IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAURA HOFFMAN, *et al.*, Plaintiffs, v. MICHAEL O'MALLEY, *et al.*, Defendants.	Case No.: 1:18-CV-00309 Judge Christopher A. Boyko **Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment on the Defamation and False-Light Claims**

Peter Pattakos (0082884)
Rachel Hazelet (0097855)
THE PATTAKOS LAW FIRM LLC
101 Ghent Road
Fairlawn, Ohio 44333
Phone: 330.836.8533
Fax: 330.836.8536
peter@pattakoslaw.com
rhazelet@pattakoslaw.com

Attorneys for Plaintiffs

David G. Lambert (0030273)
Nora E. Poore (0079609)
Kenneth M. Rock (0096482)
Assistant Prosecuting Attorneys
1200 Ontario Street, 8th Floor
Cleveland, Ohio
Phone: 216.443.7829
Fax: 216.443.7602
dlambert@prosecutor.cuyahogacounty.us
npoore@prosecutor.cuyahogacounty.us
krock@prosecutor.cuyahogacounty.us

Attorneys for Defendants

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Statement of the Issues

1. Determining whether an alleged defamatory statement is an actionable statement of fact or a non-actionable expression of opinion requires "consideration of the totality of circumstances," including "the specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared." Here, Defendants, to further a politically motivated press release, falsely accused the Plaintiffs of mishandling "the bulk of" 76 juvenile sex-abuse cases so as to justify their termination even though Plaintiffs only worked on seven of these cases and did not mishandle any of them. Should these statements be considered protected "opinions" regardless of their falsity or Defendants' intent in making them?

2. A defamation claim must fail where the statements at issue are shown to be "substantially true." Must Defendants' statements here be held, as a matter of law, to be "substantially true" despite the evidence showing that Plaintiffs only reasonably followed their supervisors' orders on the allegedly mishandled cases, and did not mishandle any case at all, let alone "the bulk of" 76 of them?

3. A defamation claim can only withstand a claim of qualified privilege where actual malice is shown—*i.e.*, that Defendants acted with knowledge that their statements were false, or had serious doubts as to their truth. Must the Court hold here, as a matter of law, that Plaintiffs cannot prove actual malice despite the evidence showing that Defendants knew that Plaintiffs' were not responsible for "mishandling" any cases, let alone "the bulk of" 76 of them, and publicly accused them to the contrary anyway to further a publicity stunt intended to diminish their political opponents?

4. To prove a defamation claim, a plaintiff must show that the allegedly defamatory statement is "of and concerning" them, but may rely on extrinsic proof of implicit reference in doing so. Is there any basis for Defendants' argument that their public accusations against the Plaintiffs are somehow not "of and concerning" the Plaintiffs so as to require dismissal?

5. Under R.C. 2744.03, individual defendants are not entitled to immunity for defamation claims where it can be shown that they acted with malice, bad faith, or in a wanton or reckless manner. Does the same evidence showing Defendants' "actual malice" also negate their claim of immunity under this statute?

I. Summary of the Argument

One month into Defendant Michael O'Malley's tenure as the newly elected Cuyahoga County Prosecutor, his administration sought press coverage of a concocted scandal over the alleged mishandling of juvenile sexual-assault cases by the previous administration led by Timothy McGinty. The experienced reporters and publishers from whom O'Malley sought coverage of this "story"—including *The Plain Dealer's* Rachel Dissell, and *Cleveland.com* publisher Chris Quinn—immediately recognized it for what it was: a misrepresentation of reasonable differences between administrations regarding how to allocate limited resources and classify cases, and, essentially, a hit-piece intended to diminish O'Malley's political opponents in the previous administration.

As it became clear that these reporters were not willing to write about this "story" as it was presented to them, the O'Malley administration decided to escalate their political stunt by making some heads roll, terminating three assistant prosecutors who were selected as scapegoats for the alleged scandal: Plaintiffs Laura Hoffman and Linda Herman, and Robin Belcher, who supervised the juvenile unit's intake procedures. Based on the fact that these government attorneys were terminated, reporters and editors at *Cleveland.com* then decided that the alleged mishandling of cases had risen to the level of newsworthy. Thus, based on substantially false information provided by the O'Malley administration, *Cleveland.com's* Cory Shaffer reported, *inter alia*, that Hoffman, Herman, and Belcher were terminated for having mishandled "the bulk of" 76 uncharged sex-abuse cases. Additionally, O'Malley and certain members of his management team—Gregory Mussman, Jennifer Driscoll, and Joanna Whinery, co-Defendants here—compounded their smear of these attorneys by accusing them, in statements published by Shaffer and other local and national reporters, of "incompetency, inefficiency, neglect of duty," and a "complete failure of their obligations," stating that their so-called misconduct "wasn't an accident," and conveying their responsibility for placing approximately 1,900 cases on "a do-nothing list."

Not only was it false and defamatory for Defendants to convey that any cases were "mishandled" by Ms. Hoffman and Ms. Herman or that they were guilty of any misconduct that would justify termination, the truth is that the Plaintiffs only ever worked on a total of seven of the 76 allegedly "mishandled" cases, far from "the bulk" of them. As the evidence makes clear, Hoffman and Herman were low-level prosecutors who had never received any negative feedback on their performance at the office, had in fact received effusive complements for their work, and only reasonably followed their supervisors' orders in handling the seven cases at issue. The idea that these new prosecutors could have been responsible for any such office-wide failure as the one alleged by the Defendants is thus not only false and defamatory, it is simply ridiculous, as the Defendants certainly knew when they nevertheless proceeded to smear Hoffman and Herman in the press.

Worse, after Hoffman and Herman informed the *Cleveland.com* reporter, Shaffer, that they only ever worked on seven of the allegedly mishandled cases, Shaffer asked the Defendants for an explanation regarding the false impression they had conveyed to him. Rather than taking the opportunity to correct the record, the Defendants refused and instead doubled down on their smear, otherwise ignoring the reporter's repeated requests for additional clarifying information.

In their latest attempt to excuse their tortious conduct and avoid liability for defaming Ms. Hoffman and Ms. Herman, the Defendants have filed motions for summary judgment in which they repeat the very same arguments that this Court already properly rejected in denying Defendants' earlier motions for judgment on the pleadings. These arguments must again fail because the facts at issue on summary judgment are even more supportive of Plaintiffs' claims than the allegations in the Complaint that have already been held sufficient to sustain liability.

As set forth fully below, there is plenty of evidence from which a jury may reasonably conclude that Plaintiffs have met each element of their defamation claims. In short, not only may a jury reasonably conclude that Defendants' claims of widespread "mishandling" of juvenile sex-abuse

cases by the previous administration are false, it need not do so to find that it was false and defamatory for the Defendants to convey that Ms. Hoffman and Ms. Herman were responsible for mishandling the "bulk of," or *any* of the cases at issue, let alone at a level that justified their termination. The jury may also find actual malice based on the evidence that Defendants, who were undoubtedly familiar with the concept of "prosecutorial discretion," nevertheless proceeded to intentionally misrepresent reasonable exercises of that discretion as "misconduct," making Hoffman and Herman scapegoats and collateral damage in their effort to score points in the press against their political opponents. Defendants' admitted and documented refusal to correct the record when reporters questioned their misleading portrayal leaves no doubt as to whether malicious intent can be found.

For these reasons, explained more fully below, Defendants' motion for summary judgment of Plaintiffs' defamation claims should be denied.

II. Statement of Facts

A. Immediately after replacing Timothy McGinty as the Cuyahoga County Prosecutor, Defendant Michael O'Malley and his administration sought press coverage of a manufactured scandal over allegedly "mishandled" juvenile sex-abuse cases that would paint them in a favorable light with the public and disparage their political opponents in the previous administration.

After Defendant Michael O'Malley defeated incumbent Timothy McGinty in a hotly contested 2016 election, he took office as Cuyahoga County Prosecutor in January of 2017.

Within a month, he and his administration set out to obtain press coverage to show the public that "there's a new prosecutor in town who intends to hold everyone accountable for their actions," that "under [his] watch no cases will fall through the cracks," and, that unlike McGinty, O'Malley would "have the leadership in place to do that." ECF 40-7, O'Malley Tr., Ex. 5, PageID 2044:3–7 and 2127–30. To accomplish this, Defendants devised a story accusing the prior

administration of "systematic" mishandling of sexual-assault cases in the juvenile unit that "started at the top." *Id.* at 2061:26–2062:11; 2078:24–2079:2.

By obtaining media coverage of this alleged story, the O'Malley administration would not only present itself in a favorable light as the "new sheriff in town," it would also cast public aspersion on its political opponents in the McGinty administration. This included, most notably, Duane Deskins, who was First Assistant Prosecutor and head of the CCPO's juvenile unit under McGinty, and who, as O'Malley testified, would have been terminated for his alleged responsibility for the so-called scandal. *Id.* at 2078:24–2079:2.

But contrary to O'Malley's aspersions, Deskins was an extremely accomplished prosecutor who, upon arriving at the CCPO in December of 2013, noticed problems with the way the office was processing juvenile sex-crimes and thus created a special unit to handle these cases where one did not previously exist. *See* **Exhibit 1**, Declaration of Rachel Dissell, ¶ 5–¶ 6; **Exhibit 2**, Feb. 3, 2017 email from Rachel Dissell to George Rodrigue. As a result, the CCPO's juvenile unit, under Deskins' leadership, charged 730 sex-cases in 2016, which was more than double the 353 sex-cases charged in 2012, the last year of the previous administration led by Bill Mason, in which O'Malley served as First Assistant Prosecutor. ECF 40-7, O'Malley Tr., PageID # 1941:21–1942:13; 2062:18–24, 2063:3–11; **Exhibit 3**, 2012 Annual Report of the Cuyahoga County Juvenile Court, pg. 42. This 2012 number was down substantially even from 2010, while O'Malley was serving as First Assistant, when the office had still only charged 460 juvenile sex-cases, still far less than it did in the last year of McGinty's and Deskins' leadership. ECF 40-7, O'Malley Tr., PageID # 2062:18–24, 2063:3–11.

Accordingly, O'Malley understood that Deskins was a formidable candidate to eventually replace him as Cuyahoga County Prosecutor should Deskins decide to one day run for the office. Indeed, after McGinty took office, O'Malley was passed over for the First Assistant position in favor of Deskins, who got the job. *Id.* at 2073:13–11. Additionally, O'Malley knew that he would not have

been elected Prosecutor were it not for the substantial support of Cuyahoga County's black community, who had turned against McGinty due to his handling of the case of Tamir Rice, a 12-year old who was shot to death by Cleveland Police. *See* **Exhibit 4**, Tom Beres, *Why Mike O'Malley will replace Tim McGinty as Cuyahoga County Prosecutor*, WKYC.com (March 15, 2016), https://www.wkyc.com/article/news/politics/why-mike-omalley-will-replace-tim-mcginty-as-cuyahoga-county-prosecutor/95-85609823 (accessed Oct. 10, 2019) ("In an earlier interview, [O'Malley] unwittingly offered the main reason he won – 'I am not Tim McGinty.' ... McGinty's handling of the Tamir Rice case ... turned much of the African-American community against him[, ... including] Congresswoman Marcia Fudge, ... many ministers, ... [and] NAACP President Michael Nelson]."). O'Malley knew understood that Deskins, as one of the most distinguished black attorneys in Cuyahoga County with such experience and prosecutorial credentials, would be especially appealing candidate to black voters, who represent approximately one-third of the County's population and have historically been underrepresented in Countywide elected offices.

Thus, O'Malley had a clear motive to smear Deskins, in particular, to consolidate political power. But as explained further below, his efforts to do so were false and defamatory, as was immediately recognized by the reporters from whom he initially sought coverage of the allegedly "mishandled" cases.

B. Defendants first sought coverage of their manufactured scandal from *Plain Dealer* reporter Rachel Dissell, but Dissell refused to publish their story.

Defendants' first sought coverage of the allegedly "mishandled" sex cases from *Plain Dealer* reporter Rachel Dissell due to her reputation as a good reporter who was knowledgeable about the juvenile court operated. ECF 40-6, Miday Tr., PageID # 1844:10–25, 1847:6–8, 1847:16–1848:2.[1]

[1] Throughout his deposition, Miday could not testify consistently about the manner in which Defendants contacted reporters about the story. He sometimes suggested that Defendants went to the media voluntarily and without prompting, and other times that Defendants contacted reporters only after the media called the office. *See* ECF 40-6, Miday Tr., PageID # 1846:25–1847:4 ("I

Thus, the CCPO invited Dissell to their offices to explain "that a number of sexual assault cases had been mishandled by the juvenile unit," and to present [her] with additional information so that [she] might report on the issue." **Ex. 1,** Dissell Decl., ¶ 2–¶ 3.

After meeting with Defendants, Dissell "conducted additional reporting about the subject as it was presented to [her], including contacting additional parties with knowledge of the Juvenile Court"—including presiding Judge Kristen Sweeney who told Dissell that she was "not alarmed" by the alleged situation. **Ex. 1**, Dissell Decl., ¶ 5; **Ex. 2,** Dissell e-mail, pg. 3. Dissell also spoke with Deskins who told her that O'Malley's charge that cases were being "shelved" was not true and that the total number of charged juvenile sex-cases had substantially increased under the McGinty administration. *Id.* at 2–3. Based on this investigation, Dissell concluded that she could not report on the topic based on the version of the story Defendants wanted her to publish and would need to include "all perspective." *Id.* at 4; Dissell Decl., ¶ 6. Dissell and her editors then shortly determined that she would not report on the story at all, and Dissell informed the Defendants of the same. *Id.* at ¶ 6–¶ 7; ECF 40-6, Miday Tr., PageID # 1849:15–16.

C. After Dissell refused to cover their story, Defendants offered it to reporter Cory Shaffer as an exclusive.

Upon learning that Dissell would not publish Defendants' version of the story, Miday contacted *Cleveland.com* reporter Cory Shaffer and informed him that Dissell was no longer following the story. ECF 40-6, Miday Tr., Ex. 2, at PageID # 1853:10–13 and 1906. Defendants told Shaffer "hold off" on contacting other media if he wanted the story as an "exclusive." *Id.* at 1854:4–14, 1857:4–5 ("Q: So it was not [your intent to give Shaffer first access]? A: I didn't say it wasn't.").

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contacted [the media] – well, again, the media had started to call about these cases, right?"); 1847:10–15 ("Again, media had already been starting to call. And, you know, eventually, this was going to get out into the media. So it's – I think it was important to proactively contact the reporter who was familiar with juvie court in particular.").

D. Shaffer and his editors understood that the story was a politically charged hit piece aimed at the prior administration and declined to report on it until Defendants fired Hoffman, Herman, and their supervisor Robin Belcher over the "mishandled" cases.

Shaffer and his editors at *Cleveland.com* also declined to report on Defendants' "story," because they understood it was a political hit piece against the McGinty administration, and Deskins in particular. *See* ECF 40-6, Miday Tr., Ex. 2, at PageID # 1852:23–1853:3 and 1906, Feb. 10, 2017 Cory Shaffer email to Kris Wernowsky ("I know when we talked about the O'Malley thing about the juvenile rape cases, you said [Cleveland.com publisher Chris] Quinn didn't really want to touch it because he thinks it's retribution against Deskins."); **Exhibit 5**, Declaration of Cory Shaffer, ¶ 4–¶ 6.

Thus, Defendants escalated their stunt by making news that they knew would make news, and shortly informed Shaffer that Hoffman, Herman, and their supervisor Robin Belcher, who was responsible for handling intake procedures in the juvenile unit, had been terminated for their role in the alleged scandal. ECF 40-6, Miday Tr., Ex. 2, PageID # 1906 ("I just wanted to let you know that O'Malley fired three juvenile lawyers this week over this … Do you want [me to] … stick with Quinn's assertion not to do anything with it?"); ECF 40-7, O'Malley Tr., PageID # 1985:19–21; ECF 40-4, Williamson Tr., PageID # 888:14–16 ("[O'Malley's] response was if I'm going to fire – who would I fire if I'm not going to fire these two…"). It was only after Shaffer's editors learned that Defendants had terminated Plaintiffs over the story that it became "news" worth covering. **Ex. 5**, Shaffer Decl., ¶ 4–¶ 6; **Exhibit 6**, Feb. 10, 2017 Kris Wernowsky email to Shaffer ("[B]ecause heads are starting to roll as a result of this … it[] now rises to the level of a story.").

E. Hoffman and Herman did not mishandle any cases, and were wrongly targeted as scapegoats to fuel Defendants' political stunt.

As set forth fully in Ms. Hoffman's and Ms. Herman's separately filed opposition briefs concerning their discrimination claims, they were not responsible for mishandling any cases, but were merely targeted as scapegoats to fuel Defendants' political stunt. As further explained in these opposition briefs, and incorporated by reference here, Plaintiffs were targeted because of their

membership in protected classes—Hoffman as a result of her disability, optic nerve atrophy, over which she was negotiating reasonable accommodations at the time she was fired, and Herman, who was a non-traditional law student who was hired at the age of 50 and was only a second-year lawyer at the age of 52 when she was fired. *See* ECF 40-1, Defs' MSJ, at PageID # 336.

Additionally, these briefs set forth the evidence showing that Defendants' so-called scandal was nothing more than a misrepresentation of reasonable differences between prosecutorial administrations as to the classification of cases and the exercise of discretion over the allocation of limited resources. *See* Hoffman Opp. re: discrimination claims at Section III.B.1..[2]

F. After wrongly terminating Plaintiffs for "mishandling" cases, Defendants invited Shaffer to the office to convince him to report on their story, defaming Ms. Hoffman and Ms. Herman in the process.

After terminating Ms. Hoffman and Ms. Herman, Defendants invited Shaffer to their offices as they did with Dissell, to convince him to write about their story. **Ex. 5**, Shaffer Decl, ¶ 6. Defendants O'Malley, and his co-Defendant assistant prosecutors Gregory Mussman, Joanna

[2] Section III.B.1.a. of Hoffman's separate opposition brief sets forth additional facts showing that Defendants, as with the Plaintiffs, accordingly lacked any legitimate basis for firing Ms. Belcher, and that she, like the Plaintiffs, was wrongly made collateral damage in Defendants' publicity stunt. This includes Belcher's consistently stellar performance reviews as well as evidence that Belcher had, in the year prior to her termination, been nominated for both the CCPO's "Leadership and Mentoring Award" as well as the Ohio Prosecuting Attorneys Association's award for "Outstanding Assistant Prosecutor in the State of Ohio." *Id.* citing ECF 40-11, Belcher Tr., Ex. 2, PageID # 2369:6–18, 2630. Defendants' defamatory and malicious intent in firing and smearing the Plaintiffs (and Belcher) is further underscored by the fact that Belcher's supervisor Ralph Kolasinski, who directly reported to Deskins, was permitted to keep his job. *Id.* at PageID 2356:22–25. When asked to explain how Kolasinski avoided termination over the "mishandled" cases as well as any mention in the press about it, even though he was the only APA positioned on the CCPO's organizational chart between Belcher (whom he supervised) and his immediate supervisor Deskins (who, as O'Malley testified, would have similarly been fired had he not previously resigned), Ms. Williamson, the County's 30(b)(6) designee on this issue, could only respond that Kolasinski's situation "was totally different" because "he was physically remorseful" about the alleged "systematic failure," "was visibly upset" about it, and "had worked on a lot of special projects" for Deskins. ECF 40-4, Williamson Tr., PageID # 1005:18–25. O'Malley Tr., PageID # 2078:24–2079:2. This evidence further confirms that Defendants were never concerned with assessing and disciplining responsibility for any "mishandled" cases in terminating the Plaintiffs and Belcher, but rather were only targeting who they thought were the most convenient scapegoats sufficient to allow their fake scandal to fly in the press.

Whinery, and Jennifer Driscoll were present, along with Russell Tye and Diane Russell. *Id.* At his deposition, Miday, who was designated under Fed.R.Civ.P. 30(b)(6) to testify on the County's behalf concerning its communications with the media about this story, could not "recall" if specific names were discussed or "what was discussed with respect to the prosecutors." ECF 40-6, Miday Tr., Ex. 1, PageID # 1842:5–8 and 1904); *Id.* at PageID # 1866:25–1967:6, 1967:23–1968:1. When Defendants met with Shaffer, they apparently did not know how many cases were mishandled or the role, if any, that Ms. Hoffman and Ms. Herman played in the "mishandled" cases. As Miday testified,

> Q: Do you know at the time this meeting with Cory took place whether the prosecutor's office knew how many cases Ms. Hoffman and Ms. Herman had allegedly mishandled?
>
> A: The – that wasn't – the focus of the meeting with the media was about these cases.
>
> Q: So –
>
> A: That was my – that was my – that was my – you know, my understanding of – my role here was to communicate about these cases being – not properly handled.

ECF 40-6, Miday Tr., PageID #1868:8–18. But Defendants ***did*** specifically name Ms. Hoffman and Ms. Herman at the meeting and explained that they were responsible for the "bulk of" the "mishandled" cases. **Ex. 5**, Shaffer Decl, ¶ 6–¶ 7. Indeed, Shaffer has executed two different sworn declarations affirming that he "reported in the February 13, 2017 report that [Plaintiffs] were two of the three prosecutors 'who handled the bulk of the delayed cases,' because that is specifically" and "the gist of" "what Mr. O'Malley and the other members of the Office told [him] at this meeting…" *Id. See also* ECF 41-15, Shaffer Decl., PageID # 5479, ¶ 7.

Shaffer also reported that Defendants asked Ms. Hoffman and Ms. Herman to resign because O'Malley told him "at this meeting that" they "were specifically asked to resign due to their mishandling of these cases." *Id.* at ¶ 8. And though O'Malley admits that Ms. Hoffman and Ms. Herman handled only 7 of the 76 purportedly mishandled sex cases (ECF 40-7, O'Malley Tr.,

PageID # 2036:21–2037:3), Defendants nonetheless caused Shaffer to publish, wrongly, that Plaintiffs were among those responsible for "the bulk of the delayed cases." **Ex. 5**, Shaffer Decl., ¶ 6–¶ 8. Driscoll, Whinery, and Mussman admit that they made no effort to correct any of these false and defamatory statements. ECF 40-10, Driscoll Tr., at PageID # 2328:5–22; ECF 40-9, Whinery Tr., at PageID # 2275:22–24; ECF 40-8, Mussman Tr., at PageID # 2201:4–23. The full extent of these defamatory statements and their publication is set forth in Section III.A., below.

G. After convincing Shaffer to publish their defamatory statements, Defendants ignored Shaffer's requests for information that would correct the record concerning Ms. Hoffman and Ms. Herman.

On February 15, 2017, after Shaffer had published the story Defendants presented to him, he sent them a number of follow-up questions, "including how many of the 76 allegedly mishandled sex-offense cases were assigned to Ms. Hoffman and Ms. Herman, how many of those cases were assigned to other prosecutors who received discipline in connection with the cases but were not forced to resign, how Mr. O'Malley 'decide[d] who to force to resign and who to seek discipline against,' and for the case numbers of the cases that were allegedly mishandled." **Ex. 5**, Shaffer Decl., ¶ 10, Ex. B.

By February 22, 2017, Defendants had not provided any response to Shaffer's follow-up request so he sent another email requesting the information again. *Id.*, ¶ 9, Ex. C. On March 17, still having received no response, Shaffer again contacted Defendants because he "got an email from one of the juvenile prosecutors who resigned that says both of the APAs combined only had 7 of the 76 un-reviewed sex-crimes cases, and none of the inactive cases." *Id.*, ¶ 10-2, Ex. D.[3] If that were "accurate," Shaffer wrote, he would "need an on-the-record response … explaining why they were made to resign." *Id.* To this, Shaffer finally received a response from Defendants, albeit a cursory

[3] Due to a typographical error, the Declaration of Cory Shaffer that is attached as **Exhibit 5** has two paragraphs numbered 10 and two paragraphs numbered 11. Thus, the second erroneously numbered paragraphs 10 and 11 will be cited as 10-2 and 11-2 herein.

one, conveying O'Malley's statement that "If [the APA's] admission is true, ignoring seven sexual assaults against children in the county prosecutor's office will never be acceptable." *Id.*, ¶ 11-2, Ex. E. Miday's testimony confirmed that Defendants had not been truthful about the number of allegedly mishandled cases for which Hoffman and Herman bore responsibility. *See* ECF 40-6, Miday Tr., PageID # 1877:8–17 ("Q: But Cory is asking you here specifically how many of the 76 cases Laura and Linda had handled, correct? A: That's what he's asking. Q: Yeah. And he's asking that because the office did not provide him with this information at the meeting prior to him publishing the story, correct? A: I can't answer that.").

By March 21, 2017, Defendants had still failed to provide Shaffer with additional information. **Ex. 5**, Shaffer Decl., ¶ 11-2, Ex. E ("Did you guys get the numbers of the sex-crimes cases that were assigned to Herman and Hoffman yet?"). In response, Defendants told Shaffer that "our office policy is not to discuss personnel issues in the media," despite that they had done exactly that in convincing the reporter to print their defamatory statements about Hoffman and Herman in the first place. *Id.*

Defendants also added in this last response to Shaffer that, "It is Prosecutor O'Malley's belief that neglecting even one sexual assault case is unacceptable." *Id.* This statement also turned out to be false, as a number of assistant prosecutors who were also implicated of neglect in the alleged scandal, but were not disabled like Hoffman, or inexperienced Prosecutors of advanced age like Herman, were allowed to keep their jobs.

Thus, instead of taking the opportunity to correct the record, Defendants doubled down on their smear of Ms. Hoffman and Herman, collateral casualties of Defendants' political hit-job. *Id. See also* ECF 40-6, Miday Tr., PageID # 1883:11–21, 1878:12–24, 1879:20–24, 1887:19–25, 1888:15–20 ("Q: Well, he was asking to – he was asking you for clarification that [Ms. Hoffman and Ms. Herman] had only handled seven of these cases, and that would have been a restoration of their

reputation; would it not have been? A: I disagree with that."); ECF 40-7, O'Malley Tr., PageID # 2046:11–14 ("Q: [Miday] said that … your office wasn't going to engage [Shaffer] on any of this. A: Correct. A: That is true? A: Yes."), 2079:24–2080:2 ("Q: What if [Ms. Hoffman and Ms. Herman] told you that they just wanted the record to be corrected, that doesn't make sense to you? A: The record wasn't wrong.").

III. Law & Argument

A. Defendants' statements about Plaintiffs are not protected statements of opinion; they are false and defamatory statements wrongly impugning Plaintiffs' credibility, ethics, and abilities as attorneys.

Plaintiffs have set forth sufficient proof showing that Defendants' statements about them are false and defamatory statements of fact, and not protected opinion, including the following:

- A news article published on *Cleveland.com* and in *The Plain Dealer*, which was further publicized by local television news stations including *Fox 8* and *News Channel 5*, based on an interview with Defendants O'Malley, Whinery, Driscoll, and Mussman reported that Ms. Hoffman and Ms. Herman were "forced to resign" for mishandling "the bulk of" 76 uncharged sexual assault cases, including 37 cases of rape and 32 cases of gross sexual imposition (*see* ECF 40-6, Miday Tr., Ex. 3, PageID # 1868:23–1870:12, and 1907–1909);
- In fact, as Defendants have acknowledged, Plaintiffs only ever worked on a combined total of 7 of these allegedly mishandled cases (*see* ECF 40-4, Williamson Tr., at PageID # 114:1–2 ("So there were three cases in particular that we discussed with Laura Hoffman.") and PageID # 983:12 ("Linda Herman had four cases."); ECF 40-7, O'Malley Tr., PageID # 2036:14–2037:3 ("Of the cases identified that I'm aware of …" Linda and Laura "handled seven.").
- Further, as explained below and more fully in Plaintiffs' opposition briefs regarding their discrimination claims, the evidence shows that Plaintiffs never "mishandled" any cases at all, but rather simply handled these cases competently and in the manner in which they were instructed to by their supervising attorneys (*See* Hoffman Opp. re: discrimination claims at Section III.B. (citing evidence); Herman Opp. at Section III.B. (same).
- Defendants Driscoll and Mussman also stated that the cases had never fully been reviewed and that over 1,900 cases had been

improperly switched to "inactive" status (*see* ECF 40-8, Mussman Tr., Ex. 5, at PageID # 2202:24–2206:4 and 2244; ECF 40-10, Driscoll Tr., Ex. 1, PageID # 2319:23–2320:17, 2336.

- Defendant O'Malley cited "incompetency, inefficiency, and neglect of duty" as the reasons why Ms. Hoffman and Ms. Herman were forced to resign (ECF 40-6, Miday Tr., Ex. 3, at PageID # 1868:23–1870:12 and 1909);
- In a television interview that aired on News Channel 5 Cleveland, Defendant O'Malley stated that the alleged mishandling of cases "wasn't an accident," directly implicating purposeful and potentially criminal misconduct and dereliction of duty by Ms. Hoffman and Ms. Herman (*see* ECF 40-7, O'Malley Tr., Ex. 5, at PageID # 2044:3–17 and 2129);
- Defendant O'Malley also stated during a television interview that aired on Fox 8 Cleveland that the alleged mishandling of cases was a "complete failure of [Plaintiffs'] obligations." (*see* ECF 40-7, O'Malley Tr., Ex. 5, at PageID # 2044:3–17 and 2127);
- As the evidence shows, the 1,900+ cases that were marked "inactive" pursuant to an office-wide policy for which Plaintiffs bore no responsibility—not, as Defendants have wrongly stated, as a result of any wrongdoing by the Plaintiffs (*Id.*; ECF 40-4, Williamson Tr., PageID # 936:10–11 ("I know it was a practice. I don't know who started it. I know it was a practice.");
- With regard to these cases that were, purportedly, wrongly designated as "inactive," O'Malley further accused Plaintiffs of misconduct by placing cases "on such a thing as an inactive list, where it ends up that employees just do nothing with the case" and described such designation as "never an acceptable resolution" despite that Plaintiffs, again, only ever handled their cases competently and in the manner in which they were instructed by their supervising attorneys (*see* ECF 40-7, O'Malley Tr., Ex. 5, at PageID #2128–2129; and PageID # 1984:19–23) ("Robin as being the ultimate individual over all of these cases, … all of these cases, in my opinion, are attributed to her."); ECF 40-11, Belcher Tr., at PageID # 2379:8–13 (discussing that it was the office's practice to mark certain cases "inactive"), 2446:6–17 (discussing, with respect to Laura's performance on one of the supposedly mishandled cases, that she handled it as she was trained and that the McGinty administration "knew that it took time to review cases and charge appropriately."); 2446:18–25 (discussing, with respect to Linda's performance on her SART files, that Robin was not aware of any instance in which Linda had mishandled them);

- Further defaming Ms. Hoffman's and Ms. Herman's reputations in an interview published by *The Morning Journal*, Defendant O'Malley (wrongly) stated that Plaintiffs acted unethically as Assistant Prosecutors by publicly threatening his intent to "refer prosecutors' names to the Ohio Supreme Court's disciplinary counsel" in connection with the allegedly mishandled files and to this day has not done so (*see* ECF 40-7, O'Malley Tr., Ex. 10, PageID # 2058:6–2059:15 and 2141).

None of these statements are protected as opinions as Defendants have urged. *See* ECF 41-1, Defs' MSJ, PageID # 2919–2922. Whether a statement is one of fact or opinion for the purposes of a defamation claim requires "[c]onsideration of the totality of circumstances." *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699 (1986). That requires consideration of at least four factors, the "[f]irst is the specific language used, second is whether the statement is verifiable, third is the general context of the statement, and fourth is the broader context in which the statement appeared." *Id.*

In applying these factors to the statements at issue, as discussed above, it is clear that the Defendants purported to have terminated the Plaintiffs' based on facts, including that the Plaintiffs' mishandled "the bulk of" 76 cases due to "incompetency, inefficiency, and neglect of duty." *See Wampler v. Higgins*, 93 Ohio St.3d 111, 117-118, 2001-Ohio-1293, 752 N.E.2d 962 ("[T]he language surrounding the averred defamatory remarks may place the reasonable reader on notice that what is being read is the opinion of the [speaker]."). In short, the Plaintiffs were either responsible for mishandling the bulk of, or *any* of the 76 cases, or they were not; they either neglected their duties, or they did not; they were either competent in exercising their duties, or they were not; and they either followed their supervisors' orders, or did not.

Moreover, as the Court stated in its Feb. 28, 2019 Order denying Defendants' motion for judgment on the pleadings, evidence that the published statements described Plaintiffs as "neglectful, inefficient, and incompetent in the exercise of their prosecutorial duties" and characterized their conduct as "criminal" would show that such statements were defamatory. ECF

26, Feb. 28 Order, PageID # 295. The Court further noted that "[i]t would be inappropriate for the Court to assess truthfulness," of the statements because that would involve a question of fact. *Id.* As explained fully above and in Plaintiffs' separately filed oppositions concerning their discrimination claims, Plaintiffs have offered sufficient evidence that the challenged statements, which Defendants presented to reporters as facts, were false and defamatory.

Because Plaintiffs have submitted sufficient evidence from which a jury may find that Defendants' statements are false, summary judgment in Defendants' favor is not appropriate. *See also Gilson v. Am. Inst. of Alternative Medicine*, 2016-Ohio-1324, 62 N.E.3d 754, ¶ 106 (10th Dist.) (finding that defendants' statement that plaintiff "was confused and unable to function in her role as a nurse" was a statement of fact "capable of objective verification by testimony and documentary evidence showing the job duties that [plaintiff] was unable to accomplish"); *Webber v. Ohio Dept. of Pub. Safety*, 10th Dist. Franklin No. 17AP-323, 2017-Ohio-9199, ¶ 40 (statement that plaintiff "did not perform her job duties" because of plaintiff's personal beliefs supported an actionable claim for defamation).[4]

B. Defendants' defamatory statements are not substantially true.

Defendants also argue that the defamation claims must fail because the statements at issue are "substantially true," thus providing a complete defense to Plaintiffs' defamation claims. *See* ECF 41-1, Defs' MSJ, PageID # 2923-2929, citing *Nat'l Medic Servs. Corp. v. E.W. Scripps Co.*, 61 Ohio

[4] Defendants also contend that the Court should find the statements constitute protected opinion because "[t]he audience understands that an employer's reasons for disciplining an employee can arise from the employer's opinion of the employee's performance." *See* ECF 41-1, Defs' MSJ, PageID # 2921. But this disregards that Defendants, in speaking with reporters about Ms. Hoffman and Ms. Herman, presented false and defamatory statements about them as objective fact, and in no way qualified such statements as mere opinion. Thus, the challenged statements are not immune from liability. *See, e.g.*, *Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶117, ¶119 (finding that statements appearing in "an article that contained quotes and facts" did not constitute protected opinion where the statements were "presented as objective statements of fact" and "[n]othing in the tone or the actual words used express or imply that it is anything but fact.").

App.3d 752, 755, 573 N.E.2d 1148 (1st Dist.1989). But Ohio law also provides that, "[w]hether a defamatory statement is substantially true is a question of fact." *Murray v. Knight-Ridder, Inc.,* 7th Dist. Belmont, Case No. 02-BE-45, 2004-Ohio-821, ¶ 46, quoting *Young v. Morning Journal*, 76 Ohio St.3d 627, 669 N.E.2d 1136 (1996) (summary judgment improper where there was a question as to whether the report was substantially accurate under R.C. 2317.05); *Scripps*, at 755 ("whether a defamatory statement is substantially true is a question of fact"); *Sweitzer v. Outlet Communications, Inc.*, 133 Ohio App.3d 102, 110, 726 N.E.2d 1084 (10th Dist. 1999) (same).

Here, Plaintiffs have put forth sufficient evidence from which a jury could reasonably find that Defendants' statements were false—that not only were Plaintiffs not responsible for mishandling the "bulk of" the cases at issue, but that they didn't "mishandle" any cases at all.

First, as explained above and more fully in Plaintiffs' respective opposition briefs on their discrimination claims, a reasonable jury may first conclude that no cases were mishandled by the office at all, and that Defendants' have only put forth a fake scandal based entirely on misrepresentations of reasonable differences between prosecutorial administrations as to the classification of cases and the exercise of discretion over the allocation of limited resources. (*See* Section II.A., above (citing evidence) Hoffman Opp. re: discrimination claims at Section III.B. (citing evidence)).

Alternatively, a jury may also reasonably conclude that even if cases were "mishandled" by the previous administration, Hoffman and Herman bore no responsibility for it, and thus did not themselves "mishandle any cases." Such a finding would be supported by substantial evidence showing that Hoffman and Herman had only received positive performance reviews, had never received any negative feedback on their work, and, as junior attorneys in the office only reasonably followed their supervisors' orders in processing the allegedly "mishandled" cases at issue. *See, generally,* Hoffman and Herman Opps. re: discrimination claims. Indeed, Defendants have even

admitted their belief that Ms. Belcher was ultimately responsible for the purportedly mishandled files, ECF 40-7, O'Malley Tr., PageID # 1984:19–23; 1986:7–8, and that at most, Ms. Hoffman and Ms. Herman could be associated with only 7 of the 76 files. *See* ECF 40-7, O'Malley Tr., PageID # 2036:21–2037:3; ECF 40-4, Williamson Tr., at PageID # 114:1–2 and 983:12; ECF 40-6, Miday Tr., PageID # 1871:6–9.

Moreover, based on the evidence Plaintiff have set forth above, there can be no question that Defendants' statements were not just false but also defamatory, as they were "injur[ious to Plaintiffs'] reputation, expose[d them] to public hatred, contempt, ridicule, shame or disgrace; [and] affect[ed them] adversely in [their] trade or business." *Kanjuka v. Metrohealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 15–¶ 17 (8th Dist.) citing *Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 136, 21 Ohio B. 143, 486 N.E.2d 1220. ("An allegation that one has acted unprofessionally constitutes defamation per se.").

C. Defendants knew that they were making Plaintiffs scapegoats to generate headlines, and not only proceeded to defame them anyway but refused to correct the record when given the opportunity to do so. There is no question that reasonable minds may find actual malice under these circumstances.

Defendants also try to avoid defamation liability by claiming that Plaintiffs have not presented sufficient evidence that the statements at issue were made with actual malice, a standard necessary to defeat qualified privilege and to establish a defamation claim by a "public figure." *See* ECF 41-1, Defs' MSJ, at PageID # 2929; 2932, citing *inter alia*, *Hahn v. Kotten*, 43 Ohio ST.2d 237, 331 N.E.2d 713 (1975). *See also Ohio State Home Servs. v. Better Bus. Bureau*, 89 Ohio App.3d 732, 735, 627 N.E.2d 602, 604 (1993) (holding that qualified privilege does not apply where actual malice is plausibly alleged). Plaintiffs do not dispute that it is necessary to prove actual malice to defeat qualified privilege, thus it is unnecessary to undertake the "public figure" analysis. Rather, it is sufficient to note that Plaintiffs have exceeded their burden to set forth evidence from which a jury may find actual malice.

Actual malice is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity. *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 11-12, 1995 Ohio 66, 651 N.E.2d 1283 (1995); *McNett v. Worthington*, 3d Dist. No. 15-11-05, 2011-Ohio-5225, ¶ 21. Reckless disregard is shown by presenting sufficient evidence to permit a finding that the defendant had "serious doubts" about the truth of the published information. *Parker v. Rice*, 6th Dist. No. L-08-1168, 2009 Ohio 388, ¶ 23, citing *A & B-Abell Elevator*, 73 Ohio St.3d 1 at 12.

Here, Plaintiffs have set forth proof from which a jury may conclude that Defendants knew when they made their statements to reporters that the statements were false, or at the very least, harbored serious doubts as to their truth.

This includes, again, the substantial evidence showing (1) Defendants' intent to smear their political opponents in the previous administration (*See* Section II.A., above (citing evidence)); (2) their need to make some "heads roll" in order to convince skeptical reporters to cover their "scandal" (*See* Sections II.B.–D, above (citing evidence)); as well as their knowledge that the so-called scandal was based entirely on misrepresentations of reasonable differences between administrations regarding how to classify cases and allocate limited resources. *See* Hoffman and Herman Opps. re: discrimination claims at Sections III.B. (citing evidence)). More specifically, Defendants knew that Ms. Hoffman and Ms. Herman were not responsible for the office-wide policy of marking certain cases "inactive," or for dictating their supervisors' expectations as to how SART files were to be processed.

Furthermore, Defendants knew that they did not have any evidence showing that Ms. Hoffman and Ms. Herman did anything but reasonably follow the orders of their supervisors, and all evidence that Defendants' did have, including Plaintiffs' exemplary performance reviews, was to the contrary. *Id.* at Sections III.B.. Indeed, Ms. Belcher confirmed that Defendants did not even bother

asking her about Ms. Hoffman or Ms. Herman, let alone their performance on any of the seven "mishandled" cases, before deciding to fire them. ECF 40-11, Belcher Tr., at PageID # 2388:11–18.

Finally, and perhaps most clearly probative of actual malice, Defendants had the opportunity to correct the record after Mr. Shaffer communicated to them his surprise that Plaintiffs had only handled seven of the cases and asked for further information to clarify. Not only did Defendants refuse to correct the record even despite this opportunity, they doubled down on their defamatory statements. *See* Sections II.F, III.A. above (citing evidence).

This evidence is more than sufficient to allow a reasonable jury to find that Defendants acted with actual malice.

D. Defendants' false and defamatory statements were plainly "of and concerning" the Plaintiffs.

Defendants also argue that their statements about Ms. Hoffman's and Ms. Herman's so-called dereliction of duty that justified their termination are somehow not "of and concerning" Ms. Hoffman and Ms. Herman. *See* ECF 41-1, Defs' MSJ, PageID # 2934. But as they did in their motions for judgment on the pleadings that the Court denied, Defendants again fail to provide any analysis of the "of and concerning" element, instead merely concluding that "nearly all of the challenged statements" are not "of and concerning" Plaintiffs, presumably because not every relevant news article and report mentioned Plaintiffs by name. *Id.*

Binding U.S. Supreme Court precedent, is, however, clear that a defamatory statement need not address a particular plaintiff by name if the plaintiff is implicated by the context of the defamatory statement. *Rosenblatt v. Baer*, 383 U.S. 75, 82-83, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966).

In *Baer*, the Court clarified that government officials may bring defamation actions even where they are only implicitly referenced in the offending publication. "Even if a charge and reference were merely implicit," a plaintiff is permitted to show "by extrinsic proofs" that the publication is "of and concerning" her. *Id.* at 81-82. *See also McGuire v. Roth*, 8 Ohio Misc. 92, 95, 219

N.E.2d 319 (C.P. 1965) (citing *Sullivan*) ("It is plain from the plaintiff's petition that the plaintiff alleges that the Uhrichsville-Dennison Water Board employed Chester Engineers to provide specifications for a new water plant by a split vote and that the plaintiff was one of the members of said board who voted to employ said firm. This is sufficient to support the allegation that the allegedly libelous statement was made of and concerning the plaintiffs although the plaintiff was not specifically named.").

Accordingly, courts have consistently held that a small group of Plaintiffs who are identified as a group, and identifiable as members of that group, *can* assert defamation claims based on false statements about the group. *Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 A.D.3d 82, 93, 15 N.Y.S.3d 36, 45, 2015 N.Y. App. Div. LEXIS 6276, *21, 2015 NY Slip Op 06409, 8, 43 Media L. Rep. 2186 ("[A]n individual belonging to a small group may maintain an action for individual injury resulting from a defamatory comment about the group, by showing that he is a member of the group. Because the group is small and includes few individuals, reference to the individual plaintiff reasonably follows from the statement and the question of reference is left for the jury.") (citation omitted); *See also Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 899, 1980 U.S. Dist. LEXIS 10178, at *16-17, 5 Media L. Rep. 2566 (citing *Ball v. White*, 3 Mich.App. 579, 583, 143 N.W.2d 188, 190 (1966) (quoting from W. Prosser, The Law of Torts, § 92, pp. 583-584 (2nd ed.)) ("[I]n cases involving small groups, the courts have been willing to permit the conclusion that the finger of defamation is pointed at each individual member, and this sufficiently identifies him so that a motion for summary judgment must be denied."); *Lins v. Evening News Ass'n*, 129 Mich. App. 419, 428, 342 N.W.2d 573 (1983) ("[T]he reference to the [union's] local's leadership refers to a small group (seven men) whose identities are readily ascertainable from the content of the article").

Here, at least one of the news reports listed Plaintiffs by name, *see* ECF 1, Pls' Complaint, PageID # 18, at ¶ 113; ECF 40-6, Miday Tr., Ex. 3, at PageID # 1869:2–12 and 1907–1909

("O'Malley last week asked three assistant prosecutors who handled the bulk of the delayed cases to resign. Laura Hoffman, Linda Herman, and Robin Belcher resigned…"), and all of the subsequent reports and articles addressing the same story are at least implicitly "of and concerning" Plaintiffs. *See* ECF 4-2, Def's Answer, Ex. B, at PageID # 81 ("Three individuals no longer work here … 'It wasn't an accident or it wasn't like the computer system went amuck and did this,' O'Malley said. 'Individuals did this.'"); ECF 4-3, Defs' Answer, Ex. C, at PageID # 84 ("It's incomprehensible. There was a complete breakdown within this unit… Seven staff members were disciplined over the matter. Three of the seven resigned."); ECF 4-4, Defs' Answer, Ex. D, at PageID # 85–88; and ECF 4-5, Defs' Answer, Ex. E, at PageID # 89 ("Three assistant county prosecutors have been forced to resign and four others have been disciplined. O'Malley said he plans to refer prosecutors' names to the Ohio Supreme Court's disciplinary counsel."). As the Court found in its February 28, 2019 Order denying Plaintiffs' motion for judgment on the pleadings, the very contents of the articles "permit the inference that the defamatory statements are 'of and concerning' Plaintiffs Herman and Hoffman." ECF 26, Feb. 28 Order, at PageID # 296.

Accordingly, Plaintiffs have set forth evidence sufficient to establish that Defendants' defamatory statements were "of and concerning" Plaintiffs. The issue is, at the very least, one for the jury to decide. *Brady v. Ottaway Newspapers, Inc.,* 84 A.D.2d 226, 232, 445 N.Y.S.2d 786, 790, 1981 N.Y. App. Div. LEXIS 15836, at *13, 8 Media L. Rep. 1671 ("[I]f the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff.").

E. Defendants are not entitled to statutory immunity under R.C. 2744.03 because the statute does not apply to employees' claims against an employer, and because Plaintiffs have put forth evidence sufficient to show that the individual Defendants acted with malice and in bad faith.

Defendants further contend that R.C. § 2744 provides them immunity against Plaintiffs' claims. *See* ECF 41-1, Defs' MSJ, PageID # 2935-2936. Defendants are correct that R.C. 2744.03(A)(6)-(7) provides immunity from lawsuits for political subdivisions, like the CCPO, and its employees for claims such as defamation and false light under certain situations. But as explained below, R.C. 2744's exceptions do not operate to shield Defendants from liability here.

First, under R.C. 2744.09's plain language, a political subdivision is not entitled to immunity for claims arising out of a plaintiff's employment with the subdivision, regardless of whether the plaintiff asserts her claims while still an employee. Specifically, R.C. 2744.09(B) provides that it "does not apply to, and shall not be construed to apply to … [c]ivil actions by an employee … against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision …" *See also Fleming v. Ashtabula Area City School Bd. of Edn.*, 11th Dist. Ashtabula No. 2006-A-0030, 2008-Ohio-1892, ¶ 41 ("If the conduct forming the basis of the intentional tort arose out of the employment relationship, the employer does not have the benefit of immunity pursuant to the plain language of R.C. 2744.09(B)."). Indeed, courts have rejected the notion that the plaintiff must have been currently employed at the time the lawsuit was filed, because "[t]o hold otherwise would encourage employers to terminate employees to avoid potential liability when an incident has occurred." *Id.* at ¶ 31.

Moreover, the individual Defendants are similarly not entitled to summary judgment based on R.C. 2744.03(A)(6) because Plaintiffs have set forth sufficient facts from which a jury could reasonably conclude that Defendants acted in bad faith and with actual malice. *See* R.C. 2744.03(A)(6)(b) (providing that immunity does not apply if "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."). As explained in

section III(C), *supra*, Plaintiffs have set forth sufficient facts from which a jury may conclude that the individual Defendants acted with the requisite malice, bad faith, or recklessness. Thus, Defendants are not entitled to R.C. 2744.03(A)(6) immunity at the summary judgment stage.

F. The same issues of material fact as to Plaintiffs' defamation claims also preclude summary judgment on Plaintiffs' false light claims.

As Defendants correctly note, *see* ECF 41-1, Defs' MSJ, PageID # 2934-35, Plaintiffs' false light claims are based on the same factual allegations as their defamation claims, and require proof of similar elements: (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 464, 2007-Ohio-2451, 866 N.E.2d 1051. Plaintiffs' false light claims should thus survive Defendants' motions for the same reasons as the defamation claims, as set forth fully above.

IV. Conclusion

Defendants' arguments for dismissal of Plaintiffs' defamation claims must fail again, as they did when Defendants' advanced them the first time around in seeking judgment on the pleadings. As shown above, the evidence revealed in discovery has only confirmed Defendants' lack of excuse for their smear of the Plaintiffs, and that no prosecutor on Earth could withstand the type of post-hoc nitpicking by which Defendants attempt to excuse their conduct. That these excuses depend on denying the very concept of prosecutorial discretion perhaps says it all. In any event, Defendants' motion for summary judgment on Plaintiffs defamation claims are contrary to the applicable law and should be denied.

Respectfully submitted,

/s/ Peter Pattakos
Peter Pattakos (0082884)
Rachel Hazelet (0097855)
THE PATTAKOS LAW FIRM LLC
101 Ghent Road
Fairlawn, OH 44333
P: 330.836.8533/F: 330.836.8536
peter@pattakoslaw.com
rhazelet@pattakoslaw.com

Attorneys for Plaintiffs

Certification of Compliance with L.R. 7.1(F) and Certificate of Service

I hereby certify that the foregoing memorandum in opposition is 23 pages long and therefore complies with L.R. 7.1(f) pursuant to the Court's order of September 6, 2019 which granted the parties leave to file summary judgment memoranda of up to 25 pages.

I further certify that my office filed this document on October 14, 2019, using the Court's e-filing system, which will electronically serve the document on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs