IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY LANSKY,	)	**Case No. CV14833483**
	)	
Plaintiff/Counterclaim-Defendant,	)	**Hon. Jose A. Villanueva**
	)	
-VS-	)	
	)	
WILLIAM BROWNLEE, *et al.*,	)	
	)	
Defendants/Counterclaimants.	)	**MOTION FOR PARTIAL JUDGMENT**
	)	**ON THE PLEADINGS**

Now come Defendants, by and through counsel, and respectfully move this Honorable Court, pursuant to Civ. R. 12(C), for judgment on the pleadings as to Plaintiff's claims.[1] The Court should grant this motion for the following reasons. First, Plaintiff fails to state a claim for defamation upon which relief can be granted for five reasons: (1) two of the allegedly defamatory statements are not even about Plaintiff; (2) opinion regarding public officials' official actions cannot be defamation; (3) the one arguably factual statement made by Defendants about Mr. Lansky is not actually defamatory or damaging; (4) even if any of Defendants' statements about Mr. Lansky were factual, false, defamatory and damaging, the pleadings fail to even infer that Defendants acted with actual malice; and (5) Defendants' political speech regarding the Mayor's official actions is protected.

Second, Plaintiff's claim for "emotional distress" fails to state a claim upon which relief can be granted. A written statement of reasons in support for Defendants' Motion for Partial Summary Judgment on the Pleadings is set forth below.

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[1] Ohio courts regularly field *partial* motions. *Green v. Am. Bakers Ins. Co.*, 8th Dist. Cuyahoga No 66091, 1994 WL 568395 (considering an appeal from a denial of defendants' motion for partial summary judgment on the pleadings); *Carasalina, LLC v. Smith Phillips & Assoc.*, 10th Dist. Franklin No. 13AP-1027, 2014 WL 2573466 (considering an appeal from a grant of defendants' motion for partial summary judgment on the pleadings).

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I. BACKGROUND

In April 2013, Defendants William and Lynde Brownlee, husband and wife, began to take a greater civic interest in their small town of Maple Heights, Ohio. Noticing an absence of news coverage and commentary, they began a modest website, of which they are the sole editors and primary authors, that they called "Maple Heights News," located at www.MapleHeightsNews.org.[2] The Brownlees' articles on Maple Heights News range from discussion of the new McDonald's in town, to upcoming library programs, to the successes and failures of the local high school football team.[3] Over time, interest in the blog grew, and today thousands of people visit the website each month, and hundreds follow it on Facebook. Still, just Mr. and Mrs. Brownlee write a considerable majority of the articles, and they do it without pay, purely out of pride and interest in their local community.

Occasionally the Brownlees' articles wade into local politics. And in July of 2014, Mrs. Brownlee made what has turned out, quite surprisingly, to be a painful mistake: she spoke freely regarding her understanding of the policies and campaign promises of the town's Mayor, Mr. Jeffrey Lansky.[4]

In the July 17 article ("The Article"), Mrs. Brownlee recalled a 2011 political advertisement that Mayor Lansky publicized to the Maple Heights community, assailing the record of his opponent in the mayoral election that year, Neomia Mitchell.[5] Mrs. Brownlee attempted to examine Mr. Lansky's record as Mayor since 2011, as against the grounds upon which Lansky attacked Ms. Mitchell just three years

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[2] Maple Heights News occasionally has contributors write articles, but the articles are viewed and approved by William or Lynde prior to publication.

[3] *See*, generally, www.MapleHeightsNew.org, last checked November 20, 2014.

[4] William Brownlee did not write the article at issue here, however he did proofread the article for grammar and formatting purposes.

[5] See Defendants/Counterclaimants Amended Answer Exhibit B, "Have You Seen the Voting Record of Neomia Mitchell."

earlier, suggesting a shade or two of hypocrisy.[6] In doing so, Mrs. Brownlee spoke with the free-wheeling openness and stream-of-consciousness writing style not atypical of an internet political blogger.

The article apparently drew the immediate ire of the City's sensitive Mayor, who was able to convince a licensed attorney to, within just four days, transmit a grandstanding letter to Mrs. Brownlee alleging that her Article "makes a number of ill-informed, false and defamatory statements about Mayor Lansky," citing seven supposed examples, explaining "you are entitled to express your opinion, but you are not entitled to your own facts," and demanding that she "publish an immediate retraction," or else face legal action.[7]

Upon reviewing the letter, Mrs. Brownlee: (1) struck a line through portions of the article about which she was not absolutely certain, making a few visible augmentations to clarify; (2) clearly notified readers of the article about the changes with a "note-to-readers" message at the beginning of the article; and (3) then left the revised version of the article up on the website.[8]

Apparently this was not sufficient for Mayor Lansky, and on September 29, 2014, he was able to convince the same attorney to file a lawsuit demanding damages "in excess of $25,000 plus interest." And so here the Brownlees find themselves: in Ohio's busiest Court of Common Pleas, defending their clearly-constitutionally-protected political speech on a small blog post written in the otherwise sleepy town of Maple Heights, Ohio.

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[6] See Defendants/Counterclaimants Amended Answer, Exhibit A, “Throwback Thursday #TBT Article.”

[7] See Plaintiff’s Complaint, Exhibit B, July 21, 2014 Letter from Brent L. English to William and Lynde Brownlee.

[8] See Defendants/Counterclaimants Amended Answer Exhibit A, “Throwback Thursday #TBT Article.”

II. STANDARD OF REVIEW FOR JUDGMENT ON THE PLEADINGS

"[A] motion for judgment on the pleadings has been characterized as a belated Civ. R. 12(B)(6) motion for failure to state a claim upon which relief can be granted."[9] The standard of review for a motion for judgment on the pleadings pursuant to Civ. R. 12(C) is similar to the standard of review for a motion to dismiss pursuant to Civ. R. 12(B)(6).[10] The Court may dismiss under Civ. R. 12(C) if the Court finds that the nonmoving party can prove no set of facts in support of his claims that would entitle him to relief.[11]

However, under Civil Rule 12(C), the Court should consider both the complaint and the answer.[12] Further, pursuant to Civ. R. 10(C) and applicable Ohio case law, "when a document is attached to and incorporated by reference into a pleading, it may be considered as part of pleadings."[13] Consequently, the exhibits Mr. Lansky attached to his Complaint and the exhibits the Defendants attached to their Amended Answer and Counterclaim are all before the Court and material to the adjudication of this Motion.

Finally, Civ. R. 12(C) motions are specifically for resolving questions of law.[14] In the instant matter, the analysis confronting the court is purely legal in character: do the Brownlees have a constitutional right to question the policies of their Mayor on a web blog, in the manner that they have, however inartful? This is, first and foremost, a legal question, and its resolution will require no additional facts beyond those raised in the pleadings and attachments thereto. Likewise, whether their

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9 *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 163 (9th Dist. 1994).

10 *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-70 (1996).

11 *Id.* at 570.

12 *Id.* at 569.

13 *See*, e.g., *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995); See *also* Civ. R. 10(C) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.").

14 *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569 (1996).

statements are even about the Plaintiff, whether they are opinion or factual, and whether they are defamatory at all are also questions of law for the Court, rather than for a jury.[15]

Moreover, because this case raises matters of free political speech that is otherwise being chilled and suppressed, binding precedent insists that the case be disposed of expeditiously, at this stage:

> Summary procedures are especially appropriate in the First Amendment area. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself * * *. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."[16]

Further, the imposition of unnecessary litigation costs such as discovery, in response to clearly protected speech, is a harm in and of itself.

III. LAW AND ANALYSIS

> *The very notion of a court interfering with the free flow of debate on matters of profound public concern is repugnant to our democratic way of life. We should never forget that an unfettered press is the custodian of all our liberties and the guarantor of our progress as a free society. The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.*[17]

Plaintiff's Complaint fails to state a claim for which relief can be granted because Defendant Lynde Brownlee and Maple Heights News' statements regarding Mayor Jeff Lansky are (1) statements of opinion; (2) not defamatory toward Mr. Lansky; (3) not damaging to Mr. Lansky as a matter of law; and (4) constitutionally-protected political speech about a public figure acting in his official capacity. Furthermore, there are no means by which Mr. Lansky could demonstrate that Defendant's statements

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[15] Distinction between opinion and fact is a matter of law. *See, e.g., Rinsley v. Brandt,* 700 F.2d 1304, 1309 (10th Cir. 1983); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978).

[16] *Dupler v. Mansfield Journal Co. Inc.*, 64 Ohio St.2d 116, 120-21 (1980), citing *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966).

[17] *Varanese v. Gall*, 35 Ohio St.3d 78, 80 (1988), citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04(1984).

were made with actual malice or in reckless disregard of the truth. For the same reasons, and more, Mr. Lansky cannot state a claim for which relief can be granted as to his claim for "emotional distress."

A. Plaintiff fails to state a claim for defamation upon which relief can be granted.

"Defamation is the unprivileged publication of a false and defamatory matter about another,"[18] and defamation occurs when a publication contains a false statement "made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession."[19] Thus, to establish a claim for defamation, a plaintiff must show: (1) a false statement of fact was made about the plaintiff, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement.[20]

The United States Supreme Court has explained in numerous defamation cases that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy," and [More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[21] This principle governs defamation cases where public officials are plaintiffs.

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18 *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 353 (6th Dist. 1992).

19 *Jackson v. Columbus*, 117 Ohio St.3d 328, 331 (2007), quoting *A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995).

20 *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 388-89 (2012), citing *Pollock v. Rashid*, 117 Ohio App.3d 361, 368 (1st Dist. 1996); *see also Lucas v. Perciak*, 2012-Ohio-88, ¶ 12, 2012 WL 112983 (8th Dist. 2012), citing *Akron–Canton Waste Oil, Inc. v. Safety–Kleen Oil Servs., Inc.*, 81 Ohio App.3d 591, 601 (9th Dist. 1992).

21 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

i. Two of the allegedly defamatory statements are not even about Mayor Lansky.

To be defamatory, statements must be "about another," and the "other" must be the plaintiff. Of the seven statements complained of in Paragraph 11 of Mr. Lansky's Complaint, the pleadings definitively demonstrate that two of the statements are not even about *him.* While Mr. Lansky asserts defamation because The Article indicated that someone "voted 'no' to printing and mailing city newsletters to residences," The Article is plainly referencing the acts of Mr. Lansky's 2011 mayoral opponent, and not Mr. Lansky, by quoting Mr. Lansky's 2011 campaign literature, which indicates that his then opponent voted 'no' to printing and mailing city newsletters to residences, during her tenure as a Maple Height City Councilwoman.[22] The statement is made to point out that Mayor Lansky did not stop the program from being discontinued as mayor, despite his campaign literature's suggestion that he may.

Likewise, while Mr. Lansky asserts defamation because The Article indicated that someone "voted 'no' for renewal of the Code Red Resident Alerting System," The Article is plainly referencing the acts of Mr. Lansky's 2011 mayoral opponent, and not Mr. Lansky, by quoting Mr. Lansky's 2011 campaign literature, which indicates that his mayoral opponent voted 'no' for renewal of the Code Red Resident Alerting System" during her tenure as a Maple Heights City Councilwoman.[23] Mrs. Brownlee was observing that Mayor Lansky did not stop the program from being discontinued as mayor, despite his campaign literature's suggestion that he may.

Because the Defendants' statements regarding the Maple Heights community newsletter and the Code Red Resident Alerting System are not about Mayor Lansky, these two passages cannot form the basis for any meritorious defamation or emotional distress claim by Mr. Lansky against Defendants. To

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[22] See Defendants/Counterclaimants Amended Answer Exhibit A, "Throwback Thursday #TBT Article," also available online at http://mapleheightsnews.org/2014/07/17/throwback-thursday/.

[23] See Defendants/Counterclaimants Amended Answer Exhibit A, "Throwback Thursday #TBT Article," also available online at http://mapleheightsnews.org/2014/07/17/throwback-thursday/.

the extent that the Plaintiff's Complaint relies on these statements to assert a claim for defamation or emotional distress, those claims must be dismissed. This leaves just five statements at issue.

ii. Opinions regarding public officials' official actions cannot be defamation.

Mr. Lansky's Complaint should be dismissed at this stage because, of the five passages in question that *are* about him, at least four are undeniably constitutionally-protected political opinion, and are therefore subject to absolute constitutional immunity.

The first element of a defamation claim is "that the defendant has asserted a false statement of fact, rather than just an opinion."[24] "Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, ... a libel action cannot be maintained unless it is premised on published assertions of fact," rather than on assertions of opinion.[25]

The determination of whether the speech at issue is an opinion or a fact is a question of law to be determined by the court.[26]

In *SPX Corp. v. Doe,*[27] the Northern District of Ohio further explained the critical distinction between Ohio and federal law regarding protected *opinion* speech: "by virtue of *Scott* and *Milkovich,* the Ohio Supreme Court and the United States Supreme Court came to opposite conclusions as to whether the identical statements could be the basis for a defamation claim. The apparent inconsistency was resolved in *Vail v. Plain Dealer Publishing Company*, 72 Ohio St.3d 279 (1995)."[28] There, the Ohio Supreme Court stated that *Scott* applied the Ohio Constitution, while *Milkovich* applied only the United States Constitution. The Ohio Supreme Court stated:

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[24] *Rothschild v. Humility of Mary Health Partners,* 163 Ohio App.3d 751, 757 (7th Dist. 2005).

[25] *Brian v. Richardson,* 87 N.Y.2d at 51.

[26] *Ferreri v. Plain Dealer Publishing Co.*, 142 Ohio App.3d 629, 639 (8th Dist. 2001), citing *Vail,* 72 Ohio St.3d at 281.

[27] 253 F.Supp.2d 974 (N.D.Ohio 2003).

[28] *Id.* at 979-80.

"[r]egardless of the outcome in *Milkovich*, the law in this state is that embodied in *Scott*. The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press."[29]

Under Ohio law, opinions are considered constitutionally protected speech.[30] The Ohio Supreme Court in *Vail* determined that the law in Ohio is that the Constitution provides a guarantee of protection for opinions,[31] and a statement is not libelous as long as it constitutes a declaration of opinion.[32]

Thus, the Ohio Supreme Court continues to hold that the Ohio Constitution provides protection independent of the First Amendment, and recognizes the *Scott* analysis as the method for analyzing fact versus opinion in defamation claims.[33] In *Wampler*, the Court further held that the *Scott* analysis applies to all defamation claims, not just those involving media defendants.[34]

A totality-of-the-circumstances test is used in making this determination.[35] "The test is a fluid one and calls for the court to consider (1) the language used, (2) whether the statement is verifiable, (3) the general context of the statement, and (4) the broader context in which the statement appeared."[36] Each of these factors must be addressed, but the weight given to each will vary depending on the

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29 *Vail*, 72 Ohio St.3d at 281.

30 *Sweitzer v. Outlet Communications, Inc.*, 133 Ohio App.3d 102, 111 (10th Dist.1999); *Vail* v. *Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279, 280 (1995), citing *Scott v. News–Herald*, 25 Ohio St.3d 243, 250 (1986).

31 *Vail*, 72 Ohio St. 3d at 281 (emphasis added).

32 *Id* (emphasis added).

33 *See Wampler v. Higgins*, 93 Ohio St.3d 111, 117–20 (2001); *McKimm v. Ohio Elections Commission*, 89 Ohio St.3d 139, 144–45 (2000).

34 93 Ohio St.3d at 120–25. A strong case can be made that Defendant's are "media defendants," but this Court needn't resolve this issue to rule in the Defendant's favor on Plaintiff's claims.

35 *Ferreri*, 142 Ohio App.3d at 639, citing *Vail*, 72 Ohio St.3d at 282.

36 *Id.*

circumstances of the case.[37] The test is merely a "compass to show general direction and not a map to set rigid boundaries."[38]

Applying that analysis, the first factor is the specific language used. The Court must consider whether the words used normally convey information of a factual nature, or hype and opinion. Words lacking precise meaning ordinarily are not actionable.[39] Further, statements that are "loosely definable" or "variously interpretable" cannot, in most contexts, support an action for defamation.[40] In *Buckley v. Littell*, a writer in his book on the political right in the United States accused columnist and author William F. Buckley, Jr., of being a "fellow traveler" of "fascists."[41] Noting that Mr. Buckley and the author of this particular tome embraced widely different definitions of "fascism" and different views as to which journals could be described as "fascist," the court declined to develop a "correct" definition of this pivotal term.[42]

The Second Circuit held, rather, that the use of such expressions "cannot be regarded as having been proved to be statements of facts, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate, an imprecision which is similarly echoed in the book."[43] Pursuing a line of analysis similar to that found in *Buckley*, the court held that the term "incompetent" as applied to a judge was too vague to support a claim of libel.[44]

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37 *Vail* 72 Ohio St.3d at 282; *SPX Corp.*, 253 F.Supp.2d at 980.

38 *Id.*

39 *Vail*, 72 Ohio St.3d at 282–83; *Wampler*, 93 Ohio St.3d at 127–28.

40 *See Buckley v. Littell*, 39 F.2d 882, 895 (2nd Cir. 1976).

41 *Id.*

42 *Id.*

43 *Id.* at 893.

44 *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 397 N.Y.S.2d 943, 947 (N.Y. 1977).

The second factor is whether the statements are verifiable. A statement is deemed verifiable if: (1) the author represents that he has knowledge or evidence that substantiates the statements, and (2) there is a plausible method to verify the statements.[45] In *SPX,* the Court weighed this factor in favor of the speaker because "[d]efendant gives no indication that he possesses materials that can substantiate his statements. The statements are simply made in isolation."[46]

The third factor is the context of the statements, which requires consideration of the alleged defamation in the context of other accompanying statements. Cautionary terms or "language of apparency" weigh against liability.[47] Also important is the tenor, including whether the statements appear in a piece characterized by objective facts or subjective hyperbole.[48] In *Information Control,* the court stated that "it is established that words are not defamatory unless they are understood in a defamatory sense .... Thus, the words alone are not determinative; the facts surrounding the publication must also be considered."[49]

The court noted the importance of the language itself: "Where the language of the statements is 'cautiously phrased in terms of apparency' or is of a kind typically generated in a spirited legal dispute in which judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended in the media and other public forums, the statement is less likely to be understood as a statement of fact rather than as a statement of opinion."[50]

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45 *Scott,* 25 Ohio St.3d at 251–52; *Vail,* 72 Ohio St.3d at 283; *Wampler,* 93 Ohio St.3d at 129.

46 253 F.Supp.2d 974 (N.D.Ohio 2003).

47 *Scott,* 25 Ohio St.3d at 252; *Wampler,* 93 Ohio St.3d at 130.

48 *Vail,* 72 Ohio St.3d at 282.

49 *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781, 783-84 (9th Cir.1980).

50 *Id.*

Fourth, the Court must consider the broader social context in which the statements appear. Under this factor, the court considers the type of writing and the placement of the statements: "different types of writing have ... widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion."[51] Statements appearing in such locations as forum and commentary newspaper sections, or other venues often associated with "cajoling, invective, and hyperbole" are more likely opinion.[52]

Earlier this year, the Court of Appeals for this District decided essentially this same case which was disposed of after Defendant's filed a Motion for Judgment on the Pleadings. In *Lograsso v. Frey*, "Lograsso, an attorney, was the law director for the city of South Euclid," and "Defendants maintain[ed] a website called 'South Euclid Oversight.'"[53] Defendants (1) stated that Lograsso's "resume was not adequate" for the position of law director; (2) videotaped a South Euclid city council meeting, including Frey's remarks and Lograsso's response to them, and subsequently posted the video on their "South Euclid Oversight" website and on the video sharing website YouTube; (3) claiming that the city needed to stop hiring people with "questionable financial histories," and stated that Lograsso had "several such financial irregularities;" (4) stated that Lograsso had become law director because of political cronyism, and inferring that Lograsso had committed fraud; (5) "waived a packet of documents in the air proclaiming that [they] had documentation proving all of the accusations [they] made against Mr. Lograsso at the October 2012 City Council meeting;" and (6) again videotaped this meeting, and posted it on their "South Euclid Oversight" website and on YouTube.[54]

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51 *Scott*, 25 Ohio St.3d at 253.

52 *Id; Vail*, 72 Ohio St.3d at 282; *Wampler*, 93 Ohio St.3d at 131.

53 *Lograsso v. Frey*, 2014-Ohio-2054, ¶4 (8th Dist. 2014).

54 *Id.* at ¶¶ 6-8.

The Eighth District first confirmed that the Plaintiff was a public official: "We find that in his role as law director, Lograsso qualified as a public official. Given the authority of a law director, he has "substantial responsibility or control over public affairs, and his position must have such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it * * *. Thus, as a public official Logroasso had to demonstrate that the defendants acted with actual malice." [55] The Court concluded the matter as follows:

> Upon review, we find that Frey's alleged statements that were specifically directed at Lograsso were his opinion. . . . we also decline to construe Lograsso's conclusory statements or inferences against Frey as setting forth a claim that would entitle Lograsso to relief. . . . In light of the above, the complaint did not set forth sufficient allegations that would have entitled Lograsso to relief for either defamation or false-light invasion of privacy.[56]

The case here is utterly indistinguishable. Mr. Lansky's Complaint cites five passages from the Article that are actually *about him*. At least *four* of these passages quite obviously fail to form a basis upon which relief can be granted because they are matters of political *opinion*, upon which reasonable minds could disagree. Is Mayor Lansky responsible for the closing of a Maple Heights fire station, the discontinuation of a Maple Heights recycling program, and the discontinuation of Maple Heights "safety town" program for children? Were van services for senior citizens reduced during Mayor Lansky's tenure?

Defendants believe so because the buck stops with the Mayor. First, Mr. Lansky is indeed debatably ultimately responsible for the closing of the fire station in question because he is the Mayor and Safety Director (which includes fire safety) who oversaw the closing of the station; moreover, he is

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55 *Id.* at ¶ 16, citing *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966).

56 *Id.* at ¶¶ 36-38.

the City's safety director, and appears to have final authority over issues like fire stations.[57] Further, is the statement regarding the closure of a fire station even a *statement* at all? Defendants went above and beyond what was necessary by striking through the statement after the Mayor's counsel complained to them.[58]

Second, Mr. Lansky indeed introduced and then signed the Maple Heights ordinance that altered recycling policy,[59] and it is therefore reasonable to infer that the Mayor caused the changes to recycling policy.

Third, Mr. Lansky asserts defamation because The Article indicated that the Mayor "reduced van services for senior citizens," Mayor Lansky did indeed preside over the elimination of individual shopping trips for senior citizens, in favor of group shopping trips.[60]

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[57] See Defendants/Counterclaimants Amended Answer Exhibit C, "Mayor as Director of Safety" and Exhibit D, "Authority of Director of Safety." Charter of the City of Maple Heights, Article V, Sec. 3, entitled "MAYOR AS DIRECTOR OF SAFETY," stating "The Mayor shall be the Director of Safety and as such shall exercise all powers and perform all duties delegated to and conferred upon the Director of Safety by this Charter, the ordinances of the City and the laws of the State of Ohio." See also Maple Heights, Ohio Code of Ordinances, Chapter 244, Department of Safety, entitled "DIVISIONS OF POLICE AND FIRE; AUTHORITY OF DIRECTOR OF SAFETY," stating "The Director of Safety shall establish, from time to time, rules and regulations for the control, management and duties of the personnel of the Divisions of Police and Fire, not inconsistent with Ohio statutes or ordinances of the City."

[58] See Defendants/Counterclaimants Amended Answer Exhibit A, "Throwback Thursday #TBT Article."

[59] See Defendants/Counterclaimants Amended Answer Exhibit E, "Resolution 2014-37." Maple Heights Resolution Number 2014-37 was introduced to the Maple Heights City Council by Mayor Lansky on May 7, 2014. Section 1 of Resolution 2014-37 as introduced by Mayor Lansky states "The Mayor and the Finance Director are hereby authorized to enter into a two-year contract extension without the recycling program with Waste Management of Ohio, Inc. . . . for its garbage and waste removal in the City of Maple Heights. . . . Further, authorization is hereby given to immediately eliminate the recycling program from the remainder of 2014." Further, the legislation "authorize[ed] the Mayor to renew the contract with Waste Management of Ohio, Inc. for two years and eliminate the recycling program in its entirety, effective immediately." While the legislation was voted on by the Maple Heights City Council after its introduction by Mayor Lansky, Mayor Lansky was responsible for introducing the resolution to the City Council and, ultimately, for the resolution becoming enforceable in Maple Heights.

[60] See Defendants/Counterclaimants Amended Answer Exhibit F, "An Open Letter to Maple Heights Seniors." Specifically, in "An Open Letter to Maple Heights Seniors," the Senior Center identifies that as part of Mayor Lansky's effort to conserve financial resources, "Grocery shopping will be done as group trips only. There will be no individual trips to the grocery store." A conservation of City resources occurred by "reducing the number of vans in service from 5 to 3," Mayor Lansky presided over the reduction of services for senior citizens.

Finally, while Mr. Lansky asserts defamation because The Article indicated that the Mayor "stopped Safety Town," Mayor Lansky actually did discontinue safety town, citing what he viewed as a lack of sufficient participation.[61]

Ultimately, these are all policy disputes that this Court could not settle without interposing itself as an impermissible "ministry of truth."[62] Moreover, as seen by the analysis above, each of these statements are verifiable through documents that Mrs. Brownlee obtained and relied upon in drafting her article.[63]

The context of http://mapleheightsnews.org/ further displays the statements to be protected opinion: the website is, first and foremost, a website. It has no print, television, or radio analog. Its motto is and has been "building a better community," which suggests that the website is committed more to community activism than to dry straightforward factual news reporting.

Moreover, the Article in question is clearly editorial in nature. It begins as follows: "In 2011, Mayor Lansky's Campaign literature invited electors to 'reflect on the successes we have accomplished in only a short time' during his first term as Mayor of Maple Heights. Let's take a look back and see if the City has gone '…forward; not backwards' since then."[64] Furthermore, it was originally posted in, and remains posted in, the "editorial" section of the website, with term "editorial" appearing

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61 See Defendants/Counterclaimants Amended Answer Exhibit H, "2012 Spring/Summer Newsletter," and Exhibit I, "2013 Spring Newsletter." The Spring/Summer 2012 Newsletter provides residents information about the Safety Town Program and registration on page 2, and the 2013 Spring Newsletter does not provide any information about the Safety Town Program for 2013 or any opportunity for residents to register for the program, because the program had been canceled during the Mayor's tenure.

62 "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012), See G. Orwell, Nineteen Eighty–Four (1949) (Centennial ed.2003).

63 See Defendants/Counterclaimants Amended Answer Exhibits B through J. Each of these documents supports a statement that Mrs. Brownlee made regarding the Mr. Lansky's record and performance as Mayor of Maple Heights.

64 See Defendants/Counterclaimants Amended Answer Exhibit B, "Have You Seen the Voting Record of Neomia Mitchell."

conspicuously next to the name of the author and date of the The Article.[65] Meanwhile, the website has always and continues to maintain an entirely separate designation for "news."[66]

Applicable precedent ensures that this context is determinative. In *Loeb v. Globe Newspaper Co*, the court observed that the article containing the alleged defamations of the publisher of the *Manchester Union-Leader* was situated on the *Boston Globe*'s editorial page.[67] The court held that, in the specific context or setting at issue there, the statement to the effect that Mr. Loeb never backed a winner in a presidential election was protected opinion.[68]

In short, it is well understood that editorial writers and commentators frequently "resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction."[69] Hence, in analyzing the distinction between fact and opinion, the court will take fully into account the different social conventions or customs inherent in different types of writing.[70]

> From the earliest days of the Republic, individuals have published and circulated short, frequently sharp and biting writings on issues of social and political interest. From the pamphleteers urging revolution to abolitionists condemning the evils of slavery, American authors have sought through pamphlets and tracts both to stimulate debate and to persuade. Today among the inheritors of this lively tradition are the columnists and opinion writers whose works appear on the editorial and Op-Ed pages of the Nation's newspapers. The column at issue here is plainly part and parcel of this tradition of social and political criticism.[71]

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65 See http://mapleheightsnews.org/category/editorial/

66 See www.MapleHeightsNews.org

67 498 F.Supp. 481, 483 (D. Mass 1980).

68 *Id.* at 486.

69 *Id.* at 1309.

70 *See also National Ass'n of Gov't Employees v. Central Broadcasting Corp.*, 379 Mass. 220 (1979) (holding that the charge of communism levied against a union was opinion because the audience heard the charge on a radio call-in talk show called "Sound Off" and would likely have regarded it as "pejorative rhetoric").

71 *Ollman v. Evans*, 750 F.2d 970, 986 (D.C. Cir. 1984).

"[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole."[72] Moreover, "sifting through a communication for the purpose of isolating and identifying assertions of fact' should not be the central inquiry."[73] Rather, it is necessary to consider the writing as a whole, as well as the "over-all context" of the publication, to determine "whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff."[74] "[C]ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose."[75]

In *Brian v. Richardson,* the court considered an article by former United States Attorney General Elliot Richardson called "A High–Tech Watergate" that was published on the Op–Ed page of the New York Times on October 21, 1991.[76] Although the article contained assertions that the plaintiff, Dr. Earl W. Brian, was "linked to a scheme to take [Richardson's client] Inslaw's stolen software and use it to gain the inside track on a $250 million contract to automate Justice Department litigation divisions,"[77] the court concluded that Brian's defamation claim against Richardson was properly dismissed.[78] It explained that since "the purpose of defendant's article was to advocate an independent governmental investigation into the purported misuse of the software that Inslaw had sold to the Justice Department, ...

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72 *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 294 (N.Y. 1986) (citation and internal quotation marks omitted).

73 *Guerrero v. Carva,* 10 A.D.3d 105, 112, 779 N.Y.S.2d 12 (N.Y. App. Div. 2004), quoting *Brian v. Richardson,* 87 N.Y.2d 46, 51 (N.Y. 1995).

74 *Brian v. Richardson,* 87 N.Y.2d at 51, quoting *Immuno AG. v. Moor–Jankowski,* 77 N.Y.2d 235, 254, 566 N.Y.S.2d 906 (N.Y. 1991).

75 *Mann v. Abel,* 10 N.Y.3d 271, 276, 856 N.Y.S.2d 31, 885 N.E.2d 884 (N.Y. 2008) (citations omitted).

76 87 N.Y.2d at 48.

77 *Id.* at 48–49 (internal quotation marks omitted).

78 *Id.*

a reasonable reader would understand the statements defendant made about plaintiff as mere *allegations* to be investigated rather than as *facts.*"[79]

Finally, "the culture of Internet communications, as distinct from that of print media such a newspapers and magazines, has been characterized as encouraging a "freewheeling, anything-goes writing style."[80] Thus, "[i]t is ... imperative that courts learn to view libel allegations within the unique context of the Internet. In determining whether a plaintiff's complaint includes a published 'false and defamatory statement concerning another,' commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms 'are often the repository of a wide range of casual, emotive, and imprecise speech,' and that the online 'recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts.'"[81]

"The observation that readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts, specifically addresses posted remarks on message boards and in chat rooms. However, it is equally valid for anonymous Web logs, known as blogs, and it applies as well to the type of widely distributed e-mail commentary under consideration here."[82]

As blog statements, verifiable by documents obtained by Mrs. Brownlee, posted in the editorial section of the Maple Heights News website, Defendant's policy critiques must be viewed in context as

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79 *Id.* at 53.

80 S*ee* Cheverud, Comment, *Cohen v. Google, Inc.*, 55 N.Y. L. Sch. L. Rev. 333, 335 (2010/11).

81 O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases,* 70 Fordham L. Rev. 2745, 2774–2775 (2002).

82 *Id.*

protected opinion speech, and not statements of fact subject to Mr. Lansky's allegations of defamation. Thus, Plaintiff's Complaint should be dismissed as to these allegations.

iii. The one arguably factual statement made by Defendants about Mr. Lansky is not actually defamatory or damaging.

A statement is only defamatory if it "reflect[s] injuriously on a person's reputation, or expos[es] a person to public hatred, contempt, ridicule, shame or disgrace, or affect[s] a person adversely in his or her trade, business or profession."[83] Meanwhile, while a pleading of special damages is not necessary in a case of defamation, there must be s*omething* that addresses the element of injury. Thus, *even* after accepting a statement as false, it must still be defamatory. And *even* accepting a statement as false *and* defamatory, there still must be some allegation with the potential to later establish actual damages, but Plaintiff has made no such allegation in his Complaint.

While Mr. Lansky asserts defamation because The Article originally indicated that the Mayor "vetoed legislation to raise property taxes," Mayor Lansky did indeed abstain from signing legislation that would have increased property taxes.[84] There is quite obviously nothing about Defendants mistaking an "abstention from signing" with a "veto" that "tends to cause injury to a person's reputation or exposes him to public hatred, contempt, ridicule, shame, or disgrace or affects him in his trade or business." Mr. Lansky's Complaint fails to even allege otherwise; and even if it had, that allegation would have been entirely lacking in credibility.

Further, the statement was *complimentary*, rather than *defamatory*: it is a credit to Mr. Lansky that he did not pursue action to raise property taxes on the occasion in question, Defendants meant the

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83 *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St. 3d 1, 7 (1995).

84 See Defendants/Counterclaimants Amended Answer Exhibit G, "Memo Regarding Resolution Number 2013-46," indicating that the Mayor did not sign the ordinance. Defendants simply characterize the Mayor's refusal to sign legislation a "veto," based on the City Clerk's indication that the Mayor refused to sign.

statement as adulatory, and there is nothing defamatory about the statement because it is completely consistent with Mr. Lansky's policy position on the matter, and caused no harm.

The statement is, *at most*, a mistake. And to this end, the pleadings demonstrate that Defendants immediately concluded that this statement was a mistake, and altered it on July 23, 2014, editing The Article to strike through this wording.[85] The Plaintiff has failed to make any claim that is actually defamatory toward Mr. Lansky, and the Complaint, as to this statement, should be dismissed.

iv. Even if any of Defendants' statements about Mr. Lansky were factual, false, defamatory and damaging, the pleadings fail to even infer that Defendants acted with actual malice.

The United States Supreme Court has identified the primary free speech concerns presented by the censorship of political speech, and established general rules for evaluating these cases. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."[86] The Supreme Court recognized that a primary purpose of the first amendment is to encourage self-government by permitting comment and criticism of those charged with its leadership, and further, that public discussion of public officials is a "fundamental principle of the American form of government."[87]

To ensure "freedom of expression upon public questions" and to enhance the "profound national commitment to . . . uninhibited, robust, and wide-open" debate on public issues, the United States Supreme Court held that the public official plaintiffs must prove with "convincing clarity" that the defendant published the allegedly defamatory statements with "actual malice."[88] The Court further recognized that liability based on any lesser degree of proof would thwart the central meaning of the

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85 See Defendants/Counterclaimants Amended Answer Exhibit A, "Throwback Thursday #TBT Article"

86 *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

87 *Id.* at 275.

88 *Id*. at 269-70, 285-86.

first amendment by denying publishers "breathing space" needed to survive, thus infringing on society's opportunity to take part in government.[89] Most importantly, the requirement of proof of actual malice with convincing clarity was adopted to prevent "dampen[ing] the vigor and limt[ing] the variety of public debate."[90]

In *New York Times v. Sullivan*, the United States Supreme Court announced the rule that the First Amendment to the United States Constitution placed limits on the application of state law defamation claims, holding that a higher standard of fault—actual malice—applies to actions brought by public officials against critics of their official conduct.[91] Actual malice prohibits a public official from recovering any damages for an otherwise defamatory falsehood unless he proves that the communication was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[92] This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law "'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech."[93] Ohio courts have recognized these important principles as well, stating that "[i]t is well-settled that a public official must prove that allegedly defamatory statements were made with actual malice."[94] Thus, even if the seven statements

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89 *Id.* at 271-73.

90 *Id.* at 279.

91 376 U.S. 254, 283 (1964). To qualify as a public official, the person "must have, or appear to have, substantial responsibility or control over public affairs, and his position must have such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees * * *." *Rosenblatt v. Baer,* 383 U.S. 75, 86 (1966).

92 *Id.* at 280.

93 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,334, 94 S.Ct. 2997 (quoting *New York Times*, 376 U.S. at 279).

94 *Lansky v. Ciaravino*, 2008-Ohio-2666, ¶27 (Ohio Ct. App 8th Dist. 2008); citing New *York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 118-19 (1980).

identified in Plaintiff's Complaint were both factual and defamatory, Lansky must establish that the comments were made with actual malice.

In *Curtis Publishing Co. v. Butts* a majority of the Court determined that both for public officials and public figures, a showing of the New York Times malice standard is subject to a clear and convincing standard of proof.[95]

"To show 'actual malice,' the plaintiff must prove that the statement was made 'with knowledge that it was false, or with reckless disregard of whether it was false or not.'"[96] "To establish reckless disregard, the plaintiff must present clear and convincing evidence that the false statements were made with a high degree of awareness of their falsity or that the defendant in fact entertained serious doubts as to the truth of his publication."[97] Further, "[e]vidence of negligence in failing to investigate the facts is insufficient to establish actual malice."[98]

"The standard of 'clear and convincing evidence' is defined as 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.'"[99]

"This concept of actual malice has been further refined by subsequent decisions of the United States Supreme Court. Actual malice may not be inferred from evidence of personal spite ill-will or

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95 388 U.S. 130 (1967).

96 *Lansky v. Ciaravino*, 2008-Ohio-2666, ¶30 (Ohio Ct. App. 8th Dist. 2008) citing *Lansky v. Rizzo*, Cuyahoga App. No. 88356, 2007-Ohio-2500, ¶19; *New York Times Co.*, 376 U.S. at 280.

97 *Id.* at ¶30; citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

98 *Id.*, citing *New York Times Co.*, 376 U.S. at 287.

99 *Id.* at ¶ 31; citing *Cross v. Ledford*, 161 Ohio St. 469, 477 (1954).

intention to injure on the part of the writer."[100] Rather, the focus of inquiry is on defendant's attitude toward the truth or falsity of the publication.[101] Further, "actual malice is to be measured at the time of publication * * *."[102]

Moreover, "'reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.'"[103]

Mr. Lansky is currently the Mayor of the City of Maple Heights. He is a public official and must prove that Defendants acted with malice in publishing the article.

Even if this Court believes that Plaintiff has alleged facts sufficient to satisfy the first four elements of his defamation claim, Mr. Lansky most certainly fails to allege any facts that could prove actual malice and/or reckless disregard for the truth. The pleadings demonstrate that there could be no evidence here that Mrs. Brownlee made any of these statements with knowledge that they were false or with reckless disregard of whether one of the statements was false.

Defendants did not entertain any doubts as to the truth of their statements, as each of the statements was obtained or derived from public documents.[104] Mr. Lansky has failed to allege otherwise, and the Complaint should be dismissed in its entirety, as Mr. Lansky cannot proffer any

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100 *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84, (1966).

101 *Herbert v. Lando*, 441 U.S. 153, 160 (1979).

102 *Dupler v. Mansfield Journal Co. Inc.*, 64 Ohio St.2d 116, 124 (1980); *New York Times*, 376 U.S. at 286.

103 *Varanese v. Gall*, 35 Ohio St.3d 78 (1988), quoting *St. Amant v. Thompson,* 390 U.S. 727 (1968).

104 See Defendants/Counterclaimants Amended Answer, Affidavit of Lynde Brownlee.

evidence of actual malice: a slight mistake, later redacted, is not evidence of "malice," or "recklessness."

v. Defendants' political speech regarding the Mayor's official actions is protected, and all constitutional considerations heavily weigh in favor of dismissal here and now.

The First Amendment of the United States Constitution states: "Congress shall make no law ... abridging the freedom of speech," while Section 11, Article I of the Ohio Constitution guarantees that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

"The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment.[105] "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people."[106] Upon these principles, the Supreme Court is willing to give very strong protection even to speech that is false, specifically in the context of public figures' defamation claims.[107]

The Court in *Hustler Magazine, Inc. v. Falwell* articulated important First Amendment principles, stating: "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'"[108]

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105 *281 Care Comm. v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014), citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

106 *Id.*, citing *McCutcheon v. Federal Election Comm'n*, 134 S.Ct. 1434, 1462 (2014) (Thomas, J. concurring) (internal quotations omitted).

107 *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

108 485 U.S. 46, 53 (1988), citing *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, (1967) (Warren, C.J., concurring in result).

Moreover, as Justice Frankfurter put it succinctly in *Baumgartner v. United States,* stating that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures. Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks,' [T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary."[109]

In *New York Times,* the Supreme Court explained "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."[110] This is even true for false statements: In *United States v. Alvarez,* the Court explained "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee," since "th[e] erroneous statement is inevitable in free debate."[111]

In crafting the actual malice test in *New York Times v. Sullivan,* the Court considered two very important concerns. First, that false statements were inevitable in free debate and the need to protect some false statements in order to prevent freedom of expression from being chilled was important to enforce the protections of the First Amendment.[112] The second involved the inherent value of speech that is false, rather than the dangers of chilling true speech. The Court noted that false statements have a intrinsic value in public discourse.[113] Most importantly, the Court noted that "[f]reedoms of expression

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109 322 U.S. 665, 673–674, (1944), citing *New York Times,* 376 U.S. at 270 and *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 274, (1971).

110 *New York Times,* 376 U.S. at 284.

111 132 S.Ct. 2537 (2012).

112 *Sullivan,* 376 U.S. at 271-72.

113 *Id.* at 279, n 19.

require 'breathing space,"[114] and "[t]his breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability."[115]

In The Article, Mrs. Brownlee was engaging the public in an evaluation of Mr. Lansky's record as Mayor by comparing a political campaign flyer Mr. Lansky produced as a starting point for comparison to the Mayor's actual performance after election.[116] Mrs. Brownlee used documents she was e-mailed by city officials or that she requested to gather information, ensuring that she was accurately portraying the current state of affairs in Maple Heights, and then proceeded to include that information in the article.

For example, Mrs. Brownlee used a resolution introduced only by Mayor Lansky and subsequently signed into law by Mayor Lansky to explain that while Mayor Lansky wrote that "In only 4 years, Mayor Jeff Lansky has done all of this . . . no reduction in city services or programs during economic downturn," as Mayor, Mr. Lansky eliminated the recycling program by introducing, and presumably supporting, the legislation to eliminate recycling, and signing the resolution when it reached his desk.[117]

Mrs. Brownlee did a comparison like this for each of the statements proffered to be defamatory by Mr. Lansky, and the First Amendment strongly protects these evaluations and criticisms of public officials.

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114 *New York Times*, 376 U.S., at 272.

115 *Hustler Magazine*, 485 U.S. at 52.

116 See Defendants/Counterclaimants Amended Answer Exhibit B, "Have You Seen the Voting Record of Neomia Mitchelll."

117 See Defendants/Counterclaimants Amended Answer Exhibit E, "Resolution 2014-37."

B. Plaintiff's "Emotional Distress" claim fails to state a claim upon which relief can be granted.

Being Mayor opens one up to criticism for policy choices, and is not for the thin-skinned (or litigious). In Ohio, it is necessary for a party alleging intentional infliction of emotional distress to establish that the alleged culpable conduct *so exceeds the bounds of decency that it is considered atrocious, completely outrageous and utterly intolerable in a civilized community*.[118] Further, "there are situations [such as politics] naturally fraught with antagonism and emotion, where a person must be expected to endure the resultant antagonism and mental anguish."[119]

Here, Mr. Lansky is a public figure, and public figures, "having thrust themselves into the public eye, cannot prevent others from criticizing or insulting them for their acts or deeds."[120] In *Hustler Magazine v. Falwell*, the Supreme Court explained that in order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress without showing in addition that the publication contained a false statement of fact which was made with actual malice.[121]

In *Garrison v. Louisiana*, the Court held that a speaker is protected by the First Amendment *even if* the writer or speaker is motivated by hatred or ill will: "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[122] "Thus, while a bad motive may be deemed controlling for

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118 *Yeager v. Local Union 20*, 6 Ohio St.3d 369 (1983).

119 *Stepien v. Franklin*, 39 Ohio App. 3d 47, 51, citing *Local Lodge 1297 v. Allen*, 22 Ohio St.3d 228 (1986).

120 *Id.*. citing *Scott*, 25 Ohio St.3d at 245-46.

121 *Falwell*, 485 U.S. at 56.

122 *Id.* at 73.

purposes of tort liability in other areas of the law, the court ruled the First Amendment prohibits such a result in the area of public debate about public figures."[123]

As explained above, Defendants here commented about a public figure concerning issues affecting the community, and Mr. Lansky cannot show that that The Article contained a false statement of fact which was made with actual malice. Mr. Lansky has not alleged any fact indicating malice by any of the Plaintiffs, and cannot show actual malice. Thus, Plaintiff's "emotional distress" claim is not actionable here and should be dismissed at this stage.

IV. CONCLUSION

Plaintiff's Complaint alleging seven different defamatory statements fails to state a claim for which relief can be granted because Defendant Lynde Brownlee and Maple Heights News' statements regarding Mayor Jeff Lansky are (1) statements of opinion; (2) not defamatory toward Mr. Lansky; (3) not damaging to Mr. Lansky as a matter of law; and (4) protected political speech about a public figure acting in his official capacity. Moreover, there are no means by which Mr. Lansky could demonstrate that Defendant's statements were made with actual malice or in reckless disregard of the truth. Finally, for the same reasons and more, Mr. Lansky cannot state a claim for which relief can be granted as to his claim for "emotional distress." For the foregoing reasons, this Court should dismiss all claims against Defendants.

[123] *Stepien*, 39 Ohio St.3d at 52; citing *Falwell*, 485 U.S. at 53.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Ohio Rules of Civil Procedure 5(B)(2)(c) and 5(B)(2)(f), the undersigned does hereby certify that a true and accurate copy of the foregoing was served upon the following via electronic mail on this 20th day of November, 2014.

/s/ Kelsey E. Hackem
Kelsey E. Hackem

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