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IN THE SUPREME COURT OF OHIO

ROBERT E. MURRAY, *et al.*, Plaintiffs-Appellants, v. **THE CHAGRIN VALLEY PUBLISHING COMPANY**, *et al.*, Defendants-Appellees.	Case No. 2015-0127 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. 101394 Cuyahoga County Court of Common Pleas Case No. CV-13-811106

MOTION FOR RECONSIDERATION OF PLAINTIFFS-APPELLANTS ROBERT E. MURRAY, MURRAY ENERGY CORPORATION, AMERICAN ENERGY CORPORATION, AND THE OHIO VALLEY COAL COMPANY

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MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 18.02(B)(1), Plaintiffs-Appellants Robert E. Murray, Murray Energy Corporation, American Energy Corporation, and The Ohio Valley Coal Company respectfully move this Court to reconsider its July 8, 2015 order declining jurisdiction to hear this discretionary appeal by the narrowest of margins. Three Justices would have accepted jurisdiction to determine (1) whether, as the Eighth District held, a false-light claim requires publication of private matters (Proposition of Law I), and (2) how to distinguish actionable factual statements from protected opinion in a world transformed by advances in technology (Proposition of Law III). Mr. Murray and his companies respectfully request that the Court reconsider its decision and accept jurisdiction of this important case, which will allow this Court to address the contours of the tort of false light for the first time since recognizing it nearly a decade ago and to clarify Ohio's unique fact/opinion test in the context of factual assertions made on editorial pages across the State of Ohio and on other public forums across the Internet.

Mindful that a motion for reconsideration "shall not constitute a reargument of the case," S.Ct.Prac.R. 18.02(B), Plaintiffs-Appellants seek only to emphasize the significant legal concerns and consequences of allowing the Eighth District's ruling to stand. In this case, Defendants-Appellees David Lange and the Chagrin Valley Times ("CVT") published Lange's "commentary"—which Lange sardonically described to his editor as a "Happy New Year" gift—calling Mr. Murray a "real liar" and a "determined" killer of coal miners whose lives he considers "meaningless." This commentary was based on various false statements, proved as such in the 2,500-page summary judgment record. Lange admitted at deposition he knew full well the effect his piece would have. Moreover, CVT reporter Sali McSherry re-published defamatory statements that Defendant-Appellee Patriots for Change ("PFC") made "to

embarrass" Plaintiffs, using tactics so shoddy that Plaintiff's expert David Kaplan (a professor at one of the country's top journalism schools, a former reporter, and ombudsman for the Corporation for Public Broadcasting from 2011 to 2014) opined that aspects of her reporting were "inappropriate and unethical" and "unfair and incomplete." The court below has no answer to Professor Kaplan's opinions from which a jury could find liability and, tellingly, nowhere discusses them in its opinion. Nor do Defendants in their briefs opposing jurisdiction. Ignoring the reputational damage to Plaintiffs from these statements, Defendants instead seek to re-litigate events that occurred years ago at Crandall Canyon. But libelous statements of fact included within an editorial are no less actionable than those in a news story.

Against this background, this Court should reconsider its decision for two central reasons. First, in contravention of this Court's precedent adopting the tort of false light, the court below conflates the elements of defamation with those of false light, effectively collapsing the two causes of action and limiting the force of Ohio privacy law. Moreover, the Eighth District's ruling muddles the elements of false light under Ohio law by adopting a new requirement, foreclosed by Section 652E of the Restatement (Second) of Torts, that actionable statements publicize private matters. *Murray v. Chagrin Valley Times*, 8th Dist. No. 101394, 2014-Ohio-5442, ¶¶ 38–39. This new element fundamentally transforms false light from a remedy for publicizing untrue statements about a person into another protection for invasion of privacy resulting from publishing private details of a person's life, duplicative of other privacy torts. In this way, the Eighth District reads false light out of Ohio law and removes any remedy for tortious conduct that defamation does not reach. This Court's silence on the elements of false light since first recognizing this new cause of action in 2007 underscores the pressing need for this Court's intervention to clarify Ohio law, lest it become a dead letter.

With respect to the test this Court adopted for distinguishing actionable factual statements from protected opinions, this Court has not addressed the issue in nearly fifteen years. Perhaps that accounts for the Eighth District's treatment of statements Defendants defended as factual as opinions and its extension of opinion protection to even factual statements appearing on an op-ed page. This Court has never held that such statements are protected opinion, but that will become the law without this Court's review. This case has received considerable attention from the press, ensuring that editors across the State relish the opportunity to prepare sharply worded editorials—other "Happy New Year" gifts like Lange's—that they know will now be insulated from any reputational tort, even if they include false assertions of fact that they also know will be damaging to the reputations of their subjects.

Second, it cannot be the case that false light or defamation injuring a person's reputation is not actionable where there is sufficient evidence from which a jury could find the requisite state of mind, particularly on summary judgment where courts must construe the evidence in favor of the non-moving party (here, as in most defamation cases, the plaintiffs). Had this case proceeded, ample evidence would have supported a verdict in Plaintiffs' favor. Yet the courts below deprived Plaintiffs of their day in court. Betraying a bias that permeated its analysis, the Eighth District went so far as to call on the General Assembly to enact so-called "anti-SLAPP" legislation to foreclose companies from using defamation law to vindicate reputational harms inflicted on them. Unable to accomplish this end directly, the Eighth District's ruling will effect the same result indirectly by imposing even higher standards to meet an already nearly insurmountable standard in defamation cases and to withstand summary judgment. Now that the Ohio Elections Commission may no longer enforce Ohio's political false-statement law, as discussed by former Commissioner Bryan Felmet in his brief as *amicus curiae*, further limiting

the availability of remedies for defamation and false light as the Eighth District did runs counter to the public policy of the State and carries considerable adverse consequences for those injured in the court of public opinion. Defendants offer no response to this serious concern. Indeed, as with Professor Kaplan's expert report, Defendants fail even to mention Mr. Felmet's *amicus* brief in their jurisdictional briefs. That silence speaks volumes.

I. The Eighth District Badly Confuses Ohio Law on False Light and Defamation.

By incorporating a requirement that actionable statements relate to private matters, the ruling below muddles the law on false light, which expressly "does *not* depend upon making public any facts concerning the private life of the individual," according to comment a to the Restatement (Second) of Torts § 652E (emphasis added), which this Court adopted in *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, syllabus. Further, the Eighth District immunized defamatory statements appearing on an op-ed page. But this Court has never held that is the law in Ohio. In these respects in particular, the Eighth District's ruling dramatically expands and re-works the law, presenting questions of public or great general interest warranting this Court's review.

First, this Court made clear in *Welling* that false light will provide a remedy in some cases where defamation does not. *Id.* at ¶ 46. Indeed, the elements of false light differ, materially, from those for a defamation claim. Under false light, liability arises from publicity if "the false light in which the other was placed would be highly offensive to a reasonable person" and the defendant acted with the requisite state of mind. *Id.* at syllabus. But like too many Ohio courts that believe analysis of a defamation claim obviates the need for further consideration of false light, the court below considered neither of these elements in anything other than the most conclusory way. *Murray*, 2014-Ohio-5442, ¶ 39. With respect to state of mind, the Restatement

notes there are substantial, unanswered questions regarding the relationship between the standard for actual malice in defamation law and the scienter required for false light. *See, e.g.*, Restatement (Second) of Torts § 652E cmt. d. "[Y]et there is little authority on this issue" or on the proper standard for state of mind under false light. *Id.* cmt. e. The law is not nearly so settled as Defendants would have this Court believe. This Court has not considered the issue, and in fact few courts in Ohio have addressed it at all, let alone with any developed reasoning, making this case ideal for this Court to do so for the benefit of the bench and bar in the future.

Contrary to Defendants' assertion that "defamation and false-light require evaluation of the same issues" (Opp. at 5), false light protects different interests than defamation, *see* Restatement (Second) of Torts § 652E cmt. b. For this reason, "[w]ithout false light, the right to privacy is not whole." *Welling* at ¶ 49. It is also why false light provides a remedy even where the publicity at issue is not defamatory. "[F]alse light invasion of privacy offers redress not merely for the publication of matters that are provably false, but also for those that, although true, are selectively publicized in a manner creating a false impression." *Krajewski v. Gusoff*, 53 A.3d 793, 806 (Pa.Super.Ct. 2012). The Eighth District failed to recognize this principle. *Murray*, 2014-Ohio-5442, ¶ 39. Not only does the ruling below modify the standard for false light by incorporating a new element from Ohio's other privacy torts that actionable statements publicize private matters, as discussed in Appellants' Memorandum in Support of Jurisdiction, but it also makes false light unable to reach conduct defamation does not. In this way, the Eighth District's ruling creates an unworkable precedent re-making this tort and demonstrating the need for this Court to exercise jurisdiction.[1]

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[1] Chief Justice O'Connor and Justice Lanzinger dissented in *Welling*, believing this Court improvidently accepted jurisdiction. *Welling* at 473. Even if *Welling* did not fairly present an

Second, rather than follow the four-factor test this Court articulated in *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986), and its progeny, the Eighth District reformulated Ohio law by reducing the analysis to a simple, bright-line rule that effectively privileges defamatory statements if they happen to appear in a "commentary" or opinion piece on the op-ed page. In this way, the court below greatly expanded Ohio's protections for opinions (above and beyond those editors already enjoy for negligent research on their subjects). But the Eighth District did so only by treating as opinions statements PFC made with the intent to embarrass Plaintiffs and did not defend as opinions. Instead, PFC defended them as factually accurate. Nor does the Eighth District explain how PFC's false factual statements become "opinions" when re-published by CVT, Lange, and McSherry. Still, the Eighth District concedes that statements it regarded as protected opinions "are more amenable to arguments that they are factual in nature." *Murray*, 2014-Ohio-5442, ¶ 28. In the Eighth District's world, facts can be opinions, and "truthiness" (a statement that feels true even though it is not) counts—*so long as content appears on an op-ed page*. That is not the law in Ohio. Indeed, the Ohio Constitution qualifies protection for opinion with the proviso that every person remains "responsible for the abuse of the right" of free speech. Ohio Constitution, Article I, Section 11. This Court should exercise jurisdiction to provide meaningful guidance to Ohio courts concerning how to distinguish actionable statements from protected opinion. Doing so is particularly important now, in an age when the internet, social media, and emerging platforms have expanded the opportunities for expression of opinion far beyond the traditional forums at issue in this Court's precedents. In that world, the ruling below extends opinion protection almost without limit.

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issue of public or great general interest in recognizing false light, this case does for the simple reason that the Eighth District opinion, borne of basic misunderstandings of false light and this Court's silence on the cause of action since 2007, adds a new element to the tort.

II. The Eighth District's Ruling So Narrowly Circumscribes False Light and Defamation That It Deprives Persons Suffering Reputational Injury of a Remedy.

Mr. Murray vigorously exercises and defends his First Amendment rights. He does so on issues of concern to him, his companies, and the coal industry, which is a vital engine of economic growth and source of jobs for Ohio. In the exercise of free speech, "[t]he press provides a vital public service but it also can do great harm if culpable misconduct results in the publication of a false and defamatory statement." Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U.Ark.Little Rock L.Rev. 201, 220 (2000). For this reason, it is well established that the First Amendment offers *no* protection to defamatory speech, *see, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), just as deceptive or misleading commercial speech and child pornography enjoy no protection under the First Amendment, *see, e.g.*, *State v. Guinn*, 42 Ohio St.3d 92, 95–96, 537 N.E.2d 656 (1989) (commercial speech); *New York v. Ferber*, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982) (child pornography).

Contrary to Defendants' assertions, this case is not about speech protected by the First Amendment. Instead, this case raises the question whether there is any remedy available to Ohio citizens when they are defamed or portrayed in a false light by, among other things, reporting that is "inappropriate and unethical" and "unfair and incomplete," as Plaintiffs' expert Professor Kaplan opined here. The First Amendment also protects access to the courts. *See McDonald v. Smith*, 472 U.S. 479, 484, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11–12, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). But even before the Eighth District's decision further curtailing the ability to seek redress in court for defamation or false light, few litigants were able to have their defamation or false light claims decided by a jury. *See*

Joseph W. Beatty, Note, *The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9 U.Fla.J.L.&Pub.Pol'y 85, 106 (1997) (noting that in 75% of defamation suits, defendants prevail on dismissal or summary judgment and that, in the less than 10% of cases where defamation plaintiffs ultimately prevail, judgment is overturned on appeal 70% of the time). Indeed, Plaintiffs have not located *any* Ohio cases in the last decade that went to verdict against a media defendant. But the availability of a remedy is more important than ever. As Mr. Felmet points out in his *amicus* brief, which Defendants ignore in their jurisdictional papers, this question is of public or great general interest at this particular moment because Ohio may no longer enforce its political false-statement law in the Ohio Elections Commission, *see Susan B. Anthony List v. Ohio Elections Comm.*, 45 F.Supp.3d 765, 781 (S.D.Ohio 2014), placing greater importance on the availability of defamation and false light to remedy reputational harm in Ohio's common pleas courts.

The facts in this case illustrate the point and present this Court with the opportunity to bring much-needed clarity to Ohio law on defamation and false light while ensuring access to the courts for injured parties to vindicate their rights and reputations. Defendants took great pains in this Court and below to present its version of the facts at issue and characterize them as "undisputed." Without refuting each and every misstatement and inaccuracy in Defendants' Memoranda, suffice it to say that Plaintiffs dispute those so-called "undisputed" facts and developed a substantial summary judgment record, which disproves Defendants' claims and from which a jury could find the elements of defamation and false light, including the requisite state of mind. On a motion for summary judgment, in defamation cases as in other civil actions, Ohio courts must construe the facts and inferences in favor of Plaintiffs as non-moving parties. *See Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988).

These summary-judgment principles apply in defamation cases.[2] As the Supreme Court recognized in a false-light case, "it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." *Time, Inc. v. Hill*, 385 U.S. 374, 393–94, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), fn.11 (citing *New York Times v. Sullivan*, 376 U.S. 254, 284–85, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). This Court too has been adamant that "when facts are in dispute,

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[2] Two Justices agree that determining the proper weight the First Amendment should receive in summary resolution of proceedings short of trial presents a question of public or great general interest this Court should decide. They are correct. Thirty-five years ago, this Court opined that "[s]ummary procedures are especially appropriate in the First Amendment area." *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 120, 413 N.E.2d 1187 (1980). For this proposition, however, *Dupler* relies on a federal case (*Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C.Cir.1966), that has since been criticized and undermined by the advent of modern summary judgment practice.

Defendants trumpet the fact that the D.C. Circuit recently cited *Keough* (CVT Opposition at 7, fn.3), but that court remains bound by the decision. That does not change the fact that numerous courts, including the Sixth Circuit, reject *Keough*. *See, e.g.*, *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 917 (6th Cir.1982); *Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir. 1980) (collecting cases rejecting *Keogh*). In any event, this disagreement about the continuing vitality of *Keough*, on which this Court premised its decision in *Dupler*, underscores the need for this Court to determine whether *Dupler* continues to set forth the standard for summary judgment in defamation cases. In the few months since Plaintiffs first sought discretionary review in this appeal, Ohio's appellate courts have cited *Dupler* more than a dozen times. The Eighth District continues to apply *Dupler* in opinions rejecting non-frivolous defamation claims at the summary-judgment stage. *See, e.g.*, *Hogg v. Heath*, 8th Dist. No. 100188, 2015-Ohio-515, ¶ 8 (citing *Dupler* in affirming summary judgment against plaintiff who had been mis-identified as the perpetrator of an armed robbery). Because *Dupler* remains a leading case in Ohio on the summary-judgment standard, particularly in the defamation context, it is critical for this Court to address whether *Dupler* should be modified as stated in Appellants' Second Proposition of Law.

Defendants' reliance on *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), also highlights the need for this Court's review. There, the Supreme Court recognized the propriety of summary judgment where there is an "insufficient caliber or quantity" of evidence to get to a jury. *Id.* at 254. By failing to address the opinions of a qualified expert and ignoring key facts in the 2,500 page summary-judgment record that did not square with its outcome-determinative analysis, the Eighth District's standard goes well beyond *Anderson*'s call for evidence of sufficient "caliber and quantity." Without further word from this Court, what the Eighth District's new standard is and how it will ever allow defamation claims to proceed to a jury remain unknown. But failing to consider these questions threatens to relegate reputational torts to the dustbin of history at a time when they are needed more than ever.

summary judgment is wholly inappropriate." *Pixley v. Pro-Pak Industries, Inc.*, 142 Ohio St.3d 203, 2014-Ohio-5460, 28 N.E.3d 1249, ¶ 35 (O'Neill, J., dissenting); *see also American Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 104 (Pfeiffer, J., dissenting) (where evidence "was not wanting as to any element necessary to prove defamation," verdict should not be reversed).

"The courts should be no more tolerant of a journalist rushing to publish a story without adequate verification than they are of a pharmaceutical company that rushes a new drug to market without adequate testing." Logan, 23 U.Ark.Little Rock L.Rev. at 220–21. Plaintiffs are not seeking entry of judgment or a declaration from this Court that they were wronged. All Plaintiffs seek is their day in court.

CONCLUSION

For these reasons, as well as those set forth in their Memorandum in Support of Jurisdiction, the brief of the Ohio Coal Association as *amicus curiae*, and the brief of Bryan Felmet as *amicus curiae*, Plaintiffs-Appellants Robert E. Murray, Murray Energy Corporation, American Energy Corporation, and The Ohio Valley Coal Company respectfully request that this Court reconsider its order declining to exercise jurisdiction and accept this appeal for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Jurisdiction was served this 20th day of July, 2015, via regular U.S. mail, with a courtesy copy by electronic mail, on the following:

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