IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

MARCUS WATTLEY, *et al.*, Plaintiffs, vs. JOHN RINALDI, *et al.*, Defendants.	Case No. 2023CV00931 Judge Natalie R. Haupt **Plaintiffs' Combined Response in Opposition to Motions for Summary Judgment of Defendants Edward Gilbert, Khalil Walker, Kenneth Walker, and Josh Grimsley**

Plaintiffs hereby submit this combined response in opposition to the following motions that are currently pending before the Court (collectively, the "*MSJs*"):

- *Motion of Defendant Josh Grimsley for Summary Judgment*, filed on May 10, 2024 (the "*Grimsley MSJ*")
- *Motion of Defendant Edward L. Gilbert, Esq. for Summary Judgment*, filed on May 15, 2024 (the "*Gilbert MSJ*")
- *Defendants Kenny and Khalil Walker's Motion for Summary Judgment*, filed on May 16, 2024 (the "*Walker MSJ*")

For the reasons stated herein, the Court should deny all of the MSJs in their entirety, as there exist genuine issues of material fact that preclude judgment as a matter of law on all of Plaintiffs' claims against the various Defendants.

Respectfully submitted,

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Introduction

This case arises out of a disciplinary incident that occurred on May 24, 2021, whereby Plaintiffs—who had sterling reputations as football coaches and educators, and who were charged with leadership of the storied Canton McKinley High School football program—asked one of their students, Defendant Khalil Walker ("Khalil" or "K.W."), to relax and enjoy a pepperoni pizza while watching his teammates perform exercises, in an effort to teach Khalil a valuable lesson about leadership, teamwork, and accountability. In response to Khalil increasingly self-destructive behavior, which was jeopardizing his future prospects as a scholar and athlete, Plaintiffs wanted to help Khalil appreciate how one player's selfish behavior can affect his teammates—a valuable lesson both on and off the field. In his deposition, Khalil admitted that he understood the well-intended purpose of Plaintiffs' actions and that Plaintiffs cared about his well-being, did not hate him, and did not want to harm him. And following the incident, Khalil hugged his coaches, thanked them for not giving up on him, and was even one of the first players to show up for practice the following day, where he apologized to his teammates and demonstrated a renewed sense of commitment and positive attitude.

What should have been a success story about caring coaches turning things around for a troubled student instead metastasized into a vile and vicious narrative that re-cast Plaintiffs as "anti-Semitic" "child abusers" who committed a "hate crime" against Khalil and intentionally violated Khalil's professed Hebrew-Israelite religious beliefs. The blame for this false narrative, disconnected from all reality, can be placed squarely at the feet of Defendants, who had varying incentives to defame Plaintiffs in order to serve their own agendas:

Defendant Grimsley, who coveted Wattley's job and was about to be fired from Wattley's coaching staff, deliberately misrepresented the "pizza incident" to school district officials and

encouraged Khalil and his father to hire a lawyer to threaten to sue the school district in order to save his job and get Wattley fired.

Defendant Gilbert, upon learning of Khalil's affiliation with a religion that prohibits the consumption of pork, saw an opportunity to manufacture a civil-rights claim that would allow him to avoid the application of statutory and qualified immunity and therefore fabricated allegations that Plaintiffs knew of Khalil's religious beliefs and forced him to eat pepperoni with the specific intent to harm Khalil. Gilbert's statements regarding this matter are especially suspect given that Khalil has sworn under oath that Plaintiffs had no reason to know about his religious beliefs and thus could not have intentionally violated those unknown beliefs.

Khalil and his father, Defendant Kenny Walker, who works 70-hour weeks as a home health-care aide for thirteen dollars per hour to make ends meet, were similarly financially incentivized to go along with Gilbert's defamatory narrative and allowed Plaintiffs to be smeared in the international press as anti-Semites.

This story is not new. Indeed, Plaintiffs' claims in this re-filed case largely mirror those that have already been evaluated by this Court in a previously filed case, *Wattley, et al. v. Rinaldi, et al.*, 2021CV00982 ("*Wattley I*"). In *Wattley I*, Defendants Khalil, Kenny, and Gilbert sought summary judgment on Plaintiffs' claims against them, which was denied, and Plaintiffs' claims against these defendants were allowed to proceed to trial. Since then, neither Khalil, Kenny, nor Gilbert have offered anything new by way of law or fact that would change the Court's original determination on these claims against them. As for Grimsley, although the Court granted summary judgment to Grimsley on Plaintiffs' defamation and false light claims in *Wattley I*, this case additionally presents a claim for tortious inference against Defendant Grimsley, which merits the Court's consideration.

Regardless of what anyone might think of Plaintiff's methods, it is beyond dispute that Plaintiffs did not cause or risk harm to anyone; they did not exceed their well-established discretion

as high-school football coaches to discipline a misbehaving and underperforming student-athlete; and they certainly did not intentionally violate anyone's religious beliefs. But that is not the message received by the public. Defendants' disagreements with Plaintiffs' methods do not entitle them to spread and/or aid in the dissemination of a false and defamatory narrative that has and will continue to cause severe damage to Plaintiffs personal reputations.[1] Just as in *Wattley I*, Plaintiffs have shown, whether through direct record evidence or by reasonable inference therefrom, that there are at least genuine issues of fact relating to each of Plaintiffs' claims against Defendants that must be allowed to be heard and determined by a jury. Defendants' MSJs must be denied.

I. The Court may only grant summary judgment if, after construing all evidence and reasonable inferences in favor of Plaintiffs, no genuine issue of material fact remains to be litigated.

Under Civ.R. 56(C), summary judgment is proper only if

> (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Steinborn v. Farmers Ins. of Columbus, Inc., 5th Dist. Stark No. 2018CA00128, 2019-Ohio-1745, ¶ 34, quoting *Esber Beverage Co. v. Labatt USA Operating Co.*, 138 Ohio St. 3d 71, 2013-Ohio-4544, 3 N.E.3d 1173, ¶ 9. "The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which

[1] Even while this case was pending, Defendants continued to peddle their defamatory narrative against Plaintiffs. For instance, in June 2023, Defendants participated in a sham settlement, whereby the Canton City School District paid the Walkers $125,000 to settle outstanding claims that had no merit just so that Defendants could argue that Plaintiffs engaged in wrongful conduct that warranted financial restitution. Indeed, the second sentence of the Gilbert MSJ proudly touts the fact that the school district "recognized the despicable conduct in which Plaintiffs engaged and settled … for a substantial sum." A full discussion of this sham settlement is contained in *Plaintiffs' Motion to Compel Kathryn Perrico's Compliance with Subpoena, and Brief in Opposition to Canton City School District and Ms. Perrico's Motion to Quash and Motion for Protective Order*, filed on May 28, 2024, and Plaintiffs related reply brief, filed on June 14, 2024, which are incorporated herein by reference.

demonstrates absence of a genuine issue of fact on a material element of the non-moving party's claim." *Wentling v. David Motor Coach Ltd.*, 2018-Ohio-1618, 111 N.E.3d 610 (5th Dist.), ¶ 23, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. To satisfy its burden, "the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims." *Bovetsky v. Marc Glassman, Inc.*, 5th Dist. Stark No. 2016CA00122, 2016-Ohio-7863, ¶ 12, quoting *Dresher*, 75 Ohio St.3d 280, 293. If "the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial." *Id.*, quoting *Dresher*, 75 Ohio St.3d 280, 293. But where "the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id.*, quoting *Dresher*, 75 Ohio St.3d 280, 293. Moreover, the "trial court does not have the liberty to choose among reasonable inferences in the context of summary judgment, and all competing inferences and questions of credibility must be resolved in the nonmoving party's favor." *Wilmington Savs. Fund Soc., FSB v. Lautzenheiser*, 5th Dist. Stark No. 2020CA00059, 2021-Ohio-1046, ¶ 37, quoting *Tomlin v. City of Akron*, 9th Dist. Summit No. CV 29293, 2021-Ohio-819, citing *Perez v. Scripps—Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988).

II. Substantial evidence supports every material allegation in Plaintiffs' complaint, which, as this Court has previously ruled, precludes summary judgment for Defendants Gilbert, Walker, and K.W. on Plaintiffs' claims of defamation. Defendants have not offered a single eyewitness to contradict Plaintiffs' evidence.

It is inevitable that efforts to cover up one lie will lead to more lies that become increasingly absurd as the cover-up continues. While this case offers many examples of this phenomenon, one of the most revealing is the way the Defendants—in the Hall of Fame City of Canton, Ohio, of all places—purport to deny the most basic realities of the great game of American football in their efforts to defend the claims asserted against them here.

To wit, on one hand, there is unanimous agreement among the Defendants, and several

other key witnesses who have testified in this case, that football is an extremely demanding sport, both physically and mentally;[2] that it's an essential part of a football coach's job to ensure their players are trained and disciplined to meet these demands;[3] and that this training is, to a substantial degree, militaristic in nature, such that it is an everyday occurrence for coaches to shout at their players as a drill sergeant would.[4] Additionally, no one who has ever played football at a junior-high

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[2] Grimsley Tr. 25:17–25 ("Q: And it is […] among the most physically demanding sports that's played in U.S. high schools, correct? A: Yeah. Q: It's also mentally and emotionally demanding, correct? A: Correct."); Gilbert Tr. 34:7– 36:8 ("Q: You understand that football is a physical game, correct? A: At least my experience it has been. […] Q: Would you agree that football is also a mentally and emotionally demanding sport? A: I would agree with that."); Walker Tr. 12:6–8 ("You would agree that football is a demanding game, physically demanding, emotionally demanding? A: Yes."); K.W. Tr. 53:3–8 ("Q: And football is a physical game, correct? A: Yes. Q: And it can be a very emotional game, correct? A: Yes. That's your experience, right? A: Yes."); Wattley Tr. 352:7–8 ("It's an emotional game and emotions run wild sometimes.").

[3] Grimsley Tr. 26:11–17 ("Q: Football certainly requires coaches to discipline their players, correct? A: Correct. Q: It's an essential part of the job, correct? A: Yeah. Q: Of a football coach" A: Yeah."); Gilbert Tr. 35:18–23 ("But it is very common for football coaches to discipline players, is it not, sir? A: It's not unusual"); Walker Tr. 13:5–24 ("Q: You understand it's very common for coaches to discipline their players, right? A: Yes."); Walker Tr. 57:8–14 ("Q: You trusted the coaches to handle it, right? A: ... They asked what it would take for [K.W.] to come back to the football program, because I was going to keep him out for a long, extended period. I said, 'Run him hard.' Q: Run him hard. Work him hard? A: Basically."); K.W. Tr. 29:8–30:14 ("A: I feel like Coach Wattley's were more college-directed workouts, they were harder, tougher. … Q: It's fair to say that the training program under Coach Wattley was more effective in building a college-type body? A: Yes."); Talbert Tr. 41:17–42:7 ("Q: High School football coaches have pretty broad discretion on how they run their teams and motivate their players; is that fair to say? A: I would say yes."); Rinaldi Tr. 27:14–23 ("Q: Football coaches, they have a lot of discretion on how they decide to essentially motivate their players and get them to perform at their best, correct? … A: Yes. Q: And that would include high school coaches as well, correct? A: Yes."); Wattley Tr. 327:18–328:13 ("A lot of times, when you're a big kid, you don't face it often. … When you get to a level when you're dealing with players that look like you, move like you, there's going to be failures in there. But how you react to those failures and challenges in life, I mean, that's what makes you a better player and that's what I was trying to tell [K.W.]. Like, you're big here, but there's going to be 70 of you when you go to college. And it's the truth. And how you deal with getting beat, because you get beat, if you do what you do now, it's not going to work.").

[4]Grimsley Tr. 26:18–27:4 ("Q: It's very common for football coaches to shout at their players, right? A. Yeah. Q: It happens every day at football practice, coaches are yelling at their guys, right? A: It's fair, yeah. Q: It's very common for football players to use the f-word at football practice, isn't it, sir? A: Try not to. Q: But it happens all the time, right? A: Certain individuals, yeah."); Gilbert Tr. 31:21–23 ("Q: It's not unusual for football coaches to shout at their players, is it? A: True."); Walker Tr.

level or higher could honestly deny that "singling out" a player who lets the team down is commonplace, including, for example, to discipline the whole team by requiring it to perform strenuous physical exercises as a result of an individual's misconduct.[5] And it is beyond reasonable dispute that it is an essential part of a football coach's job to push their players' mental and physical boundaries to build the mental toughness and physical strength necessary to excel in this demanding sport.

Defendant Josh Grimsley certainly could not legitimately argue with any of these points, including, especially, the latter, as he had no choice but admit at his deposition to having sent a text message to Plaintiff Romero Harris, his former colleague on the Canton McKinley coaching staff, in

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14:8–15:1 ("Q: You ever heard a football coach yell before? A: I've heard football coaches yell."); K.W. Tr. 99:19–23 (Q: Coaches yell at football practice all the time, don't they? A: Yes. Q: It's a normal part of football, right? A: Right."); Talbert Tr. 41:17–42:7 ("Q: Football coaches shout at their players to motivate them, correct? A: Yes."); Rinaldi Tr. 27:24–28:11 ("And so some coaches might take a, you know, quote, 'drill sergeant' type approach to coaching players, and some might take a different approach. They might be more useful, as you said, correct? A: Yes. Q: And you've seen both, correct? A: Yes.").

[5]Grimsley Tr. 27:6–27:17 ("It's also very common for football coaches to criticize their players in front of the team, correct? […] It commonly happens? A: Commonly? Yeah. Yeah. Q: Hey, you're not working hard enough; you need to do better; this team is counting on you. That sort of thing, right? A: Sure. Q: That's common, right? A: Yeah."); Grimsley Tr. 84:8–19 ("Q: Forcing your peers to do something because of something you did. Making your team do extra drills because of something you did? A: Correct. Q: You've never seen that before at a football practice where a coach says, oh, so-and-so jumped offsides, now we all got to run? You've never seen that before? A: Oh, for sure, but – Q: That happens all the time at a football practice, right sir? A: For sure."); Gilbert Tr. 36:3–23 ("Q: In your time playing football, did you ever have an experience where a player on your team committed a mistake, like, for example, jumping off sides and the rest of the team had to do extra exercises or perform extra drills as a result of that mistake? … A: Yes."); Talbert Tr. 42:8–44:11 ("Q: Have you made players do extra exercises, extra workouts because you thought they either weren't committed to the team, committed to, you know, giving 110%? A: Yes […] Q: And what's the purpose of […] those types of exercises and practices with respect to the team? A: Those types of exercises are done because you are one and you are a collective group. Q: So the mistake of one becomes the mistake of everybody? A: Correct."); Rinaldi Tr. 133:21–138:6 ("Q: In your experience, you've seen coaches single out players in front of their teammates, correct? A: Maybe with some bear crawls or something like that. … Q: So … you have seen players singled out by coaches in front of their teammates, sometimes to do physical activities in front of their teammates, correct? A: Through the course of the years, yes.").

January of 2021, just a few months before the "pizza incident" at issue in this case, in which Grimsley urges Harris, who had just become the team's new strength coach, as follows:

> **"Do me a favor one day. Mentally get in our kids' asses and fuck them up in the weight room. They love that shit and need to get their asses kicked!"**

Grimsley Tr. 101:19–105:13, Ex. 2.

Incredibly, the very same Josh Grimsley who urged the importance of "mentally getting in [high school football players'] asses," "fucking them up in the weight room," and "kicking their asses!" because "they love that shit," postures in this lawsuit as a delicate flower who is shocked and outraged by the prospect that a star player at one of the most competitive high school football programs in the nation would be "punished"—for serious misconduct that would have warranted his removal from the team—by being asked to relax and enjoy some Gatorade and pizza during a training session, over the course of approximately twenty minutes, while his teammates performed basic exercises with 45-pound weight plates in the same room, to teach him and his teammates a lesson about teamwork, leadership, and accountability.

As it was Grimsley's initial lies about the pizza incident that set off the chain of increasingly absurd and destructive lies at issue in this lawsuit, it is perhaps unsurprising, but nevertheless extremely revealing that every one of the Defendants in this lawsuit have feigned the same absurd posture as Grimsley's described above. *See* Gilbert MSJ, pp. 1, 4; Walker MSJ, p. 25 (pathologizing Plaintiffs' admirable and harmless efforts to save a struggling student-athlete from throwing away his future as "abuse"); Wattley Tr. 116:10–18, 117:2–8 (pathologizing the very act of coaching as improper "behavior modification").

And this, again, is hardly the only evidence that Defendants' lies about the Plaintiffs were intentional, calculated, and malicious. From the moment Defendants' sensational, lurid, and facially absurd accusations set off a tidal wave of local, national, and international press early in June 2021,

Plaintiffs immediately came forward with evidence showing that these accusations were not only false and defamatory, but plainly and wildly so. This evidence included statements from numerous eyewitnesses who came forward with an account that made far more sense than Defendants' wild story that the Plaintiffs—who had sterling reputations as football coaches and leaders of young men, and who were charged with leadership of the storied McKinley football program—committed a "hate crime" by forcing one of their players (K.W.) to eat a pepperoni pizza with the intent to harm him by knowingly violating his alleged Hebrew-Israelite religious beliefs that prohibit consumption of pork. And this evidence was described in detail in Plaintiffs' numerous complaints filed in connection with this case after Defendants refused to abandon their wildly defamatory statements or make any effort to retract them or otherwise remedy the damage they caused.

This Court has repeatedly declined to dismiss or otherwise grant summary judgment on Plaintiffs' defamation and false light invasion of privacy claims against Defendants Gilbert, Walker, and K.W., finding that Plaintiffs' allegations were sufficient to sustain the claims and that Plaintiffs have obtained evidence, including sworn testimony by K.W.'s teammates who participated the event, and even K.W. himself who has flatly denied the truth of almost every one of his co-Defendants' defamatory statements, which precludes summary judgment on Plaintiffs' claims. Similarly, the Court previously rejected Grimsley's arguments for statutory immunity based on allegations of bad faith and actual malice, which are now also supported by ample evidence.

Incredibly, Defendants, in their motions for summary judgment, do not offer a single eyewitness to contradict, let alone negate, any of the third-party witness accounts submitted by Plaintiffs. The most Defendants offer is rehashed versions of the same legal arguments the Court previously rejected in *Wattley I*, and self-serving misrepresentations of the parties' testimony that, at most, demonstrate issues of fact that must be resolved by a jury. As set forth fully below, there is an abundance of evidence establishing Plaintiffs' entitlement to their day in court against Defendants,

whose motions for summary judgment should be denied.

III. There is an abundance of evidence proving the defamatory and malicious nature of Defendants' statements that Plaintiffs forced K.W. to eat a pepperoni pizza with the intent to harm him by knowingly violating his religious beliefs, and that Defendant Grimsley intentionally misrepresented the pizza incident to aid and abet these defamatory statements with the intent to ensure Plaintiffs' termination from their jobs as McKinley's football coaches.

As stated above, there is an abundance of evidence proving every material allegation in Plaintiffs' complaint, including the defamatory and malicious nature of Defendants' statements that Plaintiffs committed a "hate crime" by forcing one of their players (K.W.) to eat a pepperoni pizza with the intent to harm him by knowingly violating his Hebrew-Israelite religious beliefs. This evidence—which also shows that Defendant Grimsley intentionally misrepresented the pizza incident to aid and abet the other Defendants' defamatory statements, with the precise purpose of ensuring Plaintiffs' termination as McKinley's football coaches—raises issues of fact that must be resolved by the jury.

A. Eyewitnesses to the pizza incident have unanimously confirmed that its purpose was legitimate and clearly understood: to address K.W.'s serious misconduct by teaching a lesson about leadership, teamwork, and accountability.

At the first Canton school board meeting held over this matter, at which district officials rushed to terminate the coaches based on their rushed, incomplete, and flawed investigation of the accusations, a number of player-eyewitnesses were jumping out of their shoes to tell the truth about what really happened. These players unanimously confirmed that Marcus Wattley and his staff were among the last football coaches who would intentionally harm a player, let alone deliberately force a player to eat a certain type of food with the intent to violate that player's religious beliefs. *See* **Exhibit 1**, Affidavit of David Smith Jr., ¶¶ 2, 14 ("It was apparent to me and my teammates that these coaches cared about us and wanted us to succeed on and off the field."); **Exhibit 2**, Affidavit of Alex Vazquez, ¶¶ 2, 11–14, ("After the accusations against Coach Wattley and his staff went

public, a group of my teammates and I tried to tell anyone who would listen what really happened. No one at the district wanted to interview us or seemed to care what we had to say."), Ex. 1 (Vazquez text message to Romero Harris: "[Y]ou guys put so much dedication into us and you guys actually care and everything he's saying is so bs."). These players also provided a clear and convincing account that made exponentially more sense than the salacious narrative put forth by Defendants, which they have since confirmed via sworn deposition testimony and affidavits:

First, that it was clear to everyone in the room that day, including K.W. himself, that the pizza incident was intended to address K.W.'s admitted behavioral problems—including those caused by off-campus marijuana use that K.W., at his father's instruction, had admitted to his coaches and teammates after his father had grounded him for the same—that had not subsided in response to more traditional disciplinary methods, and which were jeopardizing K.W.'s status on the team and his future as a Division I college football player. *See* **Ex. 1**, Smith Aff., ¶¶ 4–5 ("By May of 2021, it was well known by myself and his other teammates that [K.W.] was using marijuana. That month, he told our coaches and the team that his father had grounded him for his marijuana use, and he apologized to us as a group and told us he knew he had to be better."); **Ex. 2**, Vazquez Aff., ¶¶ 3–4, ("By May 24, 2021, [K.W.] had missed some training sessions without checking in with any of our teammates or coaches, and we players and coaches remained concerned about whether he could get it together to be a productive member of our team for his senior season."); Powell Tr. 15:4–16 ("Outside of football, he was deciding to ... make bad decisions with marijuana and stuff like that. ... He was, like, missing practices and ... not doing normal things that we knew of him."); Wattley Tr. 152:13–153:8 ("[K.W.] had become very disruptive in his behavior. ... He was suspected to showing up to multiple lifts under some kind of influence and we would later find out it was marijuana, from [K.W.] and his father. ... He was still going down a bad path. We were trying to help him because I told [K.W.], like if you do this in the football program in college you get kicked off

the program. I don't believe in kicking kids off the program.").

These witnesses have also confirmed that coaches' purpose in asking K.W. to relax and enjoy pizza and Gatorade while his teammates were performing strength drills in the same room was similarly clear: to teach the player and the team a lesson about teamwork, leadership, and accountability by conveying the notion that "it's easy to be selfish when no one is watching, but it's not so easy to be selfish in front of your teammates."

As explained by David Smith—a senior on the team who was one of the three players interviewed by the school district in its investigation of the incident:

> Before this exercise began, Coach Wattley addressed the room, including [K.W.], about the importance of hard work and accountability. I specifically remember that Coach Wattley said to us, 'it's easy to be selfish when no one is watching.' It was obvious that this exercise was meant to teach the team, and especially [K.W.], a lesson about teamwork and accountability in hopes that [K.W.] would stop his selfish behavior that was hurting the team and also that no other player would engage in similar behavior. The coaches had used a similar lesson the previous year [that] was understood by the team and there were no issues and problems that arose from it.

Ex. 1, Smith Aff., ¶ 7;

This understanding has been similarly confirmed by then-sophomore Alex Vazquez (**Ex. 2**, Vazquez Aff., ¶ 6), and Mani Powell—a "close" friend of K.W., who, like K.W., was a team leader entering his senior season, and is now entering his freshman season as a linebacker for the University of Arkansas:

> [B]asically, the moral of the story that [the coaches] were trying to put out to us is that to be -- to be the team that we wanted, to be the team that we were looking to be we couldn't have any selfish people on the team. And [K.W.], had seemed to be being, you know, selfish towards the team. So they were basically letting it be known that if one player is messing up, then we all got to pay for it, you know? They're letting it be known that on the field if one player mess up, then we all will have to pay for it, no matter if it's penalties, you know, losing the game or things like that. That was the moral of the story. That was the message they were putting across to us as football players. ... So I went in the gym ready to do the consequences for him

> just because that was my teammate and I thought after that we was going to be able to get past it and become a better football team because of it ... .

Powell Tr. 8:25–9:25; *See also* Wattley Tr. 153:9–13 ("We were trying to teach [K.W.] a lesson that no one is bigger than the team. And just like if a kid gets hurt, if someone's not there, we have to work harder because that kid's not here to work or that kid chose not to."); 154:9–11 ("[K.W.] was going to see that we have to work harder because we have a guy who's not accountable and ... chose not to work."); 176:19–20 ("I mentioned it's easy to be selfish in private, it's hard to be selfish when your team's there."); McLeod Tr. 34:3–8; 39:14–17 ("A guy who was missing, letting his team down … don't want to show up and ... work with your guys ... He was asked was he hungry or thirsty, yeah, and he was going to sit there and have something to drink and something to eat while his guys worked out."); Harris Tr. 101:20–24 ("If you have a kid with behavioral issues … you want him to just see what it ... looks like to have that comfort and leisure while the rest of the team gets better."); Brodie Tr. 23:8–24:14 ("They asked him if he was hungry and thirsty and he had food and a drink. So he was going to sit and relax while the other kids did the alternative—another workout after the max-out.").

B. McKinley football players and coaches have unanimously confirmed that there was no reason for anyone to know that K.W. had any religious beliefs at all, let alone any that would prohibit the consumption of pork; In fact, K.W.'s teammates and coaches had seen him eat pork "many times."

The same witnesses have confirmed that the pepperoni pizza was selected for the exercise not for any reason other than that K.W. would enjoy eating it. There is ample evidence in the record showing that K.W.'s teammates and coaches had previously seen him eat pork products, including pepperoni pizza, many times in the recent past. **Ex. 1**, Smith Aff., ¶ 13 ("The May 24, 2021 training session was the first time I ever heard about [K.W.] not eating pork. Before that day we had had many meals with the team where pork was served, including on pizza and with breakfast food, and I had seen [K.W.] eat that pork many times."); **Ex. 2**, Vazquez Aff., ¶ 10 ("The May 24, 2021 training

session was the first time I ever heard about [K.W. not eating pork."); Wattley Tr. 70:15–21 ("I didn't just pull a pizza out of nowhere to try to piss [K.W.] off. I've seen [K.W.] consume pepperoni pizza, pepperoni sausage pizza."); Wattley Tr. 89:18–90:3 ("[K.W.] ate pork ribs. [K.W.] ate sausage. [K.W.] ate bacon. ... I don't know how he practices his religion. ... Have I seen [K.W.] eat pork? Yes. Have I seen [K.W.] eat a lot of pork? Yes."); Mcleod Tr. 59:1–5 ("[W]e served pizza to the kids and we watched him eat it before, so the pepperoni wasn't ever an issue.").

These witnesses and others, including Defendant Grimsley, have also confirmed that prior to the May 24, 2021 training session, they had never heard of K.W. having any religious beliefs at all, let alone any such beliefs that would prohibit the consumption of pork. *See* Vazquez Aff., ¶ 8 ("Until [K.W.]'s religious beliefs were mentioned in the news after this event, I had never heard of him having any religious beliefs at all, including on May 24 in the gym. There was another player on the team who was a practicing Muslim and did not eat pork for that reason, and my coaches and teammates were aware of that."); Smith Aff., ¶ 13 (same, and adding that "I also do not eat pork, and my coaches and teammates were aware of that as well"); Powell Tr., 10:9–19 ("[S]omething that I've never heard came out, and that was that he was a Hebrew Israelite or something like that, and that he was -- he was allergic -- not allergic but he wasn't eating pork as a religious thing."); Grimsley Tr. 88:8–20 ("A: I had no idea about ... the whole pork thing. I didn't even know he was Muslim or whatever it is. ... Q: You never heard anything about [K.W.'s] religion ... before this incident, right? A: No.").

C. There is no evidence that the Plaintiffs "forced K.W. to eat pork" at all, let alone with intent to violate his religious beliefs or otherwise harm him, and all evidence is to the contrary; Eyewitnesses have unanimously confirmed that K.W. was free to leave the training session, and that Plaintiffs offered him other food as an alternative to the pepperoni pizza after he complained that he didn't eat pork.

Not only did K.W.'s coaches and teammates have no reason to know about his alleged religious beliefs prior to the pizza incident, but during the event, after K.W. said that he didn't eat

pork, the coaches specifically offered him a non-pork alternative, including chicken or McDonald's, and K.W. rejected those alternatives, instead choosing to pick the toppings off the pizza and eat a portion of the crust. These witnesses, including Defendant Grimsley, have also confirmed that K.W. was free to leave the training session at any time, as he had done before in the past. **Ex. 1**, Smith Aff., ¶¶ 8–9 ("During this exercise ... my teammates and I all knew we were free to leave at any point if we did not want to participate. Coach Wattley specifically told Khalil that he could leave if he didn't want to participate. ... Coach Wattley told [K.W.] that the coaches could get him something else to eat, like chicken or McDonald's. [K.W.] declined the offer and just picked the toppings off the pizza and ate the rest of it."); **Ex. 2**, Vazquez Aff., ¶¶ 7–8 (same); Powell Tr. 10:20–25 ("[C]oaches -- more than one coach actually offered to go get various -- various different, you know, foods for him ... One of the things I know for a fact that I heard was that he was able to get some McDonald's chicken nuggets as an alternative for pizza."); 11:5–7 ("He was offered an alternative food and he also – you know, the door was always open and he was also free to leave."); Grimsley Tr. 282:16–24 ("A. ... I remember Coach Wattley at the end telling him you can quit, you can eat the pizza or you can leave. ... Q. ... He never said, If you don't eat this pizza you're going to get kicked off the team, did he? A. No. No."); 75:3–5 ("Q. You've seen [K.W.] storm off the field, right? A. Multiple times. ... Q. Ever see him walk out of a practice or training session? A. Yes."). *See also* Wattley Tr. 180:17–22 ("I'm instructing the kids, 'This is a family. We have to work hard for each other. We have to work with each other. You guys, if you don't like it, you can leave or you guys can come together. You can work harder to support each other or you can leave."); 180:25–181:8 ("'You can leave, you can quit or you can eat until you're full' ... that's what I told him ... [K.W.] has quit so many times. Probably more than two dozen."). 89:18–90:3 ("We have players on our team that when we don't have non-pork options, they come to me directly ... I would give a coach money and we would get them a substitute."); 210:14–16 ("[W]hen [K.W.] said he didn't want to eat the pizza, I

think I told Coach Thatcher to go get him chicken or chicken nuggets."); McLeod Tr. 57:1–2 ("I just heard, you know, 'Go get him chicken nuggets,' and [K.W.] said, 'No.'"); McLeod Tr. 43:9–15 ("Q: If ... any player told you that they could not eat something, you would honor their wish, wouldn't you? A: Absolutely. We have two players on the team that we do honor that, and one ... is not with a religion and the other is because of his religion.").

D. There is no evidence that the pizza incident caused or risked any harm to K.W. or anyone else, or that it could have possibly exceeded the broad and well-established discretion of high school football coaches to coach and discipline their players.

Not only did the coaches have no reason to believe that this exercise, which lasted approximately 20 minutes, would cause or risk any harm to K.W., or anyone else, or would otherwise exceed their widely understood discretion to coach and discipline their football players, there is, unsurprisingly, not a shred of evidence—apart from Defendants' false and defamatory claims that K.W.'s religious beliefs were violated—that anyone was in fact harmed. Eyewitnesses have in fact affirmed that any notion that these coaches intended to harm K.W. by this exercise is, in fact, "ridiculous." **Ex. 1**, Smith Aff., ¶¶ 8, 14 ("I never felt unsafe throughout the workout nor did I ever believe that [K.W.] or any of my teammates were in danger. ... Based on my experience with Coach Wattley and his staff, including that day in the gym, the idea that these coaches intended to hurt [K.W.], discriminate against him based on his religion or race, or do anything but try to help him is ridiculous to me. I believe this idea would also be ridiculous to any reasonable person with any familiarity with these coaches or our program under their leadership."); **Ex. 2**, Vazquez Aff., ¶¶ 7, 11 (same); Powell Tr. 15:18–16:8 ("Q: Throughout the pizza incident, did you ever believe that anyone in the room was in danger of suffering any serious harm? A: Never. Never once. Q: … Do you have any reason to believe that these coaches were trying to hurt [K.W.]? A: No, I don't. Q: Do you have any reason to believe that these coaches discriminate against people based on their religion or race? A: No. Q: Do you believe that these coaches had […] their players' best interest at heart

including [K.W.]? A: Yes.").

Even the defamatory "whistleblower" Grimsley admitted at his deposition, in explaining why he was in the room for the entire pizza incident and "didn't do anything to stop it," that he did not intervene "because [K.W.] wasn't – he wasn't being harmed or anything." Grimsley Tr. 88:5–7. *See also* Wattley Tr. 340:25–341:8 ("Other programs do it at the school. Other programs in the state of Ohio and the country do similar workouts. Not one kid got hurt. Not one kid said they were in danger."); Harris Tr. 104:7–18 ("Q: Tell me how ... that [plate] routine made any of those 45 teammates better football players. A: … It helps strengthen their muscles, their legs, shoulders, core, back, triceps. From just the lunge alone ... glutes, quads, hamstrings, core from the plate, back, biceps or triceps depending on how they're holding it."). *See also* **Exhibit 3**, Affidavit of Dan Boarman, Ex. 1 (expert report) ("It is my opinion that it is beyond reasonable dispute that these coaches were acting within their discretion in seeking to convey this lesson to a player who was putting his status on the team and his future as a football player at risk. It was a teachable moment and these coaches apparently went above and beyond their responsibilities to make the most of it ... it is beyond reasonable dispute that these coaches acted well within their commonly understood discretion with respect to the players' use of the 45-pound plates during the pizza incident. ... Plate work is widely employed by high schools, colleges, and prominent strength coaches throughout the country, not only to improve physical and mental endurance, but also to ensure proper conditioning to keep players on the field, safe, and uninjured."); First Amended Complaint ("FAC") ¶ 103 (citing cases).[6]

[6] *Starkey v. Hartzler*, 9th Dist. Wayne No. 96CA0048, 1997 Ohio App. LEXIS 1177, at *2–3, 6-7, 9-11 (Mar. 26, 1997) (middle school football coach's decision to "kne[el] down on his hands and knees behind [a player], encouraging another player to push [the alleged victim] over [the coach]," allegedly causing a back injury, "[was a] method used ... to discipline his young players involv[ing] the type of discretion as contemplated by R.C. 2744.03(A)(3)"); *Schnarrs v. Girard Bd. of Edn.*, 168 Ohio App.3d 188, 2006-Ohio-3881, 858 N.E.2d 1258, ¶ 41–¶ 43 (11th Dist.) ("[The coach's] determination to use male players during girls' basketball practices, demonstrated a positive exercise of judgment which

E. K.W.'s deposition testimony—including his admissions that he understood the well-intended purpose of the pizza exercise, he was not harmed by this exercise, he knew that Plaintiffs cared about his well-being and did not hate him, he knew that Plaintiffs were unaware that he had any particular religious beliefs, he knew that Plaintiffs did not intend to violate his religious beliefs by serving him the pepperoni pizza, he promised to "straighten things out" with school-district officials because he didn't believe that Plaintiffs should be disciplined over the incident, and that he participated in a team-sponsored

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portrayed a considered adoption of a particular course of conduct in relation to an object to be achieved, *viz.*, improving skills for upcoming games ... [The coach], by virtue of his position, had the discretion to plan and conduct practices."); *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, 924 N.E.2d 906, ¶ 40 (10th Dist.) ("[O]nly a coach knows when a team and its members are capable of performing a particular maneuver ... a coach has discretion in choosing whether to start progressions from the beginning after a substitution."); *Michael v. Worthington Ohio City School Dist.*, 10th Dist. Franklin No. 19AP-145, 2020-Ohio-1134, ¶ 32-33 ("There is no evidence that any of the coaches intended to harm [the player]. In fact, there was testimony that the players and coaches thought of each other like family ... and had a close relationship."); *Mosely v. Dayton City School Dist.*, 2d Dist. Montgomery Case No. 11336, 1989 Ohio App. LEXIS 2695, at *7 (July 6, 1989) ("[T]he teacher's method of conducting his physical education class, including specifically the manner in which he directed the children to play 'Capture the Turkey,' was a matter confided to the exercise of his judgment or discretion."); *Pope v. Trotwood-Madison City School Dist. Bd. of Edn.*, 2d Dist. Montgomery No. 20072, 2004-Ohio-1314, ¶ 29-30 ("[The coach's] decision to participate in the basketball games while also supervising those games was within his discretion ... evinc[ing] a 'positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved,' *i.e.*, the participation of all of the students."); *Banchich v. Port Clinton Pub. School Dist.*, 64 Ohio App.3d 376, 378, 581 N.E.2d 1103 (6th Dist.1989) ("[A] teacher's method of conducting a physical education class was a method confined to the exercise of his judgment or discretion."); *Koch v. Avon Bd. of Edn.* (1989), 64 Ohio App.3d 78, 81, 580 N.E.2d 809 ("[W]hether a piece of [physical education] equipment would be used or how the equipment was used was also left to the discretion of each instructor. Because the policy of the board to defer to the expertise of a certified physical education instructor was a decision resulting from the exercise of the board's judgment, we hold that this is the type of act that R.C. 2744.03(A)(5) intended to shield from liability."); *Cook v. Kudlacz*, 2012-Ohio-2999, 974 N.E.2d 706, ¶¶ 21, 31-34 (7th Dist.) ("[C]ompliance with scholastic standards and disciplinary requirements are enforced within a broad range of discretion. ... [W]e cannot logically conclude that the rules were implemented solely to punish [the student] for going on a family vacation ... [the coaches'] actions do not show intimidation and/or harassment."). *See also Thompson v. McNeill*, 53 Ohio St.3d 102, 105, 559 N.E.2d 705 (1990) ("Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages."); *Harris v. McCray*, 867 So.2d 188, 192-193 (Miss.2003) ("Coaches have to know what motivates their players and what does not. Coaches know that in order to discipline football players, each one is a different human being - one player may be disciplined by a mere stern look from the coach, while a military-style drill sergeant chewing out will not faze another player."); *Lennon v. Petersen*, 624 So.2d 171, 174-175 (Ala.1993) ("[The coach] had to evaluate his players to determine if they were playing to the best of their ability. ... He was responsible for motivating the players and evaluating their performance. [The coach] was acting within his authority in using his discretion in such matters, and he is entitled to discretionary function immunity.").

pork-rib-eating contest in 2019—leave no doubt as to the defamatory and malicious nature of the accusations at issue in this lawsuit.

Not only is the above-summarized testimony alone sufficient to establish the defamatory and malicious nature of Defendants' statements that the coaches intentionally violated K.W.'s religious beliefs, but K.W. himself, to his credit, and despite serial and egregious coaching of his testimony by his co-Defendant Mr. Gilbert[7] throughout the proceeding, made a series of admissions at his

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[7] *See Cincinnati Ins. Co. v. Serrano*, D.Kan. No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, *12–13 (Jan. 5, 2012) ("Instructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are never appropriate." ... Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed."); K.W. Tr. 70:17–20 ("MR. GILBERT: Objection, objection, objection. You can answer if you know. A. I don't know."); K.W. Tr., 14:16–17 ("Go ahead and answer if you can."); 16:21–23 ("Answer if you know, but don't guess or speculate, okay?"); 32:2–3 ("Go ahead and answer if you know."); 37:6–7 ("You can answer that if you know, don't guess or speculate."); 40:5–6 ("Answer if you know."); 40:14–15 ("If you understand the question, you can answer it."); 42:9–10 ("Don't say anything, just look at it."); 52:13–14 ("You can answer, if you know."); 53:16–17 ("You can answer, if you know."); 53:21–22 ("You can go ahead and answer if you can."); 54:5–6 ("You can answer if you know."); 57:12–13 ("Answer if you know, don't guess or speculate."); 60:10–11 ("Don't answer that."); 60:14 ("Don't answer that."); 61:12–14 ("He's not going to respond to the question, counsel, he's not going to admit to a criminal offense."); 63:13 ("Don't answer that."); 64:9 ("Don't answer it."); 66:17–19 ("And you're right ... don't answer any question you don't understand, okay?"); 68:20–22 ("Asked and answered. Go ahead and answer it again."); 70:17–19 ("Objection, objection, objection. You can answer if you know."); 73:3–7 ("Well, let's -- is it-- let's go off the record for a second to make sure it's not…privileged.").; 75:18 ("Don't answer that.") 75:20–21 ("if you know, you can answer."); 76:3–4 ("Don't answer that unless you know. Do you know?"); 77:5–6 (Yeah, but if you don't get it, you've got to say."); 77:11–13 ("Well, wait a minute, don't give your answer again before he starts his editorial."); 80:16–18 ("Objection. Objection. Asked and answered, but go ahead and answer."); 84:24–25; 85:1–2 (Again ... your instructions are the respond to the question that you know, but don't guess or speculate, okay?"); 86:22–23 ("Answer that if you know."); 89:16–18 ("That's been asked and answered…so if you got anything else to add."); 95:8–9 ("Do you understand the question?"); 101:4–5 ("It's been asked and answered.)"; 103:12–14 ("It's been asked and answered. Go ahead. You got anything else?"); 123:10–11 ("He just testified."); 133:19–20 ("You could answer, if you know."); 134:15–16 ("That's been asked and answered."); 134:18–19 (You already -- that's been asked and answered."); 144:16–21 (-- woah, I want the question read back and he gave part of an answer. He's entitled to hear that part of the answer so he can pick up his train of thought. That's what I'm asking to be done."); 147: 1–2 ("He said more than that, counsel."); 147:24–25; 148:1–2 ("Now if you have a question, you pose the question, but you don't have to agree with anything he says, okay? You answer the question, okay?"); 148:4–6 ("The best way you can, but you don't have to justify what you think in terms of your religion, okay?"); 148:8–10 ("So listen to his question and respond to his question the best way you can, okay?"; 148:19–21 ("It's been asked and answered, go ahead and answer it

deposition that leaves no doubt as to the same, including the following:

- K.W. did in fact confess to his coaches and teammates that his father had punished him for smoking marijuana in the weeks before the pizza incident, including by barring him from attending football practices. K.W. Tr. 162:12–23; 163:1–4. ("Q. Let's leave aside for now the dispute over the reason why coaches were teaching you a lesson that day. The question I want to limit very specifically to whether you understood the purpose of that lesson to be similar to the lesson that was being taught in the Gatorade exchange? … A. Yeah, they were calling me selfish because I had missed practice. Q. And also because you told them that you were smoking weed, right? … A. They never -- well, I told them I smoked marijuana. Q. You did tell them that, right? A. Yes."); K.W. Tr. 72:5–76:5 ("Q. After you were grounded

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again."); 150:8 (No, no, no, wait."); 162:3–4 ("Go ahead and answer, if you can."); 164:3–4 ("Do you know what question you're answering?"); 164:6–7 ("Go ahead and answer, if you can."); 167:21–22 ("Do you know what everybody was thinking?"); 187:11–12 ("Don't answer that."); 189:3–4 ("He's already answered, he says he doesn't know."); 199:4–5 (…it's been asked and answered."); 199:11–13: ("Well, he's not going to answer it again, how about doing that. He's already answered your question."); 199:20–25 ("Well, let's go back on the record and see if he's answered it. Let's go back on the record to see what the question is, and I believe he's answered your question, and I'm asking to go back on the record to make that clear."); 207:10–11 ("Boy you can go ahead and answer, if you know."); 229:3–4 ("You can answer, if you know."); 230:7–9 ("Don't answer that, it calls for a legal conclusion…It calls for a legal conclusion, don't answer that."); 230:23–24 ("You can answer, if you know."); 231:7–8 ("Go ahead and answer if you know."); 231:15–16 ("Answer if you know."); 232:8–9 ("Do you understand the question?"); 233:9–10: ("I'm going to object, but go ahead and answer if you can recall."); 237:13 ("Hold on, hold on."); 240:10 ("Wait a minute…"); 241:6–8 ("Wait a minute, whoa, whoa. Let's get -- go ahead and do your answer again, we didn't hear it."); 241:11–12 ("You said something about the Bible…"); 243:12–14 ("Wait, wait, hold on, what was the last question and answer, did you fully answer that?"); 245:6–7 ("You can answer if you know."); 247:24–25 ("You don't have to take his assumption, okay?"); 254:24–25; 255:1–4 ("Well, go ahead and answer if you know how many meetings…Okay, tell him you don't know."); 255:8 ("Do you know?").

See also Cordero v. City of New York, E.D.N.Y. No. 15 CV 3436 (JBW) (CLP), 2017 U.S. Dist. LEXIS 80556, at *18-19 (May 12, 2017) (Counsel's "extraneous comments, such as that questions called for speculation, were vague, leading or had been asked and answered ... seemed to be suggesting answers to the witness" and warranted sanctions); *Hunter v. GEICO Gen. Ins. Co.,* E.D.La. No. 17-05070, 2018 U.S. Dist. LEXIS 155335, *24-25 (Sep. 12, 2018) ("A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record."); *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) ("Depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of the strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the [civil rules]: to find and fix the truth.").

and were missing practice because you were grounded, you told Coach McLeod and Coach Thatcher why you were grounded, didn't you? A. Yes, in a meeting that I had when I got back from when I got back to practice. Q. And you told them the truth in that meeting? A. No. Q. You did not? A. No. Q. You lied to the coaches? A. Yes. Q. Why did you lie to the coaches? A. I don't know ... Q. So what did you tell them that was a lie? ... [Defendant Gilbert pulls K.W. out of the room to confer] ... A. I told them that I was smoking marijuana because I didn't want them to know that I was smoking Black & Milds because I thought Black & Milds was worse than marijuana."); K.W. Tr. 135:24–136:12 ("A. I probably told [my teammates] the same thing ... that I didn't want them knowing I was smoking Milds ... Q. So you probably told them the same thing – that you were smoking weed instead? ... That's your testimony? A. Yes."); K.W. Tr. 214:25–215:18 ("Q. Have you ever heard of any college football player getting suspended, expelled, losing a scholarship, for smoking a cigar, for example? Q. No. ... Q. But you know college football players lose their scholarship for ingesting illegal substances, correct? ... A. Yes. Q. You know that smoking marijuana is something that a person can lose their scholarship for, correct? A. Yes.").

- K.W. understood that the coaches were concerned that he was putting his future in jeopardy and that the purpose of this lesson was to teach him both that it's not OK for a player to "chill at home while [his teammates] were out there working," and that "it's a privilege to work as a member of the Canton McKinley football team." K.W. Tr. 162:1–21. *See also* K.W. Tr. 80:10–19 ("And when they told you that in that meeting when they said that if you kept missing practice the team would have to pay for it, you understood that to mean that the team would have to do extra physical activity, correct, like Hallway to Hell or something like that? ... A. Let me think -- yes.").

- K.W. participated in a team-sponsored pork rib-eating contest/fundraiser in 2019 without any regard for whether the ribs he was eating were pork or beef, despite knowing that they might well be pork. K.W. Tr. 152: 13–25; 153: 1–14 ("A. ... [Coach Wattley] asked if I wanted to do the rib eating contest and I said sure, but I asked him if the ribs were beef or were they pork and he said 'how am I supposed to know?' So I just went with it and went to the contest. Q. Then you ate the meat? A. Yes. Q. You ate the ribs? A. Yes. Q. You didn't know whether they were pork or beef?" A. No.").

- As of the date of the pizza incident, K.W. had never told the coaches that he practiced any religion at all, and that the coaches "[n]ever had any reason" "to believe he was the member of the Hebrew Israelite faith." K.W. Tr. 155:2–11 ("Q. Did you ever tell the coaches that you practice any particular religion? A. No. It never came across of me telling them that, so no. Q. Are you aware of any reason that these coaches would have to believe that you were a member of the Hebrew Israelite faith? A. I mean, I – no, they wouldn't have probably have known, but they should have knew that I didn't eat pork.").

- When K.W. was asked whether he believed that the coaches' intended to violate his religious beliefs, he said "no." K.W. Tr. 200:21–25 ("Q. Okay. My question is: Do you believe that part of the coaches' purpose was to specifically violate your religious beliefs and harm you in the eyes of your God? A. I mean, no...");

- K.W. has never believed that these coaches are "racist," he has never believed that these coaches "discriminate against people based on [their race] or anything like that," he has

never doubted that these coaches "cared about his well-being," and he has never believed these coaches "hate" him. K.W. Tr. 28:9–19 ("Q. Do you ever doubt that any of those coaches cared for your well-being? A. No, I believe that they all cared about me. Q. Did you ever believe that any of those coaches hated you? A. No.); K.W. Tr. 160:21–25; 161:1–5 ("Q. Do you believe that Coach Wattley, Coach Sweat, or any of the other coaches in this room are racist? A. No. Q. You don't believe that these coaches discriminate against people based on whether they're black or white or Asian or anything like that, do you? A. No. Q. No, you do not believe that, correct? … A. I don't believe that..").

- And on the day after the pizza incident, after the news broke that the coaches were suspended pending further investigation of the event, he placed a phone call to Coach Thatcher in which he promised to "get this straightened out" with District officials by denying the notion that the coaches had "harmed him." K.W. Tr. 184:12–25; 185:1–25; 186:1–2 ("A. So when the news had broke to the internet, I had called Coach Thatch, and then Coach McLeod had put me on speakerphone and started questioning me. And then I remember one of the things was like, they're trying to say that we harmed you, but in my thought I was thinking that physically harm, not like anything else, so I was like, no, I'm going to get this straightened out with Coach Hall the next day, that's what I said. ... Q. What did you mean by that, 'get it straightened out?' A. Like clear it up so that they wouldn't be in deeper trouble ...").

While K.W. has attempted to back off of some of these admissions, to varying degrees, including after breaks at his deposition during which he was presumably coached by Defendant Gilbert; and also with a preposterous errata sheet (**Exhibit 4**) where he (or more likely Gilbert) has invented wholly new answers to the questions posed to him at his deposition, these efforts to backpedal only further demonstrate that Plaintiffs' claims must be submitted to a jury.[8]

[8] *See Noble v. VFW Post 9904 Greentown*, Stark C.P. No. 2019CV02304, 2020 Ohio Misc. LEXIS 984, at *7 (Nov. 30, 2020), citing *Wivitowicz v. Eschtruth*, 9th Dist. Lorain No. 95CA006203, 1996 WL 183111, *5 ("The Court finds that the self-serving testimony of Plaintiff in his affidavit, taken together with his actual deposition testimony and the changes made in the errata sheet, create credibility issues that can only be resolved by the trier of fact."); *Bishop v. Admr., Bur. of Workers' Comp.*, 146 Ohio App.3d 772, 787, 2001-Ohio-4274, 768 N.E.2d 684 (10th Dist.) ("The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. ... When a deponent reviews his or her deposition testimony under Civ.R. 30(E) and makes changes in the form and substance of such deposition testimony, both the original testimony as well as the changes remain in the record and are to be considered by the trier of fact.").

F. The school district's records of its investigation also confirm that K.W. and his father never mentioned his alleged religious beliefs to district officials, and that K.W. was offered alternative food options after he said he didn't want to eat the pizza.

The school district's records of its investigation of K.W.'s claims confirm that K.W. and his father didn't mention his alleged religious beliefs when they were brought in, without Attorney Gilbert, to be interviewed by district officials. Talbert Tr. 117:1–118:11, Ex. 1. District superintendent Jeff Talbert testified that he had no recollection that K.W. or his father mentioned any religious beliefs during this interview (Talbert Tr. 119:1–5; 158:16–34; 198:20–21), and school board president John Rinaldi likewise confirmed that he was never advised that K.W. had any particular religious beliefs. K.W. Tr. 119:12–120:8; 122:3–24 (Q. "And Mr. Talbert, when he gave you a summary of Khalil Walker's statement during the investigation, he did not mention Khalil Walker's religion, correct?" A. "Not that I remember.").

The district's records, and testimony by its officials, also establishes that the player eyewitnesses interviewed in the district's investigation confirmed that the coaches offered K.W. alternative food options after he said he didn't want to eat the pepperoni pizza. Rinaldi Tr. 197:23–27, Ex. 6 ("Chicken nuggets was brought up as an alternative."); Talbert Tr. 155:24–35 ("…[K.W.] was offered chicken nuggets or something like that," as an "alternative"). *See also* **Ex. 1**, Smith Aff., ¶ 9, 11 ("Coach Wattley told [K.W.] that the coaches could get him something else to eat, like chicken or McDonald's. [K.W.] declined the offer and just picked the toppings off the pizza and ate the rest of it. ... In the days after the incident after the coaches were accused of wrongdoing, I was called in for an interview by school district officials about the events of May 24, 2021. During this interview, I told the district officials that the coaches had offered Khalil something else to eat, like McDonald's, after [K.W.] complained that he didn't eat pork. I also told the district officials that I didn't believe the coaches had done anything wrong and that I hoped they wouldn't lose their jobs.").

G. Defendants' accusations that Plaintiffs forced K.W. to eat a pepperoni pizza with knowledge of his religious beliefs, and with intent to harm K.W. by purposely violating those beliefs, were fabricated by Defendant Gilbert, who believed these allegations would allow him to extort a settlement out of the school district.

Of course, K.W.'s testimony and his puppeteered efforts to correct or retract key portions of it also point to a conclusion that has been apparent since his accusations first surfaced, and which has only been confirmed by discovery in this case: That K.W. and his father, Kenneth Walker, who works 70-hour weeks as a home health-care aide for thirteen dollars per hour to make ends meet (Walker Tr., 29:24–33:9), are, to a substantial degree, victims in this case themselves; victims of an attorney who is trained to know better and required by the most basic legal and professional standards to do better; but who instead decided to exploit what he saw as an opportunity to make a quick buck by misrepresenting the coaches' extraordinary and admirable efforts to save a struggling student-athlete from throwing away his future.

Thus, instead of advising his client honestly, or otherwise making any effort at all to investigate the truth of this matter, Gilbert instead fabricated allegations that the Plaintiff coaches sadistically forced K.W. to eat pepperoni with the specific intent to harm the player by violating his religious beliefs. Gilbert did this, and convinced his desperate clients to go along with it, because he knew that without the accusations that the coaches knew of and intentionally violated K.W.'s religious beliefs, there would otherwise be no viable legal claim worth pursuing. *See* **Exhibit 5**, Affidavit of Joshua Moskovitz, Esq., Ex. 1 (expert reports) ("[A]bsent allegations of religious discrimination, I see no viable lawsuit on Mr. Walker's behalf arising from the Incident. The allegations of religious discrimination were necessary to assert a threat of viable litigation."); **Exhibit 8**, Affidavit of Peter Pattakos, Esq., Exhibit 1 (Moskovitz Supp. Report). Gilbert also knew that these sensational and lurid accusations would create a firestorm of negative publicity for the

school district, thereby creating pressure on district officials to force a settlement, regardless of their utter falsity.

And Gilbert was in fact correct on both counts: First in that his false accusations—which he first publicized at a June 1, 2021 press conference at his office with Kenneth Walker at his side (Walker Tr. 97:4–6; 129:6–13)—would set off an explosion of sensational news coverage in the local, national, and international press. *See* **Exhibit 6**, Affidavit of Mary Slaven; **Exhibit 8**, Affidavit of Peter Pattakos, ¶ 4, Exhibit 8-B (Campbell Report). Every one of these articles quoted or referenced Gilbert's defamatory accusations that the coaches intended to harm K.W. by deliberately violating his religious beliefs in forcing him to eat pepperoni against his will. For example,

- Gilbert told the New York Times, in an article that was published on June 2, 2021, days before the coaches lost their jobs, that "[K.W.] is of the belief — and that's what hurts him so bad is — that the coach knew of his beliefs and wanted to punish him, and it's our view that it was done intentionally and that it was a punitive act." Gilbert Tr. 80:17–82; **Ex. 6**, Slaven Aff., ¶ 12, Ex. I, Claire Fahy, "High School Football Coaches Suspended After Teen Is Forced to Eat Pork, Lawyer Says," The New York Times (June 2, 2021), https://www.nytimes.com/2021/06/02/us/marcus-wattley-canton-ohio-mckinley.html; **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report).

- Two weeks later, on June 15, 2021, Gilbert told Fox 8 News in Cleveland that "This was a punitive act on the part of the coaches, an act that was deplorable and was designed to psychologically injure this child and we have now submitted this matter to the US Attorney as a possible hate crime and I understand as of yesterday they turned it over the FBI for a full investigation." Gilbert Tr. 95:23–250; **Ex. 6**, Slaven Aff., ¶ 28, Ex. X, Maia Belay, "McKinley High School video released of pizza incident; student's lawyer pursuing as hate crime," WJW (June 15, 2021), https://fox8.com/news/canton-mckinley-high-school-video-released-of-pizza-incident-students-lawyer-pursuing-as-hate-crime/; **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report)

- And on June 26, 2021, Gilbert appeared on the Talkline podcast with Zev Brenner, where he called Wattley "an ignorant African American coach" who was "anti-Semitic" toward K.W. and his family. **Ex. 6**, Slaven Aff., ¶ 27, Ex. W, Zev Brenner, "Talkline with Zev Brenner with Ed Gilbert Esq. on 'Jewish' Football Player Coerced to Eat Pork," YouTube (June 16, 2021), https://www.youtube.com/watch?v=jKNNuhaMHVI.; **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report).

These articles repeatedly reference Gilbert's accusations that Plaintiffs knew of K.W.'s religious beliefs, and intended to violate those beliefs. Gilbert even went so far as to say that it was "common knowledge among the football community" that K.W. "does not eat pork for religious reasons."[9]

[9] **Ex. 6**, Slaven Aff., ¶ 11, Ex. H, Stephanie Czekalinski and Kelly Kennedy, "Ohio football coaches allegedly force Jewish student to eat pork for missing practice," WOIO (June 2, 2021), https://www.wflx.com/2021/06/02/ohio-football-coaches-allegedly-force-jewish-student-to-eat-pork-for-missing-practice/ ("I mean it just crosses a line on every level, said the family's attorney, Edward L. Gilbert ... [i]t is common knowledge among the football community, Gilbert said, that the 17-year-old does not eat pork for religious reasons ... [t]o punish a kid like this for his religious beliefs is certainly beyond, it's ridiculous."); *See also* **Ex. 6**, Slaven ¶ 9, Ex. F, Kelli Weir, "Canton McKinley High School football player says he was forced to eat pork against religious beliefs," THE REPOSITORY (June 1, 2021), https://www.cantonrep.com/story/news/2021/06/01/mckinley-football-player-sue-canton-schools-religious-violation/5290290001/ ("Gilbert, speaking on behalf of the family, said the school district violated the player's constitutional rights when the coaches punished him on May 24 after he missed a voluntary May 20 strengthening and conditioning practice to nurse a slight shoulder injury he received during a previous practice."); ¶ 10, Ex. G, Jordan Miller, "Attorney: Canton McKinley football coaches forced player to consume pork against player's religious beliefs," JORDAN MILLER NEWS (June 1, 2021), https://www.jordanmiller.news/2021/06/01/attorney-canton-mckinley-football-coaches-forced-player-to-consume-pork-against-players-religious-beliefs/ ("Attorney Gilbert says Coach Wattley's actions were supported by a number of his assistant coaches. He says these actions are clearly in violation of the constitutional rights of the child ... [t]he family of the player intends to seek legal actions unless the district resolves the issue right away."); ¶ 13, Ex. J, Asaf Shalev, "Hebrew Israelite football student forced to eat pork as punishment," The Pittsburgh Jewish Chronicle (June 3, 2021), https://jewishchronicle.timesofisrael.com/jewish-football-student-forced-to-eat-to-pork-as-punishment-for-missing-practice/ ("[T]he student's religious identity and his avoidance of pork were known to Coach Wattley Marcus [sic] and other coaching staff, according to Gilbert."); ¶ 14, Ex. K, Bhvishya Patel, "Seven Ohio high school football coaches are FIRED after 'forcing a Jewish player to eat pepperoni pizza' as a punishment for missing voluntary training because he had an injury," Daily Mail Online (June 4, 2021), https://www.dailymail.co.uk/news/article-9645175/Teen-says-coaches-forced-eat-pork-despite-beliefs.html ("Following the allegations, James Pasch, regional director for the Anti-Defamation League's Cleveland office, tweeted: 'For school coaches to reportedly force a student to eat food in violation of his religious beliefs is unacceptable and outrageous."); ¶ 16, Ex. L, Shai Genish, "American Black Hebrew Israelite Forced To Eat Pork By High School Coach," Jewish Business News (June 3, 2021), https://jewishbusinessnews.com/2021/06/03/american-black-hebrew-israelite-forced-to-eat-pork-by-high-school-coach/ ("[T]he team's head coach Marcus Wattley did in fact know that the student had religious reasons for not eating pork."); ¶ 20, Ex. P, Lateshia Beachum, "High school football coaches lose jobs after forcing player who can't consume pork to eat pepperoni pizza," THE WASHINGTON POST (June 4, 2021), https://www.washingtonpost.com/education/2021/06/02/ohio-coaches-pepperoni-pizza-religion/ ("The announcement comes just days after Ed Gilbert, the family's attorney, said at a news conference Tuesday that the Canton City School District violated the child's First amendment rights when McKinley Senior High School head football coach Marcus Wattley and seven assistance coaches compelled the boy to eat pork on May 24 despite his numerous objections because of his faith ... 'the family is hurt by this. They're

Gilbert was also correct that his defamatory accusations would place substantial pressure on the district (or, more accurately, to give district officials political cover[10]) not only to fire the coaches, which happened only two days after he held his initial June 1 press conference;[11] but also to force a settlement of his client's claims.[12]

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hurt by this stupid act…it's beyond comprehension.'"); ¶ 24, Ex. T, Tyler Carey, "'False and inaccurate': Canton superintendent hits back at attorney who claims McKinley football coach was wrongly fired," WKYC (June 10, 2021), https://www.wkyc.com/article/sports/high-school/hs-football/canton-superintendent-hits-back-attorney-mckinley-football-coach-fired/95-e55e6472-be34-4269-bb78-b7341785cafb ("3News later broke the story of the specific claims made against the coaches, with the attorney representing the player's family saying the staff knew the teen could not eat pork due to his [sic] being a Hebrew Israelite."); ¶ 29, Ex. Y, Malcolm Hall, "Attorney: New photos show Canton McKinley football player at 2019 barbeque fundraiser," THE REPOSITORY (June 22, 2021), https://www.cantonrep.com/story/news/2021/06/22/photos-used-challenge-claim-mckinley-football-player-does-not-eat-pork/7765913002/ ("Gilbert said of the photographs ... 'If you look at those photos, my client has his hand under the table. The question is, 'Is he eating them?' And, 'Are they beef ribs?'"); ¶ 31, Ex. AA, Kevin Freeman, "More fallout over Canton McKinley pizza incident," FOX 8 NEWS (WJW) (June 24, 2021), https://fox8.com/news/more-fallout-over-canton-mckinley-pizza-incident/ ("'You do not want people like this teaching your children. I mean. It's just a bad example. They are bad role models,' Gilbert said."); ¶ 32, Ex. AB, Kelli Weir, "Canton superintendent: Ex-McKinley football coaches should be fired from noncoaching jobs," THE REPOSITORY (June 24, 2021), https://www.cantonrep.com/story/news/2021/06/24/canton-superintendent-jeff-talbert-says-mckinley-coaches-should-fired-day-jobs/5311668001/ ("The player's family has accused the coaches of forcing the player to eat a pepperoni pizza against his Hebrew Israelite faith as punishment for missing a voluntary strengthening and conditioning practice due to a slightly injured shoulder. The family says the punishment devastated the player and he has undergone psychological counseling."); ¶ 15, Ex. AC, Asaf Shalev, "Hebrew Israelite student in Ohio forced to eat pork after missing practice," THE TIMES OF ISRAEL (June 3, 2021), https://www.timesofisrael.com/jewish-football-student-in-ohio-forced-to-eat-to-pork-after-missing-practice/ ("'[T]he students [sic] religious identity and his avoidance of pork were known to Coach Wattley Marcus [sic] and other coaching staff ... I mean it just crosses a line on every level, it's just wrong."'); **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report).

[10] *See* Section III.L., *infra*.

[11] Gilbert wrongly suggests in his MSJ, at pages 28–29, that Plaintiffs had an administrative avenue to restore their coaching jobs at McKinley. They indisputably did not, nor did they have any obligation, moral, legal, or otherwise to go back to work in administrative positions for the same parties that egregiously defamed and wrongly terminated them.

[12] *See Plaintiffs' Motion to Compel Kathryn Perrico's Compliance with Subpoena, and Brief in Opposition to Canton City School District and Ms. Perrico's Motion to Quash and Motion for Protective Order*, filed on May 28, 2024, and Plaintiffs related reply brief, filed on June 14, 2024. *See also* **Ex. 6**, Slaven Aff., ¶ 10, Ex. G,

H. After Gilbert's efforts to extort a quick settlement failed, he was forced to file suit over his defamatory claims, yet remains unable to point to a single fact to justify his defamatory accusations that Plaintiffs deliberately violated K.W.'s religious beliefs.

Nor did Gilbert file suit "right away," after his efforts to extort a quick settlement from the district failed. Rather, he allowed nearly seven full months to pass from the date of his initial June 1, 2021 press conference before he filed a conclusory and frivolous 13-page complaint in late December asserting claims on K.W.'s based on the defamatory accusations. Gilbert's filing also came a full six months after Plaintiffs filed their detailed 67-page complaint in this suit, and a full three months after Plaintiffs—in their brief in opposition to Gilbert's motion to dismiss the claims against him in this suit—presented caselaw holding that defamatory statements are not protected by any privilege when they are not made in the regular course of preparing for and conducting a proceeding that is contemplated in good faith and under serious consideration." Plaintiffs' Sept. 13, 2021 brief in opposition to Gilbert's MTD, p. 2, quoting, *inter alia*, *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 53.

Jordan Miller, "Attorney: Canton McKinley football coaches forced player to consume pork against player's religious beliefs," JORDAN MILLER NEWS (June 1, 2021), https://www.jordanmiller.news/2021/06/01/attorney-canton-mckinley-football-coaches-forced-player-to-consume-pork-against-players-religious-beliefs/ ("The family of the player intends to seek legal actions unless the district resolves the issue right away."); ¶ 8, Ex. E, Will Ujek, "Father of Canton McKinley football player says coaches forced son to eat food against his religion as punishment," WKYC, (June 2, 2021), https://www.wkyc.com/article/news/local/canton/father-canton-mckinley-football-player-says-coaches-forced-son-against-religion-as-punishment/95-8687daee-4656-4e01-9228-4eeaf0614216 ("We want to get to the bottom of it as well, and if we have to go through a lawsuit to do it, then it's on."); ¶ 20, Ex. P, Lateshia Beachum, "High school football coaches lose jobs after forcing player who can't consume pork to eat pepperoni pizza," THE WASHINGTON POST (June 4, 2021), https://www.washingtonpost.com/education/2021/06/02/ohio-coaches-pepperoni-pizza-religion/ ("Gilbert said he and the family would like to work something out with the school district as it wraps up its investigation."). ¶ 29, Ex. Y, Malcolm Hall, "Attorney: New photos show Canton McKinley football player at 2019 barbeque fundraiser," THE REPOSITORY (June 22, 2021), https://www.cantonrep.com/story/news/2021/06/22/photos-used-challenge-claim-mckinley-football-player-does-not-eat-pork/7765913002/ ("I have to give credit to Talbert. He came out and said it (punishment) was indefensible ... the district has talked with us about not filing a lawsuit…[w]e are in deliberation now.""); **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report).

Despite that Plaintiffs' complaint is packed with detail supporting their defamation claims, including recorded statements of multiple eyewitnesses, Gilbert's complaint does not contain a single allegation to rebut these statements, nor any additional detail that would shed light on the truth of the accusations he first made at the June 1 press conference.

And even more incredibly, despite that Gilbert has had every opportunity to conduct discovery in this case, he has not obtained a single statement from a single witness, or any other evidence that would support the notion that Plaintiffs' deliberately violated K.W.'s religious beliefs. Instead, all he has done is hide behind utterly baseless claims of privilege, claiming that he is not only immunized from liability for his malicious and destructive lies, but also for having to answer for his basis for having made them in the first place. *See* e.g., Gilbert Tr. 6:12–16; 10:15–24; 29:20–27; 36:24–43; 39:23–33; Gilbert Tr. 64:4–9; 134:12–21. *See also* **Exhibit 7**, Affidavit of Paul De Marco, Ex. 1 ("[T]his is not a case in which Mr. Gilbert can properly invoke either the attorney-client privilege or the work-product doctrine to avoid having to divulge the facts he knew at the time he made the accusations at issue in this suit. ... The fact that in late December 2021 Mr. Gilbert incorporated the same accusations into the federal court complaint that he filed on behalf of the Walkers did not retroactively create an ethical obligation on his part not to divulge in this action the facts he knew at the time of his statements to the press in June 2021.").

From these facts, in combination with those set forth in the sections above, the jury may readily infer all of the following: First, that Gilbert never intended to file suit on K.W.'s claims because he knew they would not withstand the slightest bit of discovery; Second, that his settlement talks with the district failed as a result of Plaintiffs having filed their complaint in this suit last July, which exposed the utter lack of factual or legal merit to Gilbert's accusations (*see* FAC ¶ 103; footnote 5, *supra*); and third, that Gilbert had no choice but to file the federal suit once he realized the district wouldn't offer him a settlement in order to even begin to mount a defense of the

defamation claims against him here, and also in desperation to obtaining a stay of this case—which he has now sought, and been denied, twice—to keep the truth from coming out.

I. Gilbert's testimony confirms that he never had any factual basis for his defamatory and extortionate statements against the Plaintiffs, and not only did nothing to legitimately investigate those claims, but went out of his way to deny and conceal the truth.

At his continued deposition on November 15, Gilbert was first asked whether he had made various statements attributed to him in news reports, including his statements, reported by WOIO Cleveland, that "it is common knowledge among the football community that [K.W.] does not eat pork for religious reasons," and that the coaches "punish[ed K.W.] for his religious beliefs." Gilbert Nov. 15 Tr., 5–6, Ex. 14. In response, Gilbert claimed that he couldn't remember saying these things. *Id.*

Gilbert was then asked to confirm that he has "said publicly that the coaches knew that [K.W.] could not eat pork due to his Hebrew Israelite religious beliefs when they decided to serve him pepperoni pizza." *Id.*, 7:1–15. In response, Gilbert again claimed that he couldn't "remember saying that or not," despite numerous news articles to the contrary, and the fact that Gilbert had sued the coaches for intentionally violating K.W.'s religious beliefs. *Id.*, 7:16–17; 8:24–9:9 *See also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) ("[I]nvidious discriminatory purpose" is required to establish a civil-rights claim under 42 U.S.C. 1983); *Colvin v. Caruso*, 605 F.3d 282, 293-94 (6th Cir. 2010) (incidents of "negligence" insufficient to support a free-exercise claim under the First Amendment claim; "willful" violation of religious beliefs is required); *Novak v. City of Parma, Ohio*, No. 21-3290, 2022 WL 1278981, at *8 (6th Cir. Apr. 29, 2022) ("[A] mistaken understanding of First Amendment law is far from intentional harm.").

Then, Gilbert was asked "what was your factual basis for your allegations that the coaches violated [K.W.'s] First Amendment rights?" *Id.* 10:3–5. In response, he claimed, "I can't answer that," because "it would reveal certain information that is privileged." *Id.* 10:10–15.

After it was pointed out to Gilbert that the Court's September 2 order states that Plaintiffs' counsel "may inquire as to the facts known by the Defendant at the time the alleged statements were made," his attorney then stated that the Court's order is "inconsistent," and that it's "not [his] issue." *Id.* 11:7–12:10.

Gilbert then stated that "the factual basis" for his statement that "the coaches knew of K.W.'s beliefs as of the date of the punishment" is "privileged," as is, according to Gilbert, "what [he] did to investigate the truth of those allegations," apart from having "initially wr[itten] a letter to the other side requesting" information and documentation. *Id.* 12:25–13:21.

Then, after continually refusing to acknowledge that he accused the coaches of serving K.W. pepperoni intentionally to violate his religious beliefs (*Id.* 13:22–20:12), which was the entire basis of the federal lawsuit he threatened at his globally publicized press conference, and eventually belatedly filed against the coaches, Gilbert then said he had "no answer" for his well-documented and already admitted statement, published by Fox 8 News, that the coaches committed a "hate crime" against K.W. *Id.* 20:13–22; Gilbert 07/25/2022 Tr. (AM session), 99:20–103:3.

At this point, the subject of the deposition shifted to the efforts Gilbert made (or didn't make) to investigate the truth of his accusations once prominent news reports were published quoting K.W.'s teammates who refuted the notion that the Coaches intended to violate K.W.'s religious beliefs by serving him pepperoni pizza. *Id.*, 21:2, *et seq.*

Here, Gilbert first said that he could not remember whether he had read a June 7 Canton Repository report, issued five days after his initial June 2 press-conference from which his accusations were globally broadcast, in which it was reported that several McKinley "football players who were at the May 24 workout have said that the coaches never forced the player to eat pizza, and they gave the player the choice of eating chicken nuggets instead." *Id.* 21:2–22:15.

Gilbert then testified, "I didn't say I didn't see [the report], I said I don't remember reading it," before claiming that he "doesn't know" whether he would have been interested in learning about such a report at the time it was issued. *Id.* 22:18–22:20.

When he was asked whether he "did anything to follow-up and investigate whether the coaches gave K.W. the choice of eating chicken nuggets," Gilbert said "I don't remember, I don't know." *Id.* 23:3–11.

And when he was asked whether there was "anything else" he could say "about anything [he] did to investigate the claims he made" against the Plaintiffs, "apart from sending a letter to the school district," Gilbert could only say that he "recall[s] getting a video of the incident." *Id.* 23:12–20. Here, Gilbert was referring to the surveillance video of the incident that has been widely publicized, contains no audio, sheds no light on what was actually said during the incident, including as to what food K.W. was offered and why, and which also has two minutes dubiously missing that would have depicted K.W. hugging his coaches after the allegedly abusive incident. *See* Plaintiffs' 09/06/2022 Brief in Opp. to SJ, p. 35–36 (citing and quoting deposition testimony).

Gilbert then said that he also had "discussions with counsel for the school board" about the incident (Nov. 15 Tr. 24:3–4), but that "the only thing [he] recall[s]" about those discussions is "the school board counsel saying that they would not provide any information at some point." *Id.* 25:14–26:4.

At this point, Gilbert was reminded that the school district had actually produced a number of documents in this lawsuit, reflecting its official records of its investigation of the pizza incident, including several eyewitness statements, pursuant to a subpoena served by Plaintiffs' counsel. *Id.* 26:5–27:1.

From here Gilbert's delivered some especially preposterous testimony, including: (1) that he "do[es]n't know anything about" the subpoena served on the school district in this lawsuit (*Id.*

27:20–25); (2) that he has "reason to doubt" that the district produced documents relating to its investigation of his claims about K.W. (*Id.* 28:1–7); (3) that he's "not sure" whether he's seen any records of the district's investigation, including the notes from the district's interviews of eyewitnesses, some of whom said that the coaches offered K.W. an alternative to the pepperoni pizza; (*Id.*, 28:10–29:2); and (4) that he's "not even sure [he] was aware" that K.W.'s teammates had made such statements, let alone that he did anything to investigate whether these statements were true or not. *Id.* 28:25–29:5. Then, when shown copies of the eyewitness statements from the school-district's records, Gilbert said this was the "first time" he has seen them, said "no" when asked whether he was surprised that this was the first time he'd seen these witness statements before, and that he's "not sure" whether he had ever "bec[o]me aware ... that there were players in the room saying that the coaches offered K.W. something else to eat after he told them he didn't eat pork." *Id.* 30:20–32:22, Ex. 19. And when asked whether he had investigated the truth of the recorded witness statement that "one of the other coaches said [to K.W.] I will go get you something else to eat," Gilbert said "I don't recall." *Id.* 33:9–25, Ex. 19.

At this point, a break was taken (*Id.*, 34:1) and, continuing the pattern established at the deposition of K.W. in this lawsuit, Gilbert came back from the break to change his testimony, presumably on the advice of counsel. Despite having already testified that he was "not even sure [he] was aware" that K.W.'s teammates had made statements that the coaches offered K.W. an alternative to the pepperoni pizza (*Id.* 28:25–29:5), after the break he said he "was aware [of this] at some point." *Id.* 35:6–10. He also said that he "recall[s] talking with counsel for the school district" about this information (despite his earlier testimony that "the only thing [he] recall[s]" about those discussions is "the school board counsel saying that they would not provide any information at some

point" (*Id.* 25:14–26:4)), and that he "talk[ed] with [his] client," and "a few students" as well. *Id.* 35:11–16.[13]

Gilbert then said he "do[es]n't remember" which students he spoke with, and when asked if he remembered what those students told him, he refused to answer his question based on his attorney's instruction that this was privileged "work product."

Then Gilbert testified about the missing two-minute gap in the school district's surveillance video of the pizza incident, saying that he had nothing to do with the video being edited or altered, never did anything to investigate the lapse, and has no information about its source or how it happened. *Id.* 37:1–39:15.

Finally, he refused to answer questions about his net worth, or whether he was having money problems that would create a motive to lie, and the deposition concluded. 39:16–40:19.

J. K.W. has admitted to at least one close friend that he regrets that the defamatory accusations were made on his behalf, and that the matter was "out of his hands" due to the "influence" of his father and their attorney, Gilbert.

At his deposition, Mani Powell, testified that he and his teammates on the McKinley football team "all loved and cared for [K.W.]," which underscores the revealing fact that not a single one of these teammates has spoken up in K.W.'s defense in this case. Powell Tr. 7. Powell also testified that he "had a close connection with [K.W.]" and "spent time with him outside of football." *Id.*.

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[13] *See Noble v. VFW Post 9904 Greentown*, Stark C.P. No. 2019CV02304, 2020 Ohio Misc. LEXIS 984, at *7 (Nov. 30, 2020), citing *Wivitowicz v. Eschtruth*, 9th Dist. Lorain No. 95CA006203, 1996 WL 183111, *5 ("The Court finds that the self-serving testimony of Plaintiff in his affidavit, taken together with his actual deposition testimony and the changes made in the errata sheet, create credibility issues that can only be resolved by the trier of fact."); *Bishop v. Admr., Bur. of Workers' Comp.*, 146 Ohio App.3d 772, 787, 2001-Ohio-4274, 768 N.E.2d 684 (10th Dist.) ("The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. ... When a deponent reviews his or her deposition testimony under Civ.R. 30(E) and makes changes in the form and substance of such deposition testimony, both the original testimony as well as the changes remain in the record and are to be considered by the trier of fact.").

Pursuant to this "close connection," Powell explained, K.W. told him that he wished that the Plaintiff coaches hadn't lost their jobs over his accusations, and that he otherwise didn't want this episode to "go as far as it did" but that the matter was "out of his hands" due to the "influence" of "other parties." Powell Tr., 24–26 (A. " ... I don't even think [K.W.] wanted this to go as far as it did, but, you know, other parties might have influenced it, but I feel like he had – he had a great connection with these coaches and that the coaches believed in him maybe more than he believed in himself sometimes." ... Q. "... [W]hat do you mean when you say you that you don't think [K.W.] wanted this to go as far as it did, why do you believe that?" A. "...[A]fter I found out that the thing was getting the coaches fired and things like that, I got in touch with [K.W.] and asked him how he felt about it and he told me that, that's what he told me, he told me that he didn't want it to go this far, but it got out of his hands, basically.").

This testimony affirms not only that the Plaintiffs did nothing to harm K.W., but that K.W. is, to a significant degree, a victim of manipulative adults who have influenced him to lie about the pizza incident, and who have lied about the incident themselves, to serve their own interests.

K. Grimsley intentionally misrepresented the pizza incident to aid and abet Gilbert's and his clients' defamatory accusations with the purpose of ensuring Plaintiffs' termination as McKinley's football coaches.

It is likely that Gilbert never would have had the chance to concoct his defamatory accusations had Grimsley not planted the seed by reaching out to K.W. and his father to misrepresent the pizza incident, suggest they hire a lawyer to threaten a lawsuit over it, and promise to assist them with their defamatory campaign. Worse, after having started the fire, Grimsley threw gas on it by deliberately misrepresenting to district officials that the Plaintiffs did in fact force K.W. to eat pepperoni against his will, knowing that this lie would give credence to the sensational accusations that Plaintiffs deliberately harmed K.W. by violating his religious beliefs, and that it would cost Plaintiffs their jobs as McKinley football coaches.

Grimsley coveted Wattley's job as McKinley's head football coach, which he had applied for when it was awarded to Wattley in 2019. Grimsley Tr. 218:2–16. Grimsley was not only born and raised a Canton McKinley Bulldog, his family name is legendary in the program's history, with several of his relatives having gone on to careers in the NFL. Grimsley Tr. 13:23–42 (Q. "Your family's McKinley football legends, right?" A. "Sure."); 13:15–19; 15:1–30. Thus, when the head coaching job that McKinley has struggled to fill in the two decades since the legendary Thom McDaniels last won a state championship in 1997, Grimsley had high hopes for his application packet, which he admitted was "the most important document [he'd] ever prepared in [his] life," and which contained letters of recommendation from two former McKinley head coaches and one of the program's biggest financial boosters. Grimsley Tr. 40:9–15; 42:6–9.

But Grimsley hasn't graduated college, never played for a Division I college program, and has never been a varsity head coach of a high school program, unlike Wattley, who had done all of these things and more when the two were up for the McKinley job. Grimsley Tr. 31:18–26; Wattley Tr. 25:9–32:8. *See also* **Ex. 6**, Slaven Aff. ¶ 4, Ex. A, Kelli Weir, "Wattley officially hired as McKinley head football coach," THE REPOSITORY (April 18, 2019), https://www.cantonrep.com/story/news/local/canton/2019/04/09/wattley-officially-hired-as-mckinley/5495763007/; ¶ 5, Ex. B, Joe Scalzo, "New McKinley coach Marcus Wattley comes highly recommended," AKRON BEACON JOURNAL (Apr. 14, 2019), https://www.beaconjournal.com/sports/20190414/new-mckinley-coach-marcus-wattley-comes-highly-recommended ("He [Wattley] has a special connection with the kids" and "Man, he's an amazing coach" and had "great players coming out of St. V."); **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report); **Ex. 3**, Boarman Aff., Ex. 1 ("I coached Marcus Wattley at Copley High School where he was one of the best and hardest working players I ever coached. I also hired Marcus as an assistant on my staff at St. Vincent. St. Mary, where he did such an excellent job that I recommended him as my successor as head coach when I retired.").

Also unlike Wattley, Grimsley had a lengthy history of misdemeanor convictions for drunk and disorderly behavior. Grimsley Tr. 318:1–322:8. Grimsley therefore was not one of the final three candidates for the job that was ultimately awarded to Wattley, and he undoubtedly realized that he would not have a puncher's chance at a head-coaching position until the McKinley job came open again. Grimsley Tr. 328:4–9.

Grimsley's disappointment had only increased in the days leading up to the pizza incident, when he was informed that he wouldn't be asked to return to the football team's coaching staff for the following season, as Wattley and his staff, entering their third year on the job, had the team poised to compete for a state championship. Humphrey Tr. 117:3–6 (Q. "Did they ask Mr. Dixon and Mr. Hall, specifically ask you to reassign Josh Grimsley to a different position?" A. "They asked if I could."); Smith Aff, ¶ 5, ("We had been having a great spring of practices as a team and had high hopes for the 2021 season"); Vazquez Aff ¶ 4, "We had been having a great spring of practices as a team and had high hopes for the 2021 season.").

Thus, Grimsley saw the pizza incident as an opportunity to restore his status with the program, and re-open the same "revolving door" that allowed him to believe he was a viable candidate for the head coaching job in the first place, by manipulating a teenager who, Grimsley believed, "ha[d] some mental health issues." Grimsley Tr. 42:6–10; 217:6–15. So, after having been present in the gym for the entirety of the pizza incident, and not "do[ing] anything to stop it," "because [K.W.] wasn't – he wasn't being harmed or anything," Grimsley "took an hour or two to process" the event, and decided to call K.W. to tell him that the incident was "the worst thing he's seen" at a football practice and that he would "try to get [him] help." Grimsley Tr. 88:5–7; 92:6–14. K.W. Tr. 177:23–178:3.

Notably, Grimsley—who had been away from the program until the day of the pizza incident due to his duties as an assistant baseball coach, and who, in his application for the head-

coaching job, stressed the importance of a coach keeping "open lines of communication"—called K.W. without making any effort to speak with any of the other coaches about the pizza incident first, let alone to understand the purpose of the exercise. Grimsley Tr. 93:13–95:12 ("Q. And you called to report them and you called the kid, too, who you had never called before, without making any effort to talk to your coaches to ask them what was going on? A. Yeah. Q. Even though you had been away from the program because you were at baseball, right? A. Correct. Q. And that was your first day back in the facility? A. Uh-huh."). Further evidencing Grimsley's ulterior motive, it is also notable that he—much unlike Wattley, who was in constant contact with K.W. and served as a father figure to him (K.W. Tr. 109:24–111:1)—had "never" before "texted [K.W.] or called [him] to check on his well-being." Grimsley Tr. 93:1–9.

Phone records produced by Grimsley's service carrier, AT&T, show that he first spoke with K.W. by phone for approximately 4 minutes at 9:57 PM on the date of the pizza incident, then the pair had five separate phone conversations with him on the following day, lasting two and a half, four, three and a half, one, and six minutes, respectively. **Exhibit 9**, Grimsley's phone records from AT&T; **Exhibit 10**, Wattley Aff., ¶ 3 (confirming K.W.'s phone number). Grimsley and K.W. then had two more phone conversations on the following day, May 26, lasting about six minutes, and forty seconds, respectively. *Id.* And they had two additional calls on May 27, each lasting about three and a half minutes, which were the last calls they had until a two and a half minute conversation on June 3, at 10:20 PM, just hours after Wattley and his staff were terminated at that evening's school board meeting. *Id.* This is a total of *ten* phone conversations in the three days following the incident.

These phone records, combined with text messages produced by Grimsley, show that he convinced K.W. to posture as a victim in this case, including by baiting K.W. into sending text messages complaining about the incident that Grimsley could then forward to district officials to misrepresent the incident as abusive. Grimsley Tr., 244:6 (discussing his text messages with K.W.

and Humphrey, including K.W.'s statement that, "*I'm not Muslim, I just don't eat pork*."); Humphrey Tr. 29:21–33:1 ("I received text messages ... and a phone call from Josh Grimsley, and then he had continued to send me some text messages and copies of text messages from the student who was involved ... [M]y interpretation was that the student was more upset about the embarrassment of the incident rather than what he ate or didn't eat.") K.W. Tr. 184:12–25; 185:1–25; 186:1–2 ("A. So when the news had broke to the internet, I had called Coach Thatch, and then Coach McLeod had put me on speakerphone and started questioning me. And then I remember one of the things was like, they're trying to say that we harmed you, but in my thought I was thinking that physically harm, not like anything else, so I was like, no, I'm going to get this straightened out with Coach Hall the next day, that's what I said. ... Q. What did you mean by that, 'get it straightened out?' A. Like clear it up so that they wouldn't be in deeper trouble ..."). Grimsley also admitted at his deposition that he told Walker on his initial phone call that the coaches specifically forced K.W. to "eat the fucking pepperoni," a fact that K.W. denied at his deposition. Grimsley Tr. 124:1–17; K.W. Tr. 262:6–9. From this evidence, the jury may also infer that it was Grimsley who first suggested to K.W. and his father that they should retain an attorney, and that they, along with that attorney, Gilbert, knew they could count on Grimsley to continue to misrepresent the pizza incident as abusive in support of their efforts to extort a settlement from the school district.

And Grimsley did in fact continue to assist Gilbert and his clients in destroying Plaintiffs' careers, including by lying to district officials about the incident. The same Josh Grimsley who had,

- just months before the pizza incident urged his fellow coach to "mentally getting in [their players'] asses," "fuck them up in the weight room," and "kick their asses!" because "they love that shit" (Grimsley Tr. 101:19–105:12, Ex. 2),
- who had admitted that he did nothing to intervene in the incident because "[K.W.] wasn't being harmed or anything (*Id.* 88:5–7), and,
- who admitted his awareness that Wattley had employed a similar coaching technique at practice the previous year without incident (*Id.* 75:25–80:8),

- and who knows as well as anyone that it is commonplace for football coaches to single out underperforming players at practice, and to discipline the whole team for an individual player's mistake (footnotes 1–4, *supra* (summarizing evidence))

told district officials, in their official investigation of the incident, how "fucked up" it was, and how he was in "disbelief" and made "very uncomfortable" by the fact that his fellow coaches had asked a player to relax and enjoy some Gatorade and pizza during a training session, over the course of approximately twenty minutes, while his teammates performed basic exercises with 45-pound weight plates in the same room, to teach him and his teammates a lesson about teamwork, leadership, and accountability. *Id.* 274:2–14 ("Q. "Is there anything in here that is an inaccurate reflection of what you said in this interview?" A. "I didn't notice anything."), Ex. 9 (interview notes).

In this same interview with district officials, Grimsley also pretended that he didn't understand the purpose of the pizza incident. *Id.* Additionally, Grimsley, who by now was aware that Gilbert and his clients were seeking to extort the district with their false claims that the coaches deliberately violated K.W.'s religious beliefs by serving him pizza (*Id.* 275:1–9), made two specific misrepresentations intended to convince district officials of the same. First, despite that he was present for the entire incident (*Id.* 88:5–7), and, like the other eyewitnesses whose testimony is summarized above, knew that the coaches offered K.W. an alternative to the pepperoni pizza after the player complained that he didn't eat pork (Section III.C., *supra*), Grimsley misrepresented to district officials that no alternative meal was offered. *Id.*, Ex. 9 ("No statements about chicken nuggets."). Additionally, knowing that any claim that the coaches harmed K.W. would depend on a finding that they violated his religious beliefs, Grimsley specifically misrepresented that Plaintiff Thatcher shouted at K.W. to "eat the fucking pepperoni" after the player had indicated his resistance to eating pork. Id., 88:5–11 ("Q. But you didn't do anything to stop it? A. Yeah, because he wasn't – he wasn't being harmed or anything. ... I had no idea about his pizza, the pizza whole pork thing. I didn't even know he was Muslim or whatever it is."); 90:10–16 ("Q. [I]f this was all so

wrong, why didn't you stop it? ... A. He wasn't in any physical danger. ... And I didn't know anything about the pork."), 285:13–16, Ex. 9 ("Q. ... Coach Thatcher said, 'You'll eat the fucking pepperoni.' You said all that to the district? A. I did.").

Not only do all of the Plaintiffs deny that any of them forced K.W. to eat the pepperoni, K.W., at his deposition, testified that he too had no memory of any such thing. K.W. Tr. 262:6–9 (Q. "Do you recall any coach saying to you after you had allegedly refused to eat the pizza, "You'll eat the fucking pepperoni?" A. "Doesn't – I don't recall").

Plaintiffs were terminated from their jobs within days of Grimsley having made his defamatory statements to the district. Grimsley Tr. 275:1–26.

L. The school district's failure to account for any of the above-discussed evidence shows that its investigation was a defamatory sham, as confirmed by the testimony provided by its officials in this case, and the evidence showing that it deliberately destroyed portions of its surveillance video of the incident to serve its defamatory narrative.

The evidence set forth above only illustrates the utter lack of legitimacy to the district's decision to terminate the Plaintiffs and the defamatory nature of the same. As summarized in Section III.F, above, and further confirmed by the voluminous evidence summarized in Sections III.C. and D., every witness the district interviewed about the incident confirmed that the coaches offered K.W. an alternative to the pepperoni pizza once he stated that he didn't eat pork, and that their rushed and incomplete investigation turned up no evidence that the coaches knew of K.W.'s alleged religious beliefs. Additionally, testimony by superintendent Talbert and school board president Rinaldi, along with records of the district's investigation, confirm that it turned up no credible evidence that Plaintiffs caused or risked harm to K.W. or any student, or otherwise exceeded their broad and commonly understood discretion as football coaches in training and disciplining their players. Talbert's and Rinaldi's efforts to pretend to the contrary are transparently baseless, and reflect the same denial of the fundamental realities of the game of football relied upon

by the other Defendants in this case. Rinaldi Tr. 27:14–23 ("Q: Football coaches, they have a lot of discretion on how they decide to essentially motivate their players and get them to perform at their best, correct? … A: Yes. Q: And that would include high school coaches as well, correct? A: Yes."); 27:24–28:11 ("And so some coaches might take a, you know, quote, 'drill sergeant' type approach to coaching players, and some might take a different approach. They might be more useful, as you said, correct? A: Yes. Q: And you've seen both, correct? A: Yes."); 133:21–138:6 ("Q: In your experience, you've seen coaches single out players in front of their teammates, correct? A: Maybe with some bear crawls or something like that. … Q: So … you have seen players singled out by coaches in front of their teammates, sometimes to do physical activities in front of their teammates, correct? A: Through the course of the years, yes."); Talbert Tr. 41:17–42:7 ("Q: Football coaches shout at their players to motivate them, correct? A: Yes."); 42:8–44:11 ("Q: Have you made players do extra exercises, extra workouts because you thought they either weren't committed to the team, committed to, you know, giving 110%? A: Yes […] Q: And what's the purpose of […] those types of exercises and practices with respect to the team? A: Those types of exercises are done because you are one and you are a collective group. Q: So the mistake of one becomes the mistake of everybody? A: Correct."); 153:24–25 ("I believe they felt that they were doing something to inspire that young man, yes."); *But see* Talbert Tr. 154–157 ("You don't put a kid in the middle and shame him into doing something. That's against everything we believe. ... Putting a kid in the middle saying, you sit here and eat while you watch your friends work out is – how is that motivating him to do something different? ... We don't do that.").

Discovery in this case has in fact revealed substantial additional evidence showing the defamatory and malicious purpose of the district officials in terminating the coaches. This includes the evidence showing that Rinaldi did everything he could to undermine Marcus Wattley's candidacy for the McKinley job; Grimsley Tr. 61:25—66:1 ("A. ... [T]o make a guy have to sit there and wait to

be hired was an awful look, but – Q. What do you attribute that to? A. I think there was some school board members behind it. ... Q. Who didn't want Marcus to have the job? A. I think so. Q. Who was that? A. One of them being John Rinaldi. ... it was a black eye."); Rinaldi Tr. 153:13–164:5 (explaining the weeks-long delay in Wattley's hiring after he had been identified as the top candidate by the selection committee); and also evidence showing that the district officials went out of their way to rush their investigation and ignore the players who were eager to tell the truth about the pizza incident. **Ex. 2**, Vazquez Aff. ¶ 12 ("After the accusations against Coach Wattley and his staff went public, a group of my teammates and I tried to tell anyone who would listen what really happened. No one at the district wanted to interview us or seemed to care what we had to say."); Talbert Tr. 183:3–184:25 (confirming same).

And no less troubling is the fact that a two-minute long chunk of the surveillance video capturing the pizza incident—which would have captured K.W. coming up to Coach Wattley after the exercise was finished, hugging his coach, and thanking his coaches for not giving up on him—has somehow mysteriously disappeared from the school district's file and remains unrecoverable to date. Talbert Tr. 178:11-20 ("Q. But we don't know what happened between two minutes and two minutes – I'm sorry. We do not know what happened between 2 p.m. and 2:02 p.m., because the video does not show that time period, correct? A. Correct. Q. Do you know why that is? A. No, I can't tell you why, no."); Humphrey Tr. 51:14–52:14 ("Q. For the record, we're now at 1:59 p.m. and 58 seconds, correct? A. Yes. Q. So about 2:00 p.m.? A. Correct. Q. Okay. I'd like you to keep watching that time index. (Thereupon the video was played) Q. Did you see the time again jump? 23 A. Yes. Q. It jumped from about 2:00 p.m. and about four or five seconds to 2:00 p.m. and 20 seconds, did you see that? 2 A. Yes, I do. Q. Okay. I'd like you to -- and just to confirm, 4here are still, here we have about six or seven individuals in the gym, correct? A. Yes. Q. Including individuals moving around in the gym, correct? 9 A. Correct. Q. The video should have recorded

throughout this time because of the individuals in the gym and 12 the motion, fair? A. Correct.); Wattley Tr. 288:13–25 ("Khalil thanked me and hugged me and told me he loved me and not giving up -- giving up on him and to stay with him and to stay in his corner, and he thanked Coach Thatcher, he thanked Coach McLeod, he thanked Coach Brodie, he thanked his teammates for not giving up on him and sticking around with him and staying in his corner."); 302:9-16. ("Q. So I see -- so I know from you what is missing in this film. A. A lot. Q. So we can go back to the school and tell them to give that piece to us. What will we see? A. It was a peaceful conversation between a player and his coach.").

IV. Because Plaintiffs have submitted viable proof on all of their material allegations against Defendant Gilbert, Gilbert's motion for summary judgment must be denied for the same reasons the Court previously denied summary judgment in *Wattley I.*

Defendant Gilbert has not offered evidence that would negate Plaintiffs' substantial proof against him, summarized above. Thus, his motion for summary judgment should be rejected for the same reasons the Court denied his motion to dismiss, as set forth fully below.

In *Wattley I*, the Court held that Plaintiffs' claims against Gilbert were sufficient to survive summary judgment. Specifically, record evidence and reasonable inferences therefrom, construed in the light most favorable to Plaintiffs establishes that: (1) that Gilbert made "made false statements of fact," (2) "not in the context of any ongoing or imminent legal proceedings, and not within a judicial proceeding, but to the press," (3) "that these statements included accusations that Plaintiffs intentionally and deliberately engaged in discriminatory anti-Semitic conduct against K.W., forcing him to eat a pepperoni pizza with knowledge of his religious restrictions, and that Plaintiffs did so punitively and with a purpose to psychologically injure K.W.," (4) "that these statements were made with knowledge of their falsity, with an intent to injure Plaintiffs' reputations, and with the intention of implying that Plaintiffs had engaged in criminal activity," and (5) "that these statements ... were not made in a court proceeding" but were rather "made falsely, in order to 'force a settlement' from

the school district."

Additionally, given evidence showing the malicious nature and bad faith of Gilbert's statements, Gilbert cannot be entitled, "as a matter of law," to any finding that the statements attributed to Gilbert and his client, Walker, were "made in the regular course of preparing for and conducting a proceeding that is contemplated in good faith and under serious consideration; (2) pertinent to the relief sought; and (3) published only to those directly interested in the proceeding." *Id.* p. 41, quoting *Morrison v. Gugle*, 142 Ohio App.3d 244, 755 N.E.2d 404, (10th Dist.2001). Thus, Plaintiffs have presented sufficient evidence to establish that Gilbert's statements are not protected by a litigation privilege. At a minimum, the record creates an issue of fact as to whether the litigation privilege applies to Gilbert's statements in this case.

This conclusion is consistent with the principle set forth in the Restatement (Second) of Torts § 586, comment e—"The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered"—as adopted by Ohio courts, including the Supreme Court of Ohio that has affirmed that "attorneys are not given carte blanche to defame others under the guise of litigation." *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90. It is also consistent with decisions issued by courts nationwide affirming the same.[14]

[14] *See*, *e.g.*, *Ralston v. Garabedian*, E.D.Pa. No. 19-1539, 2021 U.S. Dist. LEXIS 244741 (Dec. 23, 2021) (demand letter accusing teacher of sexual abuse not covered by litigation privilege where there is not a good faith basis to believe that litigation was contemplated); *Giuffre v. Maxwell*, S.D.N.Y. , 2017 U.S. Dist. LEXIS 64405 (Mar. 27, 2017) (on summary judgment, press release accusing the plaintiff of lying about being sexually abused by Ghislaine Maxwell not covered by litigation privilege); *Rogers v. Dupree*, 349 Ga. App. 777, 824 S.E.2d 823 (Ga. Ct. App. 2019); *Various Mkts. v. Chase Manhattan Bank, N.A.*, 908 F.Supp. 459, 466 (E.D.Mich.1995) ("Chase's contention that Michigan would extend the absolute judicial proceedings privilege to a pre-lawsuit letter has no legal support whatsoever. In fact, the Michigan Supreme Court has expressly refused to so extend the privilege."); *Menaker v. C.D.*, E.D.N.Y. No. 2:17-cv-5840 (DRH)(AYS), 2018 U.S. Dist. LEXIS 187377 (Nov. 1, 2018) (question of fact whether attorney's letter accusing plaintiff of inappropriate conduct and sexual harassment towards female tennis player he coached where it was not clear if letter was sent in good faith and in anticipation of litigation); *Dickinson v. Cosby*, 17 Cal. App. 5th 655, 225

A. Plaintiffs have submitted viable proof of their allegations against Gilbert, thus precluding summary judgment in his favor.

In Section III above, Plaintiffs describe the evidence from which a jury could find in their favor on all material allegations supporting their claims against Gilbert.

First, there is ample and essentially unrebutted evidence that Gilbert made "false statements of fact" about Plaintiffs, including that they intentionally and deliberately engaged in discriminatory anti-Semitic conduct against K.W., forcing him to eat a pepperoni pizza with knowledge or his religious restrictions, and that Plaintiffs did so punitively and with a purpose to psychologically injure K.W. Gilbert does not deny that he made these statements, nor could he. *See* Section III. G., supra (citing evidence). Nor has he submitted evidence that could possibly negate Plaintiffs' evidence set forth above showing that these statements were false, including the statements from various eyewitnesses establishing that K.W. was offered a non-pork alternative to the pepperoni pizza, and K.W.'s own admissions that his coaches never had any reason to know that he held any particular religious beliefs at all, let alone any such beliefs that would prohibit the consumption of pork. *See* Sections III. A.–F., *supra* (citing evidence).

The jury may also readily conclude from the evidence summarized above that Gilbert made his accusations "with knowledge of their falsity," or at very least with reckless disregard as to their

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Cal.Rptr.3d 430 (2017) (press release where attorney accused Janice Dickinson of lying about rape by Bill Cosby not covered by litigation privilege); *Williams v. Kenney*, 379 N.J.Super. 118, 877 A.2d 277 (Super.App.Div.2005) (prelitigation demand letter not covered by litigation privilege where attorney included "salacious gossip" about plaintiff's sexual relationship not germane to the claim; demand letter was also faxed to news media outlets). Against this well-established authority, Gilbert cites and primarily relies on a single federal case, *Morrison v. Mahoning Cty.*, N.D.Ohio No. 4:22CV2314, 2023 U.S. Dist. LEXIS 85850 (May 16, 2023), for the general proposition that statements occurring "preliminary to a proposed judicial proceeding" are protected by a litigation privilege. This authority is inapposite here. First, Morrison is a federal case, where the judge expressly applied federal law on the litigation privilege. The Court specifically noted that it was not bound by Ohio state law on the matter. Even if *Morrison* was controlling precedent, it would not entitle Gilbert to summary judgment as there are issues of fact as to whether litigation was contemplated in good faith at the time the statements were made.

probable lack of truth. This conclusion is plain enough from the admissions of Gilbert's client, K.W., including, again, that the coaches had no reason to believe that he held any religious beliefs, that the coaches cared about his well-being and did not "hate" him, that he understood the well-intended purpose of the pizza incident, and also that he intended to "straighten things out" with the district on the day after the incident because he knew that he wasn't "harmed" by it. Also especially pertinent to a finding of malice is K.W.'s admission, as recounted by his teammate and close friend Mani Powell, that he wished the matter hadn't "go[ne] as far as it did" but was "out of his hands" due to the "influence" of "other parties," in obvious reference to Gilbert. *See* Section III.J., *supra*, quoting Powell Tr. The conclusion that Gilbert has been manipulating and misrepresenting the words of his own client to push a knowingly false narrative is further confirmed by his egregious speaking objections at K.W.'s deposition, summarized in footnote 7 above; and also, of course, by Gilbert's utter failure to identify a single fact supporting the truth of his defamatory statements, or a single thing he did to investigate the truth of these facially absurd claims, as well as his efforts to hide behind utterly baseless claims of privilege to excuse these failures. *See* Section III.H-I., *supra* (citing evidence, including Gilbert Tr., and **Ex. 7,** De Marco Aff.). And the fact that the allegations regarding K.W.'s religious beliefs were necessary for Gilbert to assert any viable threat of litigation arising from the pizza incident yet further bolsters a finding of malice. *See* **Ex. 5**, Moskovitz Aff., Ex. 1; **Ex. 8**, Pattakos Aff., Exhibit 1 (Moskovitz Supp. Report).

While it is indisputable that Gilbert's statements were made "not in the context of any ongoing or imminent legal proceedings, and not withing a judicial proceeding, but to the press," the above-summarized evidence also supports a finding that these statements were not made in good faith, but were rather "made falsely, in order to 'force a settlement' from the district." *See e.g.,* Sections III.A–I, *supra* (citing evidence).

This bad faith conduct further shows why Gilbert is not protected by any separate "attorney

immunity rule," as proposed in his motion for summary judgment. (Gilbert MSJ, p. 10–12.) As Gilbert himself acknowledges in his motion, this "rule" does not deprive Plaintiffs of standing to bring a claim against Gilbert arising from his representation of the Walkers when he has an "ulterior motive 'separate and apart from the good-faith representation of the client's interests.'" (*Id.*, p. 11.) Furthermore, the record clearly shows "something extraordinary, perhaps unethical conduct or conduct on the verge of fraud." *See* Section III.H-I., *supra* (citing evidence, including Gilbert Tr., and **Ex. 7,** De Marco Aff.)

B. Gilbert's defamatory statements about why his client was owed a settlement from the school district are actionable statements of fact, not constitutionally protected statements of "opinion."

Finally, Gilbert's argument that his defamatory statements are constitutionally protected opinions is meritless. Gilbert MSJ, 21–29. Again, this Court previously found in *Wattley I* that Gilbert's statements alleged to be defamatory by Plaintiffs constitute actionable "statements of fact." Applying the standards set forth by The Supreme Court of Ohio, there can be no doubt that this is so.

Ohio law has long recognized that a defamatory "communication may consist of a statement of fact *or* an expression of opinion." *E. Canton Edn. Assn. v. McIntosh*, 5th Dist. Stark C.A. NO. 96-CA-0293, 1997 Ohio App. LEXIS 3957, *20 (Aug. 18, 1997), citing RESTATEMENT OF THE LAW 2D, Torts (1977), Sections 565–566, p. 170 (emphasis added). "Commentary that is apparently based on actual facts and points out implications, rather than making a 'personal prediction or hyperbolic characterization,' may leave the impression in the mind of a reasonable person that such statements speak to the truth of the matter, not merely the author's opinion." *Clarkwestern Dietrich Bldg. Sys., LLC v. Certified Steel Stud Assn.*, 12th Dist. Butler No. CA2016-06-113, 2017-Ohio-2713, ¶ 17; *See also Stresen-Reuter v. Hull*, 6th Dist. Sandusky No. S-89-27, 1990 Ohio App. LEXIS 3213, at *15 (Aug. 3, 1990) ("[E]ven if some of the statements do constitute opinion, [plaintiff] can still prevail ... at trial if

a jury determines the opinions are based on factual assertions which are actionable.").

Thus, statements "couched in terms of opinion" are actionable in defamation where they "imply a false assertion of fact." *McIntosh*, 1997 Ohio App. LEXIS 3957, *17, citing *Scott v. News Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 N.E.2d (1986); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

And in deciding whether a statement is a constitutionally protected opinion or conveys actionably defamatory facts, Ohio courts apply a well-established "totality of the circumstances" test, analyzing "the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared," in assessing whether "the reader or listener would be left with the impression that incriminating facts existed." *McIntosh*, 1997 Ohio App. LEXIS 3957, *18, citing *Scott,* 25 Ohio St. 3d 243, 496 N.E.2d 699 N.E.2d (1986). All four factors "depend on the reasonable reader's perception of the statement—not on the perception of the publisher." *Wayt v. DHSC, LLC*, 2017-Ohio-7734, 97 N.E.3d 903, ¶ 137 (5th Dist.), quoting *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 144, 2000-Ohio-118, 729 N.E.2d 364. "If the law were otherwise, publishers of false statements of fact could routinely escape liability for their harmful and false assertions simply by advancing a harmless, subjective interpretation of those statements." *McKimm*, 89 Ohio St.3d 139, 145.

Here, there is no question that Gilbert's statements "g[a]ve rise to clear factual implications" that were verifiable, and which "impl[ied] first-hand knowledge that substantiates" his accusations. *Wampler v. Higgins*, 93 Ohio St.3d 111, 127-128, 2001-Ohio-1293, 752 N.E.2d 962; *Mehta*, ¶ 35, quoting *Scott*, 25 Ohio St.3d 243, 251. The very act of filing a lawsuit requires a good faith belief in the factual basis for the claims asserted. *See*, *e.g.*, Civ.R. 11; R.C. 2323.51. This belief must be based on facts, not opinions, as lawsuits of course turn on the former not the latter. Thus, when an attorney threatens to file a lawsuit as Gilbert did here, he undoubtedly implies first-hand knowledge

of facts underlying his accusations. The Court indeed specifically relied on those facts in refusing to dismiss the claims against Gilbert in *Wattley I*, which were ultimately allowed to proceed to trial. As before, the evidence in this case still shows that Gilbert has publicly accused Plaintiffs of intentionally and deliberately engaging in discriminatory anti-Semitic conduct against K.W., forcing him to eat a pepperoni pizza with knowledge of his religious restrictions, and that Plaintiffs did so punitively and with a purpose to psychologically injure K.W. Not only are these statements plainly subject to verification, the very act of pursuing a lawsuit based on these accusations would require Gilbert to verify them before a jury. There is nothing about the "general or broader context" of Gilbert's statements that would suggest to the reasonable reader that his statements weren't intended to imply these facts. The Court should accordingly reject his request to excuse his false, malicious, and destructive accusations as mere "opinions." *See also Wampler*, 127–128 ("[T]he classic example of a statement with a well-defined meaning is an accusation of a crime[.]"'); Gilbert Tr. 95:23–250; **Ex. 6**, Slaven Aff., ¶ 28, Ex. X ("This was a punitive act on the part of the coaches ... that ... was designed to psychologically injure this child and we have now submitted this matter to the US Attorney as a possible hate crime."); **Ex. 8**, Pattakos Aff., ¶ 4, Exhibit 8-B (Campbell Report).

C. Gilbert's testimony confirms the presence of triable issues on Plaintiffs' claims against all the Defendants and underscores the importance that this Court reject Defendants' insistence that the Court invert Rule 56's requirements by construing inferences in *Defendants'* favor.

Even apart from Gilbert's other testimony described above, Gilbert's November 15 testimony that he had never read the eyewitness-interview transcripts produced by the school district in this lawsuit, and was otherwise unaware of their contents—even despite being a named Defendant in this lawsuit, and a licensed and practicing attorney representing the plaintiffs (including Defendants here, K.W. and Kenneth Walker) in the related later-filed federal suit based on an identical facts, ***about which Gilbert himself launched not only national but global publicity at***

his June 1, 2021 press conference—represent stunning admissions that emphasize the liability of all the named Defendants in this case.

Gilbert's admitted indifference to the results of the district's official investigation of his accusations, after his having turned this matter into an international scandal a year and a half before, is simply beyond the pale. Moreover, these admissions not only leave no doubt about the fact that Gilbert knew his accusations were false when he broadcast them to the world, and, accordingly, that he could do nothing else but hide (and hide from) the truth about this matter, to the extent he was going to continue to pursue claims based on these allegations; They also show that falsity of Gilbert's claims was apparent to anyone who would apply the slightest scrutiny to them. That the other named Defendants in this case not only failed to apply any such scrutiny to Gilbert's facially absurd and obviously false claims, instead endorsing them, including by telling their own related defamatory lies to serve their own personal interests in destroying the Plaintiffs' careers, demonstrates malice on the part of all the Defendants as well as a textbook illustration of a malicious conspiracy to defame.

Put another way, Gilbert's admissions underscore the utter inability of all the named Defendants to justify their malicious defamatory acts in this case, which clarifies the importance that this Court reject Defendants' bizarre insistence that Rule 56's requirements be inverted so as to require construction of inferences in *Defendants'* favor.

To wit, in Gilbert insists that the Court must look to the "general and broader context" of Attorney Gilbert's statements to find as a matter of law that Gilbert's defamatory statements were just protected opinions. (Gilbert MSJ, Section III.C.5.) Similarly, Gilbert asks the Court to apply an "innocent construction rule" and recognize that his statements could have multiple interpretations, (*Id.*, Section III.C.6), and insists that Plaintiffs not be allowed to be "rewarded" for their "misconduct," (*Id.*, Section III.D). However, these exhortations all fly in the face of Rule 56, first

due to the basic fact that construing inferences about context or proper interpretations or whether Plaintiffs' engaged in "misconduct" (or, in other words, drawing *conclusions*) from the facts in evidence is exactly the job of the jury in deciding whether a defendant is liable, with all such inferences or conclusions required to be drawn in *Plaintiffs'* favor on the instant motion. *Wilmington Savs. Fund Soc., FSB v. Lautzenheiser*, 5th Dist. Stark No. 2020CA00059, 2021-Ohio-1046, ¶ 37 ("[The] trial court does not have the liberty to choose among reasonable inferences in the context of summary judgment, and all competing inferences and questions of credibility *must be resolved in the nonmoving party's favor*.") (emphasis added).

Additionally, it bears emphasis that an inference is "a mere permissible deduction which the trier of the facts may make" from facts or circumstances established by evidence "without express direction of the law to that effect, signifying those deductions and rational conclusions which are the result of the application of the ordinary principles of logic." *State v. Sherrils*, 8th Dist. Cuyahoga No. 41302, 1980 Ohio App. LEXIS 11433, at *8 (Apr. 17, 1980), fn2, citing *State v. Myers*, 26 Ohio St.2d 190, 271 N.E.2d 245 (1971). Where "reasonable competing inferences" exist, "it is not a proper function of the court to weigh those inferences, but rather to overrule the motion [for summary judgment], and submit the conflicting inferences to the jury, as trier of fact for its determination of the issue." *Cary v. Bohl Equipment*, 3d Dist. Allen Case No. 1-87-5, 1988 Ohio App. LEXIS 4326, at *8 (Oct. 28, 1988). *See also Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187, 1192 (1980); *PNC Bank, N.A. v. May*, 8th Dist. No. 98071, 2012-Ohio-4291, ¶ 29. Ohio courts have also explicitly recognized the truism that "intent is an element that can only be established by circumstantial evidence, by inference from other facts" (*Bohl Equipment*, *7); as well as that "circumstantial evidence has the same probative value as direct evidence;" and "rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the

record and another rational inference." *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 17.

Thus, and especially in light of Gilbert's November 15, 2022 testimony, Defendants' make clear by their own summary-judgment briefs that they can only prevail on summary judgment if the Court ignores, and indeed inverts, Rule 56's requirement that all reasonable inferences about why Defendants did what they did must be construed in *Plaintiffs'* favor.

D. Plaintiffs' claims against Gilbert are not time barred.

Finally, the statute of limitations does not save Gilbert from liability for his defamatory actions. Gilbert's argument to the contrary completely ignores Civ.R. 15(C), which provides that amended pleadings relate back to the original pleading. The Gilbert MSJ acknowledges that Plaintiffs timely re-filed this action on May 23, 2023 and that they amended their complaint to include factual allegations regarding their claims (specifically, regarding the timing of their voluntary dismissal of *Wattley I*.) Contrary to what Gilbert argues, Plaintiffs are not asking this Court to alter any statutory scheme but rather to merely apply Civ.R. 15 as written.

V. Because Plaintiffs have submitted viable proof on all of their material allegations against Defendants Walker and K.W., Walker's and K.W.'s motion for summary judgment must be denied for the same reasons the Court previously denied them summary judgment in *Wattley I.*

Walker's and K.W.'s motions for summary judgment must also be denied because they cannot submit evidence sufficient to negate Plaintiffs' showing that they "authorized, ratified, caused, or participated" in Gilbert's publication of his defamatory and malicious statements.

A. As this Court properly held in denying Walker's and K.W.'s motion for summary judgement in *Wattley I*, Plaintiffs' evidence at least creates an issue of fact that Walker and K.W. "authorized, ratified, caused, or participated" in Gilbert's publication of the defamatory statements.

In *Wattley I*, this Court properly denied Walker's and K.W.'s substantially similar motion for summary judgment and allowed Plaintiffs' claims for defamation and false light invasion of privacy

to proceed to trial. Just as before, Plaintiffs here have presented sufficient evidence to show that these Defendants both "authorized or ratified" their attorney Gilbert's defamatory statements, and also "caused or participated," or in other words, "request[ed], procur[ed], aid[ed], or abet[ted]" Gilbert in the publication of these statements. *See Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St. 3d 355, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 89; *Cooke v. United Dairy Farmers, Inc.*, 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25; *Scott v. Hull* (1970), 22 Ohio App.2d 141, 144, 259 N.E.2d 160. The Walker MSJ in this case offers no new facts or law that would call into question this Court's prior determinations on the same issue.

B. Because there is ample evidence that Walker and K.W. "authorized, ratified, caused, or participated" in Gilbert's publication of the defamatory statements, Walker's and K.W.'s motions for summary judgment should be denied.

While Plaintiffs acknowledge that Walker and K.W. are, to a significant degree, victims of their attorney Gilbert's malicious conduct in this case, that hardly excuses them from liability to Plaintiffs here. Rather, it is simply absurd for Walker and K.W. to claim that there is no factual evidence that Khalil or Kenny authorized or ratified Gilber's statements. (*See* Walker MSJ, pp. 21–24.) Of course, if Gilbert had made these statements without their authority, K.W. or Walker could have simply said so, which would have ameliorated a substantial portion of the damage at issue in this case. As they have not, the only "reasonable inference" to draw is that the attorney who has been speaking on their behalf as to the defamatory accusations, and continues to, has done so with their authority and approval.

Put another way, this case is much unlike one involving mere "nonfeasance," where, for example, a party fails to clear defamatory graffiti from a building he owns. *See* Walker/K.W. MSJ, p. 23, citing *Scott v. Hull*; *See also Scott v. Hull*, 142 ("There were no other allegations asserting any other responsibility of the defendants, or either of them, for the graffiti."). Rather, Walker and K.W. are active participants in having hired Gilbert to threaten a lawsuit against the district, and continuing to

endorse his defamatory campaign against Plaintiffs by attending press conferences and preserving their attorney-client relationship with him despite his continued fabrications and falsehoods. Their motions for summary judgment must, therefore, be denied. *See Cooke*, 2003-Ohio-3118, ¶¶ 37-38. ("James' participation in pre-conference discussions… and his presence at the press conference, suggests James was aware of the substance of the press conference, agreed to the common understanding ... and participated in the conference with that understanding ... [therefore] the facts the parties presented create a genuine issue of material fact for the jury to resolve."); *Gibson Bros. v. Oberlin College*, 9th Dist. No. 19CA011563, 2022-Ohio-1079, 187 N.E.3d 629, ¶¶ 41-49, appeal denied, 2022-Ohio-2953, ¶¶ 41-49 ("[T]he jury heard evidence about other actions taken by the Oberlin faculty and administration to aid the students ... [therefore] a reasonable person could conclude that Oberlin took actions to directly publish and/or assist in publishing the flyer."); *Dickinson v. Cosby*, 37 Cal.App.5th 1138, 1158–59, 250 Cal.Rptr.3d 350, 366 ("A principal's failure to discharge an agent after learning of his wrongful acts may be evidence of ratification ... Given Singer was Cosby's attorney and represented himself as such in the press releases, it is reasonable to infer that Cosby also expected the statements contained therein would be attributed to him. Nonetheless, the evidence shows Cosby did not immediately terminate the agency relationship with Singer after he issued the press releases; nor did Cosby issue a retraction or clarification. A fact finder could reasonably conclude such actions were inconsistent with any reasonable intention on Cosby's part, other than to approve and adopt Singer's statements as his own. If so, the effect is as if Cosby had approved or authorized the statements at the time Singer issued them. Cosby would therefore be responsible for their publication and subject to direct liability for defamation.").

VI. Because Plaintiffs have submitted viable proof on all of their material allegations against Defendant Grimsley, Grimsley's motion for summary judgment must be denied.

Like his co-Defendants, Grimsley has failed to present evidence that would support the truth

of his defamatory claims or negate the evidence of his malice in making those statements and in aiding and abetting his co-Defendants in defaming Plaintiffs and destroying their careers.

A. Plaintiffs stated claims for defamation against Grimsley because they alleged that he intentionally misrepresented the pizza incident with the intent to have Plaintiffs' removed from their positions as McKinley football coaches, and assisted Defendants K.W., Walker, and Gilbert in their defamatory campaign.

Plaintiffs stated claims against Grimsley for defamation based on allegations that he intentionally misrepresented the pizza incident to K.W.'s father, and assisted K.W., Walker, and Gilbert in their efforts to extort a settlement from the school district, including by piling on with additional false and defamatory statements in the school district's investigation to ensure that Plaintiffs would be terminated from their jobs as McKinley football coaches. FAC ¶¶ 12–13; 96–99; 217–30. As set forth above and discussed further below, discovery in this case has yielded ample evidence to support these allegations, thus precluding summary judgment in Grimsley's favor.

B. Ample evidence supports Plaintiffs' defamation and tortious interference claims against Grimsley.

Grimsley was not entitled to judgment at the pleadings stage, nor is he so entitled now, as the proof against him supports Plaintiffs' detailed allegations and more. Indeed, discovery in this case has only further revealed the hypocrisy, manipulative intent, and malice behind Grimsley's false and defamatory statements.

First, it is plain that Plaintiffs have submitted ample proof from which a jury may conclude that Grimsley's statements to district officials that Plaintiffs (1) did not offer K.W. a non-pork alternative during the pizza incident, and (2) specifically shouted at K.W. to "eat the fucking pepperoni" after he resisted doing the same were knowingly false and defamatory; and especially so in the context of his co-Defendants' accusations that the Plaintiffs deliberately set out to harm K.W. by violating his religious beliefs.

Additionally, Grimsley's posture in this case is especially unbelievable given his

understanding of the basic realities of the game of football, including the commonplace nature of disciplining an entire team for a single player's mistake, his admission that he did nothing to intervene in the pizza incident despite having been present for its entirety because "[K.W.] wasn't being harmed or anything (*Id.* 88:5–7), and his awareness that Wattley had employed a similar coaching technique at practice the previous year without incident (*Id.* 75:25–80:8). And Grimsley's lack of credibility in this regard approaches comical in light of the text message he sent to Harris just months before the incident, urging the importance of "mentally getting in [their players'] asses," "fuck[ing] them up in the weight room," and "kick[ing] their asses!" because "they love that shit" (Grimsley Tr. 101:19–105:12, Ex. 2).

This evidence alone shows the intentional and malicious nature of Grimsley's efforts to misrepresent the pizza incident as anything other than a well-intended and harmless exercise of a high-school football coach's discretion to train and discipline their players. And this conclusion is bolstered by substantial additional evidence of Grimsley's manipulative intent in destroying his colleague's careers: This includes the fact that Grimsley called K.W. without making any effort to speak with any of the other coaches about the pizza incident first, let alone to understand the purpose of the exercise, despite his acknowledgment of the importance of keeping "open lines of communication" as a football coach, and despite that he had been away from the football program in the previous months due to his responsibilities as an assistant baseball coach. Grimsley Tr. 93:13–95:12. Also, much unlike Wattley, who was in constant contact with K.W. and served as a father figure to him (K.W. Tr. 109:24–111:1), Grimsley had "never" before "texted [K.W.] or called [him] to check on his well-being" prior to his feigned concern over the pizza incident. Grimsley Tr. 93:1–9. And there is Grimsley's and K.W.'s squirrelly testimony about the frequency and nature of their communications, which obscures the fact that they had ***ten*** separate phone conversations in the three days following the incident, including a four-minute call on the date of the incident that

Grimsley tried to deny at his deposition. *Compare* **Ex. 7**, AT&T phone records, (showing 4 minute 13 second phone call between Grimsley and K.W. on May 24, 2021); **Ex. 10**, Wattley Aff. (confirming K.W.'s phone number); Grimsley Tr. 91:21–22 ("I didn't talk to Khalil till the next day, really. Just through text."); Grimsley Tr. 92:1–5: ("Q. Khalil said yesterday that you called him right after the event and told him it was the worst thing you had ever seen. A. No. Check my – you can check my phone records for that. That's not true."); K.W. Tr. 242:22–25 ("I remember [Grimsley called me – he called me right after, like when I got home, I was sitting in the chair."); 244:8–9 ("I know we spoke like, right after I got home."); 265: 9–16 ("Q. So following the phone conversation that you and Coach Grimsley had, the text messages, I know you said you're not sure if you talked thereafter, but let's say approximately a week after the incident, have you talked to Coach Grimsley since then, if you can recall? A. I don't remember. I'm not going say nothing I don't remember.").

This evidence taken together, combined with the evidence showing Grimsley's desperation to restore his standing within the McKinley football program, and his admission that he emphasized his false accusation that the coaches forced K.W. to "eat the fucking pepperoni" on his very first phone call with Defendant Walker (Grimsley Tr. 124:1–17; K.W. Tr. 262:6–9), is ample evidence to sustain the claims that Grimsley defamed the Plaintiffs and did so with malice. From this evidence, the jury may readily conclude that Grimsley, in his ten separate phone calls with K.W. in the three days following the incident, was working closely with K.W., Walker, and Gilbert to jointly craft a defamatory narrative that would serve their respective purposes; to extort a quick and lucrative settlement from the district and oust Marcus Wattley from the position that Grimsley coveted. *Cooke,* 2003-Ohio-3118, ¶ 25 ("As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication. Hence, one who requests, procures, or aids or abets, another to publish defamatory matter is liable as well as the publisher.); ¶ 34-35 ("While the foregoing entries do not compel a jury to conclude James was

involved in planning the press conference, they allow such an inference. ... James was present in the meetings ... From that a jury properly could conclude that the entries reflecting discussion of the upcoming press conference would include at least a general discussion of the content to be presented ... Secondly, James' participation in the press conference itself implies a common understanding or design."); *see Gibson Bros. v. Oberlin College*, 2022-Ohio-1079, 187 N.E.3d 629, ¶ 48-49 (9th Dist.), citing *Cooke* ("[T]he jury heard evidence about other actions taken by the Oberlin faculty and administration to aid the [defendants in publishing their defamatory statements]. ... Construing the totality of this evidence in favor of the [plaintiffs], a reasonable person could conclude that Oberlin took actions to directly publish and/or assist in publishing the [defamatory] flyer.").

The foregoing also supports Plaintiffs' claim for tortious interference. "The general rule in Ohio is that an employee earning a living has a right to pursue such employment free from unwarranted interference by third persons, and that one who maliciously or wantonly procures the discharge of an employee is liable to the employee in an action for damages." *Contadino v. Tilow*, 68 Ohio App.3d 463, 467, 589 N.E.2d 48 (1st Dist. 1990). A trier of fact does not need to accept Grimsley's self-serving claim that his actions were motivated by a "good faith opinion" that the punishment of K.W. was inappropriate. (*See* Grimsley MSJ, p. 23.) Instead, from the record evidence, a reasonable trier of fact could easily infer that Grimsley was motivated by malice and a desire to get Plaintiffs fired from their coaching positions for his own personal benefit. Therefore, independent of any reputational damage suffered by Plaintiffs due to Grimsley's false statements, his conduct in orchestrating the termination of Plaintiffs' positions as coaches is a separate and independent basis for liability against him.

C. Evidence of Grimsley's actual malice and improper interference precludes a finding that he is entitled, as a matter of law, to statutory immunity or qualified privilege.

Grimsley also contends that he is entitled to summary judgment due, alternatively, to statutory immunity or qualified privilege, but the evidence of the intentional and malicious nature of their wrongful conduct precludes either finding.

First, R.C. 2744.03(A)(6)(b) expressly denies immunity for "acts or omissions [done] with malicious purpose, in bad faith, or in a wanton or reckless manner." Here, as set forth above, Plaintiffs' allegations amply support a finding of bad faith and actual malice, let alone the lesser standards of wanton or reckless behavior. *See McBride v. Parker*, 5th Dist. Richland No. 11 CA 122, 2012-Ohio-2522, ¶¶ 2–4, 6–7, 26–28 (allegations that children's services director stated, with malice, that police officer "was a disruptive influence," had "inappropriate discussions" with employees, had been "sloughing off," and was "guilty of other dishonest conduct," were "sufficient" to "overcome [statutory] immunity").

Additionally, a claim of qualified privilege is similarly defeated "upon a showing of actual malice," as Defendants acknowledge. MFJP, p. 20, citing *Frigo v. UAW Local 549*, 5th Dist. Richland No. 04 CA 20, 2005-Ohio-3981; *Johnson v. Aultman Hosp.*, 5th Dist. Stark No. 2017 CA 00145, 2018-Ohio-1268. "Actual malice in a tortious interference claim … denotes an unjustified or improper interference with the business relationship." *Chandler & Assocs., Inc. v. Am.'s Healthcare Alliance, Inc.*, 125 Ohio App.3d 572, 583, 709 N.E.2d 190 (8th Dist.1997); *Key Realty, Ltd. v. Hall*, 2021-Ohio-1868, 173 N.E.3d 831, 854-855 (6th Dist.) (finding that qualified privilege does apply when tortfeasor uses "improper means" to interfere). Here, again, Grimsley's motive was to terminate Plaintiffs' employment for his own personal gain, and he used unjustified and improper means to interfere with Plaintiffs' relationship with the school district. Notably, Grimsley's conduct went well beyond merely reporting an event to his superiors through proper channels. He made a specific effort to

contact Khalil, whom he had never regularly communicated with before, to convince him to take actions designed to lead to Plaintiffs' termination of employment. Because Plaintiffs have presented ample evidence that would support a finding of actual malice and improper interference on Grimsley's part, summary judgment based on qualified privilege or statutory immunity is not warranted.

VII. Plaintiffs are not "public figures" for the purposes of a defamation claim under Ohio law, though they have presented sufficient evidence of Defendants' malice to withstand summary judgment if the Court were to hold otherwise.

In *Milkovich v. News-Herald* (1984), 15 Ohio St. 3d 292, 297, 473 N.E.2d 1191, the Supreme Court of Ohio determined that a high school wrestling coach was not a public figure or public official for purposes of defamation law. Specifically, the Court concluded that a high school wrestling coach, "while ... recognized and admired in his community for his coaching achievements ... does not occupy a position of persuasive power and influence by virtue of those achievements." *Id.* Additionally, the Court held that the coach's "position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies," and noted that the coach had not "thrust himself to the forefront of [a public] controversy in order to influence its decision." *Id.*

Applying the same analysis to Wattley and his co-Plaintiffs here requires a finding that they too are not public figures for the purpose of this claim. Of course, they are not the ones who "thrust themselves to the forefront of this public controversy" of Defendants' making. *See also E. Canton Edn. Assn. v. McIntosh*, 85 Ohio St.3d 465, 474, 1999-Ohio-282, 709 N.E.2d 468 ("As a high school principal, McIntosh did not assume a role of special prominence in the affairs of society. He did not occupy a position of such persuasive power and influence that he can be deemed a public figure for all purposes as required by *Gertz*. Nor did he thrust himself to the forefront of the public controversy that may have developed concerning his termination.").

In any event, the Court need not address Defendants' argument to the contrary, because Plaintiffs have set forth ample evidence of Defendants' malice to withstand summary judgment even if the Court were to find that Plaintiffs are public figures for the purposes of this case.

VIII. Conclusion

Applying the same sound legal principles which led this Court to deny summary judgment to Defendants K.W., Walker, and Gilbert in *Wattley I*, based on the voluminous evidence set forth herein, it is plain that this dispute raises issues of fact that must be resolved by a jury and that Defendants' motions for summary judgment in this case should thus be similarly denied.[15]

Respectfully submitted,

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[15] Because Plaintiffs' false-light claims require similar elements to be proven as their defamation claims — "(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" — summary judgment should be denied as to these claims as well. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, ¶ 61.

Certificate of Service

On June 17, 2024, this document was filed with the Court and emailed to counsel for Defendant Grimsley (mshoemaker@ffalaw.com; bfreeze@ffalaw.com), Defendant Gilbert (jason@wintertrimacco.com, courtney@wintertrimacco.com), Defendants Walker and K.W. (hwilson@reminger.com), and Defendant Humphrey (cgp@pelini-law.com).

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