.

BACKGROUND

The Ohio Elections Commission was originally established in 1974 in response to the Watergate scandal. For years, the Commission played an important role in adjudicating claims by candidates from all political parties (as well as independent candidates) that false statements had been made in the context of political campaigns. This Court has previously confirmed the Commission's key role in ensuring fair elections in prior discretionary appeals such as *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 2000-Ohio-118. That case, like this one, involved an allegedly defamatory cartoon. In *McKimm*, this Court held that when a candidate for public office distributes a campaign brochure containing an illustration implying that the candidate's opponent committed an illegal act while in office, and the candidate lacks any basis to believe that the opponent committed the act depicted in the cartoon, the Ohio Elections Commission could constitutionally determine that the candidate violated R.C. 3517.21(B)(10). *Id.*, syllabus.

Recently, however, in a highly publicized decision, a federal court in Cincinnati, Ohio permanently enjoined the Ohio Elections Commission from enforcing Ohio's political false-statement laws. In *Susan B. Anthony List v. Ohio Elections Commission*, S.D. Ohio No. 1:10-cv-720, 2014 U.S. Dist. LEXIS 127382, *5 (S.D. Ohio Sept. 11, 2014), U.S. District Judge Black

held that these laws are “more burdensome than necessary to accomplish their alleged objectives and do not satisfy strict scrutiny under the Constitution of the United States. Therefore, **the Court strikes down the laws as unconstitutional and permanently enjoins the Ohio Elections Commission and its members from enforcing Ohio’s political false-statement laws.**” (Emphasis in original).

Judge Black’s decision in *Susan B. Anthony List* marks a sea-change for the State of Ohio. Now that the Ohio Elections Commission can no longer enforce Ohio’s political false-statement laws, cases like *McKimm* are a dead letter. The inability of the Commission to enforce Ohio’s political false-statement laws after *Susan B. Anthony List* means that candidates who are defamed in the context of political campaigns (such as *amicus curiae* himself was) will need, more than ever, recourse to Ohio’s common pleas courts -- and to the common-law torts of defamation and false-light invasion of privacy -- in order to protect and restore their reputations.

The press has already noted false-statement cases filed in common pleas court that, but for the *Susan B. Anthony* litigation, would have been filed in the Commission. *E.g.*, Borchardt, J., *Rep. John Barnes files lawsuit against fellow Democrats: 3 takeaways*, Northeast Ohio Media Group (Nov. 11, 2014) (“The false-statement complaint is one that typically would be filed with the Ohio Elections Commission, a panel that enforces state campaign law. But the commission isn’t enforcing state law against false political statements while the law is being challenged in federal court. So Barnes filed a civil suit in Franklin County Common Pleas Court.”).¹

¹ Available at: http://www.cleveland.com/open/index.ssf/2014/11/rep_john_barnes_files_lawsuit.html (last visited January 21, 2015).

This appeal thus presents the Court with a timely opportunity to ensure that Ohio state courts will be truly accessible not only to defamed candidates for public office, but to other citizens (such as Appellants) seeking to restore reputations that they believe have been damaged by allegedly false and defamatory assertions.

THIS APPEAL PRESENTS ISSUES OF PUBLIC OR GREAT GENERAL INTEREST CONCERNING THE FALSE-LIGHT AND DEFAMATION TORTS, WHICH WILL BE OF INCREASED SIGNIFICANCE TO CANDIDATES FOR PUBLIC OFFICE NOW THAT THE OHIO ELECTIONS COMMISSION HAS BEEN PERMANENTLY ENJOINED FROM ENFORCING OHIO'S POLITICAL FALSE-STATEMENT LAWS

Proposition of Law No. 1: In light of *Susan B. Anthony List v. Ohio Elections Commission*, S.D. Ohio No. 1:10-cv-720, 2014 U.S. Dist. LEXIS 127382 (S.D. Ohio Sept. 11, 2014), which permanently enjoined the Ohio Elections Commission from enforcing Ohio's political false-statement laws, it is critical for Ohio's common pleas courts and courts of appeal to allow juries to decide disputed questions of fact in defamation cases.

Amicus Curiae is admittedly not as well-versed in the facts of this case as the parties, particularly in light of the extensive factual development that occurred in discovery before the trial court wrested this case from the jury on summary judgment. What is clear from *amicus curiae's* review of the parties' appellate briefs, however, as well as the Eighth District's opinion, is that the parties here vigorously disputed several critical facts going to key elements of Appellants' defamation and false-light claims, including: (1) whether certain allegedly defamatory statements at issue were true or false, and (2) whether the individual publishing them did so with a reckless disregard for the truth.

For example, the *Chagrin Valley Times* Editor Emeritus, Appellee David Lange, asserted in his Commentary that Appellants were fined the government's "highest penalty" for safety violations that were "determined" to have "directly contributed to" the tragedy at the Crandall Canyon mine in Utah. *Murray v. Chagrin Valley Pub. Co.*, 8th Dist. No. 101394, 2014-Ohio-5442, ¶ 28. To oppose summary judgment, Appellants offered evidence that

these assertions were false. For example, Appellants demonstrated that when Lange made this assertion, the penalty imposed concerning Crandall Canyon was \$10 million less than the highest penalty ever imposed on a U.S. coal mine. *See* Appellants' Eighth District Merit Br. at 16. And they explained that no tribunal had ever "determined" that these safety violations caused the tragic collapse of the mine at Crandall Canyon. *Id.* at 17-18. Finally, they noted that Lange published these assertions in what he himself sarcastically described as a "Happy New Year" gift to Appellant Robert E. Murray, and that he did so in the face of information he possessed casting doubt on the accuracy of his assertions. *Id.* at 18.

In light of these facts, it is difficult for *amicus curiae* to grasp why the trial court (in its "postcard" entry) and the court of appeals decided that a jury had no business assessing Appellants' claims for defamation and false-light invasion of privacy. After all, as Justice O'Neill recently noted, disputed facts must be tested in the "crucible of inquiry." *Pixley v. Pro-Pak Industries, Inc.*, Slip Op. No. 2014-Ohio-5460, ¶ 35 (O'Neill, J., dissenting). "While disposition of cases by summary judgment is essential to conserve the resources of litigants and the judiciary, it cannot be said strongly enough that when facts are in dispute, summary judgment is wholly inappropriate." *Id.* at ¶ 33. *See also Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 940 (2d Cir. 1980) (noting that neither grant nor denial of a motion for summary judgment is to be preferred in public-figure defamation cases, and that such actions are, for procedural purposes such as summary judgment, to be treated no differently from other actions).

After *Susan B. Anthony List*, the circumstances under which summary judgment is (or is not) appropriate is no mere academic dispute for candidates defamed by false political speech. After *Susan B. Anthony List*, candidates can no longer approach the Ohio

Elections Commission -- as *amicus curiae* himself once did -- for expedited probable-cause determinations of falsity under Ohio's political false-statement laws, because the Commission has now been permanently enjoined from enforcing those laws. Instead, candidates seeking to clear their names and recover damages for false and defamatory political speech will necessarily file their claims in common pleas court, where disputes of fact should be decided by juries, not judges bent on summary judgment.

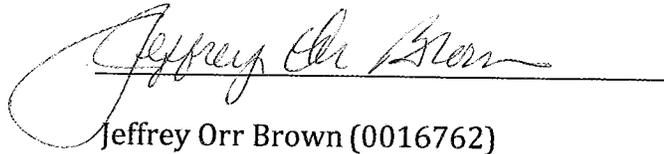
The Court's latest publicly available statistics for trials in civil cases show that just 1.2% of all civil cases in the State of Ohio are resolved after a trial. Trevas, D., *Trial Rates in Ohio Continue Decline, Statistical Report Reveals*, Court News Ohio (Sept. 30, 2014).² Based on these numbers, the Court need not fear an unmanageable explosion in jury trials if courts allow juries to decide disputed facts in appropriate defamation cases, which is exactly what juries are supposed to do, anyway. What the Court should endeavor to prevent, particularly in light of last fall's *Susan B. Anthony List* decision, is an environment in which there is no meaningful forum available in the State to fully and fairly adjudicate claims of false and defamatory political speech. Unfortunately, the Eighth District's decision in this case leads down that path by affirming the trial court's "postcard" decision on summary judgment, despite the existence of several vigorously disputed facts.

CONCLUSION

For the foregoing reasons, *amicus curiae* Bryan Felmet, Esq. joins Appellants Robert E. Murray, Murray Energy Corporation, American Energy Corporation, and The Ohio Valley Coal Company to respectfully urge this Court to accept jurisdiction over this appeal.

² Available at: http://www.courtnewsOhio.gov/happening/2014/OCS_093014.asp#.VL-s9Wx0yUk (last visited January 21, 2015).

Respectfully submitted,

A handwritten signature in cursive script, reading "Jeffrey Orr Brown", is written over a horizontal line. The signature is fluid and extends slightly above and below the line.

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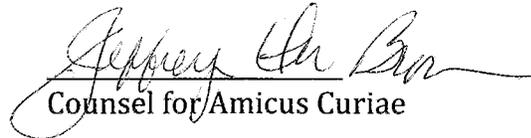
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing Memorandum in Support of Jurisdiction of *Amicus Curiae* Bryan Felmet, Esq. was served by First-Class U.S. Mail, postage pre-paid on the following counsel of record this 26th day of January 2015:


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