IN THE SUPREME COURT OF OHIO

RANDOLPH S. STEPP, APPELLEE v. MEDINA CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL., APPELLANTS	)	CASE NO.: APPEAL FROM THE COURT OF APPEALS NINTH APPELLATE DISTRICT MEDINA COUNTY, OHIO CASE NO. 15-CA-0071-M AND CONSOLIDATED 15-CA-0073-M

AMENDED MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CHARLES FREEMAN

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

A. The Press Release Was Not "Of And Concerning" Plaintiff

The immunity issue before this court revolves around the press release of March 22, 2013. This press release stated that the school board was not aware of the amount paid by the Medina County ESC. There is a constitutional requirement that an alleged defamatory (or false light) statement be "of and concerning" a plaintiff. *New York Times v Sullivan*, 376 U.S. 254 (1964), at 288. This same requirement applies to false light invasion of privacy. *Michigan United Conservation Clubs v CBS News*, 485 F. Supp. 893 (W.D. Mich 1980), at 904. This press release statement doesn't say anything derogatory about Randy Stepp. While plaintiff will argue that "of and concerning" is an issue of fact for trial, this is really an issue of law for the courts. No court in Ohio has addressed this issue in a reported decision. Courts in other states have held that whether a statement can reasonably be considered "of and concerning" a person is generally a question for law. *Elias v Rolling Stone LLC*, 2016 U.S. Dist. Lexis 83875, (S.D.N.Y. 2016), at *13, *Gilman v Spitzer*, 902 F.Supp. 2d 389, at 395, *Three Amigos SJL Rest. Inc. v CBS News Inc.*, 2016 NY Lexis 3217 (NY), at *5, *Klentzman v Brady*, 2013 Tex. App. Lexis 12961, at *19.

Incorrectly, the trial court below said that "of and concerning" was a question of fact in its decision. (Ex. A, p. 1). The Ninth District did not consider this issue even though the issue in the context of a lack of malice was placed before that court. (Appellants' Br. p. 22-23). This is a key Constitutional right and is in need of protection in this immunity analysis. See Proposition of Law No. 2.

A fundamental idea behind First Amendment law coming from the U.S. Supreme Court in the last 50 years is the right to free speech is best protected by promptly disposing of meritless defamation claims. *Time, Inc. v Pape*, 401 U.S. 279 (1971), (defendant publisher should not be put "at the mercy of the unguided discretion of a jury."). *Time v Pape*, at 291. This court by ruling that "of and concerning" is a question of law in this immunity analysis can shorten the process for public employees to gain immunity when they are inappropriately sued for defamation or false light invasion of privacy.

B. Immunity and Freedom of Speech Are Rights Deserving of Protection for Public Servants

Former board member Charles Freeman is sued only for false light invasion of privacy; the defamation claim against him was dismissed. Freeman seeks immunity from this false light claim.

There are 800,000 public employees in Ohio. They work for the public, make decisions that involve us all, and in general look to the statutes of Ohio to protect them from being sued unnecessarily. If a public employee acts maliciously, recklessly or in bad faith, then that behavior should not be countenanced. At the same time, the legislature has seen fit to protect public employees with immunity from liability for conduct that is merely negligent. This is the protection created by Ohio's immunity statute for public employees, 2744.03(A)(6). The purpose of this statute is to prevent public employees from the burden of extended litigation when their actions are not malicious, reckless or in bad faith. By its adoption of Ohio Rev. Code §2744.03, the Ohio legislature recognized its need to protect elected officials from such litigation in the absence of the absolute protection provided members of the U.S. Congress and Ohio Legislature.

This Court has deemed the resulting statutorily-created right to immunity for state and local officeholders so important as to justify interlocutory appellate review. *Burger v Cleveland Hts.* (1999), 87 Ohio St.3d 188, 199-200, 718 N.E.2d 912. That is the whole purpose behind *Hubbell*

v City of Xenia, 115 Ohio St.3d 77, 2007-Ohio-4839, which analogous to federal immunity practice authorizes a public employee an interlocutory appeal of a denial of immunity. This right is determined to be that important.

In Ohio, board of education must respond to reasonable requests from the media, as board members are answerable to the people who elected them. Tough questions on controversial matters require direct answers. *See Hahn v Kotten*, 43 Ohio St.2d 237, 331 N.E.2d 713 (1975). Those answers contain the real possibility for error, but the electorate has the right to know what the officials it elected are thinking, right or wrong. A private individual can choose to keep quiet; a public official should not.

Summary disposition is necessary in First Amendment areas, where the threat of lawsuits serves to chill debate on public issues and the conduct of public officials. The public interest is served when information is released by a school board regarding the reasons for terminating the employment of a public figure upon request by a newspaper. *Christian v Beacon Journal Publishing Co.*, 9th Dist. No. 12368, 1986 Ohio App. Lexis 7155. The condition of school finances is a vital public interest, and it is necessary that the democratically elected board members answer questions posed by news reporters forthrightly and with candor. Refusing to dismiss defamation claims for statements that merely express a difference of opinion, or mistaken facts, imposes upon elected officials an uncertain duty. Candor will be the casualty, and the electorate will be the victims. Capable citizens, fearful of civil liability for inadvertent mistakes, will choose not to volunteer to serve on such bodies as boards of education, and society at large will suffer. The

enforcement of sovereign immunity by summary judgment for all but the most outrageous statements is necessary to support our noble yet fragile experiment in self-governance.

C. A *Dresher* Analysis Is Required, Which Neither the Appellate Court Nor the Trial Court Performed

It is a fundamental premise of due process that a reviewing court has a duty to review all the evidence properly before it, not just some of the evidence. The Court of Appeals determined that no *Dresher* analysis was necessary because the only evidence put before it concerning the issues of malice, recklessness or bad faith was Stepp's deposition testimony that the individual board members did not hate him. Yet, the Court of Appeals had been pointed to the press release itself (and its benign nature). The Court of Appeals also had the following evidence before it regarding absence of malice, recklessness and bad faith, that is, the issues in an immunity defense. The school board discussed how two public relations experts, Barbara Paynter, an outside expert, and the board's in-house public relations expert, Jeanne Hurt, were both consulted to prepare the press release. Several board members and treasurer Jim Hudson were consulted for facts to go into the press release. Plaintiff Randy Stepp was asked twice for input into the press release, and was sent drafts of the press release in advance of the publication. The day after the press release Randy Stepp admitted the press release was technically correct as to the school board. This is all evidence of lack of malice, bad faith and recklessness surrounding the drafting of the press release; this evidence was ignored by the Court of Appeals. The trial court did not perform a *Dresher v Burt,* 75 Ohio St.3d 280 (1996), analysis.

Defendants put forth appropriate *Dresher* materials before the trial court. This Court mandated the *Dresher* analysis, yet the trial court performed no such analysis, and the Court of Appeals looked at only a fraction of the available 56(c) evidence. In the interests of justice, an interest which is statewide, this fundamental error by both courts below needs to be addressed by

the Supreme Court of Ohio.

D. Regarding an Immunity Defense, a Defamation Analysis Includes the Circumstances Surrounding the Publication

A discussion of the malice, bad faith or recklessness needed to establish an exception to 2744.03(A)(6) immunity involving an alleged defamation or false light invasion of privacy necessarily involves an analysis of the circumstances surrounding the issuing of the statement. It is this analysis which is lacking in the discussions by both lower courts. In *New York Times v Sullivan*, 376 U.S. 254 (1964), the analysis of the circumstances surrounding the publication consisted of a detailed discussion of the investigation made by the newspaper before the advertisement was allowed. There is no such analysis here, even though a detailed look at exactly what went into the publication of the March 22, 2013 press release was provided to both lower courts.

Courts should be required to give a full *Dresher* analysis of the facts before it regarding immunity. Immunity is for the purpose of preventing trials. Immunity and defamation (and false light) have a unique interface which has not been addressed by this Court. This interface requires a serious *Dresher* analysis, and neither court below fulfilled this responsibility.

All the Rule 56 evidence appropriately before the court should be considered. This includes the crucial information regarding the facts surrounding the publication of the March 22 press release and also includes the finalized state auditor's report. It was obvious why the final auditor's report should be substituted – it was the final report of a state agency not just a tentative interim report and it contained much more information. That's why plaintiff never opposed this

motion. A *Dresher* analysis of a defamation claim or an immunity defense needs a thoroughness that has been lacking here, a thoroughness that has Constitutional underpinnings.

E. A Statement Concerning an Ambiguous Contract Cannot Be Defamatory (or a False Light Invasion of Privacy); Immunity Is Warranted

Public entities are often involved in contractual disputes. Governments let out large contracts, and often there are differences in opinion between the parties to such contracts. Often public statements are made concerning those contracts. This is done by the government side with an eye to keeping the citizenry knowledgeable concerning public issues. Accord, *New York Times v Sullivan*, ("debate on public issues should be uninhibited, robust and wide open."). The school board's press release of March 22, 2013 gave answers to questions posed by a newspaper reporter about a contract dispute with plaintiff. The press release stated that the school board had not been aware of the total payment received by the superintendent from the Medina County ESC. This situation involves a public body and a public figure, where one side is merely presenting its version of a contractual dispute. In this type of situation full of ambiguity, the U.S. Supreme Court held in *Time, Inc. v Pape*, 401 U.S. 279 (1971), that this could not as a matter of law create a jury issue of malice.

For the above reasons, this case presents several issues that are of great public interest regarding immunity and presents First Amendment issues regarding defamation and false light.

STATEMENT OF THE CASE AND FACTS

Plaintiff Randy Stepp became the superintendent of the Medina City schools in 2006. In 2009, he received a new three year contract with a $50,000 bonus. In August 2011, he telephoned and e-mailed the school board president, Susan Vlcek, asking for a new bonus. He was also looking to recover the costs of his education. Stepp and Vlcek, and on certain occasions, Jim

Shields, the district's in-house counsel, discussed his demands. Stepp wanted a bonus payment that would be paid $30,000 a year for five years. He suggested this could come out of the surplus the school district had with the Medina County Educational Service District.

On September 2, 2011, Stepp sent language to Ms. Vlcek suggesting a one sentence addition to the 2009 contract which stated: "The board agrees to pay the costs associated with the superintendent's acquisition of past academic degrees as they relate to education." This provision said nothing about paying for school loans, interest costs, housing costs or transportation costs (gas money) while Stepp was a student.

The school board discussed the amendatory language and passed this amendment on November 7, 2011. A year later, in late 2012, a new contract was being discussed with a new bonus provision. This provision did not list the bonus, but put it in terms of a formula. Stepp told the school board that the provision was worth $50,000 to $60,000. The contract passed. Seven weeks later the school board found out that the new bonus was actually worth $83,017. At the same time, the board found out that Stepp had received a payout from the Medina County ESC of $172,011 for the 2011 contractual amendment. This sum paid for student loans which were generated beginning with his undergraduate education. When this $172,011 payment and the $83,017 bonus became public, the community and the school board were in an uproar. Two weeks later a newspaper reporter posed a set of written questions to the school board. On March 22, 2013, these were answered in a press release which was prepared with the help of the school district's in-house public relations person and an outside public relations firm. The press release stated (in part):

> The Board was not aware of the extent of the reimbursement or that it applied to all degrees.
>
> The past procedure for reimbursement was such that the Board was not informed

> of payments/contracts between the Board and Medina County Educational Center. (Complaint Ex. D).

A day later Stepp wrote that this statement was technically correct as to the school board. A few days later, movant Charles Freeman resigned from the school board.

On April 8, 2013, the school board voted to place Stepp on paid leave pending an investigation by the state auditor's office. A week later, the school board voted to rescind Stepp's new 2013 contract. On October 22, 2013 the state auditor issued an interim report which found that Stepp had used ESC funds for personal use in the amount of $4,120. On October 28, 2013, the school board began termination proceedings against Stepp. He filed an R.C. 3319.16 appeal. This was stayed by the trial court. The stay was lifted on April 17, 2014. A week later Stepp filed his resignation and the 3319.16 appeal ended.

On May 17, 2013, Randy Stepp filed a lawsuit in federal court, Northern District of Ohio, case number 1:13cv01126-LW. Sued were the school board, four of its individual school board members and Jim Shields, its HR head and in-house counsel. Motions for judgment on the pleadings were filed and ruled upon; one federal claim was dismissed, two other federal claims were stayed and the state claims were dismissed. Those state claims, including contract, defamation and false light claims, were re-filed in this case, Medina Common Pleas Court number 14CV 0874. It was at this time that Charles Freeman was added as a party defendant.

Motions for summary judgment were filed in this matter which included a request for immunity regarding the defamation, false light and constructive discharge claims. The motion for summary judgment was overruled on August 13, 2015. This is attached as Exhibit A. A timely appeal regarding the immunity issue was made to the Ninth District Court of Appeals by the four school board members and separately by Jim Shields. The Court of Appeals affirmed the denial of summary judgment on the immunity issue on September 23, 2016. This is attached as

Exhibit B. Defendant Charles Freeman timely filed a motion for reconsideration, and this was denied by the Court of Appeals on October 24, 2016. A copy of this decision is attached as Exhibit C.

LAW AND ARGUMENT

I. Proposition of Law No. I: An Appropriate Dresher Analysis Regarding a Defamation or False Light Claim Looks to the Facts Surrounding the Statement in Question

A proper *Dresher* analysis concerning an immunity defense to a defamation or false light claim looks at all the Civ. R. 56(c) materials put forth before it, particularly the evidence concerning the publication of the statement. Regarding the issue of immunity, the Court of Appeals did not consider the facts in the record that establish the absence of any evidence of malice, bad faith or recklessness. The Court looked only at some deposition testimony from Stepp regarding his admissions that the school board members did not hate him and the like. The Court of Appeals determined this was not enough evidence to begin a *Dresher* analysis.[1] The Court of Appeals did not look at the other appropriate summary judgment evidence placed before it regarding the issue of the absence of malice, recklessness and bad faith. Defendant school board provided much more evidence concerning the details surrounding the drafting of the press release: The board discussed how two public relations experts, Barbara Paynter, an outside expert, and the board's in-house public relations expert, Jeanne Hurt, were both consulted regarding the press release. Evidence was presented that several board members and treasurer Jim Hudson were consulted for facts to go into the press release. Evidence was put forward that Randy Stepp was

[1] The Court of Appeals said this was all the 56(c) materials put forth, but looking at p. 23 of the motion for summary judgment, the defendants asked the trial court to look at the press release itself – which was in evidence.

asked twice for input into the press release, and was sent drafts of the release in advance of the publication. The day after the press release Randy Stepp admitted that as to the school board the press release was technically correct. Each one of these pieces of evidence is appropriate Rule 56(c) evidence showing there was no genuine issue of fact. This established the absence of any evidence of malice, bad faith and recklessness surrounding the drafting of the press release; this evidence was not considered by the Court of Appeals.

An appropriate analysis regarding the issue of malice is found in the seminal case of *New York Times v Sullivan*, 376 U.S. 254 (1964). This discussion in *New York Times* involved the same kind of fact checking that was done by the school board and its employees.

With appropriate Civil R. 56 evidence demonstrating a lack of malice, bad faith and recklessness, the *Dresher* analysis should have gone forward. Plaintiff put forward no appropriate evidence showing the March 22nd press release was published with malice. Indeed, the evidence discussed by plaintiff (the "bold facts") involved matters that occurred weeks, months and even a year later. Plaintiff's evidence on this issue was irrelevant. The *Dresher* analysis should conclude that with no evidence of malice, bad faith or recklessness, summary judgment for the board members was warranted.

Another issue concerns the final report of State Auditor Yost. This too constituted a failure to consider information surrounding the press release – this final auditor's report corroborated the evidence in the record that the school board did not know the amount paid to Randy Stepp for education expense reimbursement. This undisputed evidence was relevant to the defamatory claim of Stepp. Failing to consider admissible evidence is reversible error. *Murphy v Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, at 360; and see *State ex rel. v Ormet Corp. v Industrial Comm. of Ohio*, 54 Ohio St.3d 102 (1990). Because of the importance of immunity to public employees, the

failure of the Court of Appeals to conduct a *Dresher* analysis constitutes reversible error.

II. Proposition of Law No. II: When an Alleged Defamatory (False Light) Statement Is Not "Of and Concerning" a Plaintiff, There Can Be No Malice, Bad Faith or Recklessness, and Statutory Immunity Is Warranted

Both defamation and false light invasion of privacy have "of and concerning" as an element. *Michigan United Conservation Clubs v CBS News*, 485 F. Supp. 893 (W.D. Mich. 1980). This is a Constitutional requirement. N*ew York Times v Sullivan*, 376 U.S. 254 (1964), at 288. The trial court in its ruling stated: "Under Ohio law the test in this defamation claim is whether recipients of the statement understand it to pertain to the Plaintiff. This is a matter for the trier of fact to determine . . . ." The problem with this statement by the trial court is that there is no Ohio case law cited to support it, because no Ohio case law exists on this subject. There is plenty of out of state case law on this subject, and it holds that generally whether a statement can reasonably said to be "of and concerning" a person is a question of law. *Elias v Rolling Stone LLC*, 2016 U.S. Dist. Lexis 83875, (S.D.N.Y. 2016), at *13, *Gilman v Spitzer*, 902 F.Supp. 2d 389, at 395, *Three Amigos SJL Rest. Inc. v CBS News Inc.*, 2016 NY Lexis 3217 (NY), at *5, *Klentzman v Brady*, 2013 Tex. App. Lexis 12961, at *19. The trial court should have ruled on this issue – it erroneously did not.

The March 22nd press release stated that the school board did not know the amount of educational reimbursement. It subsequently said that the past procedures for reimbursement were such that the board was unaware of payments made by the Medina County ESC. These two alleged defamatory or false light statements refer to the board's knowledge and do not refer to Stepp. Furthermore, these statements say nothing remotely derogatory about Randy Stepp, regardless of whether Stepp disputes their truthfulness or accuracy. This undermines plaintiff's claim of malice, bad faith or recklessness. Stated differently, if a statement says nothing about a plaintiff, then logically there cannot be any malice, bad faith or recklessness, and summary judgment pursuant to R.C. 2744.03(A)(6) regarding immunity is warranted. While malice and a statement "of and concerning a person" are separate elements of defamation (and false light), if there is nothing stated that is about a person, then as a matter of logic, that statement cannot be malicious. If a statement is not about a person, that statement cannot be said to have been made maliciously (or willfully or recklessly) about that person. This simple statement or law needs to be adopted by Ohio's highest court. Further, as a matter of law, this court should determine that because the statements in question are not "of and concerning" Randy Stepp there could be no malice (of any type), and therefore immunity should be granted.

The U.S. Supreme Court has made it clear that statements which do not satisfy the high bar of the *New York Times v Sullivan* test should not be sent to a jury. *O'Day v Webb*, 29 Ohio St. 2d 215 (1972), at 220. Where there are only legal questions, they are not turned into factual questions because a consideration of the facts is involved. *SFZ Transp., Inc. v Limbach*, 66 Ohio St. 3d 602, 605, 1993-Ohio-240. This Court needs to intervene so that this public employee receives the

immunity he deserves. To do otherwise is to deprive this defendant of his First Amendment right to freedom of speech.

III. Proposition of Law No. III: Constitutionally, a Statement Regarding the Interpretation of an Ambiguous Contract Cannot Be Actionable; Therefore, There Can Be No Malice, Bad Faith or Recklessness and Statutory Immunity is Warranted.

The alleged defamation involves the board's interpretation of the contract amendment. The contract amendment was a one paragraph sentence which said: "The board also agrees to pay the costs associated with the superintendent's acquisition of past academic degrees as they relate to education." This single sentence does not list which degrees are involved, it does not say what the educational reimbursements include, it does not mention payments for housing, interest, gas money, incidentals or discharged loans. This issue of ambiguity in interpretation was first discussed at page 4 of the motion for summary judgment, and was stated in depth in the reply brief. This argument was renewed in the Court of Appeals. The press release in question said that the board was unaware of the extent of the reimbursement and that the past procedure was such that the board was unaware of board/ESC payments.

In *Time, Inc. v Pape*, 401 U.S. 279 (1971), the U.S. Supreme Court stated: "Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury." *Time v Pape*, at 291. The Court continued stating: "In certain areas of the law of defamation, New York Times added to the tort law of the individual States a constitutional zone of protection for errors of fact caused by negligence." *Time v Pape*, at 291. This Court has stated that whether the evidence in the record supports a finding of actual malice is a question of law. *McKimm v Ohio Elections Comm.*, 89 Ohio St. 3d 139, 2000-Ohio-118, at 147. Unfortunately, neither Court below engaged in this analysis. If a statement is neither derogatory nor "of and concerning" plaintiff,

there cannot be any malice (of any kind), bad faith or recklessness, and summary judgment regarding immunity is statutorily warranted.

The press release involves the school board's interpretation of an ambiguous and vague contract amendment. This places the instant situation squarely within the rule of *Time v Pape*. Like Proposition of Law II, the defendants' First Amendment rights to freedom of speech are abridged by this failure to grant immunity where the statement in question involves an ambiguous contract.

CONCLUSION

The Medina City Board of Education, as well as every such board across this State, has been put in an impossible situation. Its members tried to discharge their duties faithfully by responding to the Medina Gazette with a statement of their position, whether right or wrong. They have a statutory right to protection from error because of the overarching public policy that the school board respond fully and forthrightly to the electorate. No school board should have to refuse to answer questions posed by the news media because of the fear of civil liability for being wrong. What will be chilled will not be errors in governance, but democracy itself. Petitioner, therefore, requests this Honorable Court accept review in the public interest of defining the rules necessary to our still-fragile experiment in effective self-governance. For these reasons, the Supreme Court of Ohio should take jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 8th day of December, 2016, to the following:

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IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

Randolph S. Stepp Plaintiff	)	Case No.: 14 CV 0874
	)	Judge Thomas J. Pokorny
vs.	)	
Medina City School District Board of Education, et al. Defendants	)	**Judgment Entry** **(Dispositive Motions)**

Board's Motion for Summary Judgment on Plaintiff's Complaint

A.(1) Defendants claim the allegations within the press release do not pertain to Plaintiff. Under Ohio law the test in this defamation claim is whether the recipients of the statement understood it to pertain to the Plaintiff. This is a matter for the trier of fact to determine, as material facts therein are in dispute. Overruled.
(2). Defendants claim individual members did not publish the press release. There is evidence if believed, tending to show that board members participated in the preparation and publishing of the release. Reasonable minds would therefore differ. Overruled. (3). Defendants argue that the statements within the release are not derogatory. However, under the conrolling caselaw it is a jury issue to determine whether the words are capable of suggesting a derogatory meaning under the attendant circumstances. Overruled. (4). The Court finds the Plaintiff is a public figure as a matter of law. Plaintiff has set forth evidence, if believed, to support a theory of recovery based on actual malice. The motion is therefore otherwise overruled.. (5). Defendants claim they are entitled to a qualified privilege as to the contents of the press release. While this issue is partially a question of law, material facts are in dispute regarding actual malice and therefore the motion is overruled.

B. Plaintiff is not required to show "intimate publicity" to survive summary judgment on the false light claim. Overruled.
C. Plaintiff's constructive termination claim requires proof of employment conditions "so intolerable that a reasonable person would have felt compelled to resign". This presents a jury issue where, as here, genuine issues of fact remain. Further, Plaintiff is not required to prove a violation of public policy in his cause of action. Since Plaintiff's theory of recovery under this claim, is based upon an alleged continuing course of conduct by Defendants, his claim is not stale. Nor is the fact that he dismissed his administrative appeal fatal to his recovery, since the Board was intent on parting ways with him and the only possible result in a successful appeal was a toothless

recommendation that the Board reinstate him. Overruled in their entirety.

D. Defendants' claims under Plaintiff's constructive discharge cause of action are premature because material facts pertaining to Plaintiff's resignation are in dispute. Overruled.

E. Issues pertaining to material facts to be proven regarding malice, wanton or reckless behavior are in dispute. Overruled regarding Plaintiff's tort claims.

Defendant James Shields' Motion for Summary Judgment

Whether Shields' statements were "substantially true" or false is a matter disputed by the parties, and, therefore, improper for summary disposition. Overruled.

In viewing the totality of the circumstances, the Court finds Shields' statements, if proven, conveyed accusations of improper conduct of the Plaintiff – not mere opinions. The issue of whether Shields acted with actual malice is in dispute. Plaintiff has submitted evidence, if believed, which would cause reasonable minds to differ.

Concerning Defendant Shields' claim that his statements were not made concerning Plaintiff, the Court finds taking into consideration the context, that reasonable minds would differ and the outcome is dependent upon disputed facts.

Determination of damages (harm) part of disputed facts in the case and are not proper for summary judgment.

Plaintiff's claim for false light (invasion of privacy) is supported by evidence sufficient to cause reasonable minds to differ.

Defendant Shields Motion for Summary Judgment is overruled in its entirety.

Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim

Plaintiff has moved for Summary Judgment on counterclaims involving reimbursement for funds used for employee gifts and awards, the ESC payments toward his student loan debts and the breach of an alleged duty of good faith and fair dealing. The facts are clearly in dispute regarding these claims. Summary disposition is improper. Overruled.

Plaintiff's Motion for Summary Judgment on Defendants' Affirmative Defense.

Defendants argue that the Board of Education violated the Ohio Open Meetings Act when it passed Plaintiff's 2013 employment contract. The facts surrounding this are disputed. However, Plaintiff argues that the violation of the act is not available as an affirmative defense to attempt to avoid the contract. This poses a purely legal issue for the Court's determination.

Assuming arguendo that the Board violated the Open Meetings Act when it approved Dr. Stepp's contract, the issue becomes whether they can escape liability under the contract on that very basis.

Under Ohio law a public body cannot avoid a contractual obligation by arguing that it approved the contract in violation of the Open Meetings Act. See: *Roberto v. Brown County Hospital,* 12th Dist.No. CA87-06-009, 1988 WL 12962 (February 8,

1988), *Jones v. Brookfield Twp. Trustees*, 11th Dist.No. 92-T-4692, 1995 WL 411842 (June 30, 1995).

"As the *Roberto* Court emphasized, the purpose of R.C. 121.22 is to open government business to public scrutiny. It was not intended as a separate method for politicians to change the results of the political process when it reaches a result with which they do not agree. This is especially true when the politicians acquiesced in the procedure which was followed." See *Roberto*, infra.

There is evidence in the record that Plaintiff relied upon the 2013 contract turning down other school districts who had expressed interest in him prior to January 7, 2013. The Court further notes that Defendant board members originally acquisced in the procedures undertaken at the 1/7/2013 meeting.

For the foregoing reasons the Court finds that the Board's alleged violations of the Open Meetings Act are not available to them as an affirmative defense to the breach of contract claim.

The Plaintiff's Motion for Partial Summary Judgment is therefore granted.

IT IS SO ORDERED.

Thomas J. Pokorny, Judge
Sitting by Assignment

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RANDOLPH S. STEPP

Appellee

v.

MEDINA CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.

Appellants

C.A. Nos. 15CA0071-M
15CA0073-M

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 14 CV 0874

DECISION AND JOURNAL ENTRY

Dated: September 19, 2016

SCHAFER, Judge.

{¶1} Defendants-Appellants, Karla Robinson, Susan Vlcek, William Grenfell, and Charles Freeman (collectively, "Board Members"), appeal the judgment of the Medina County Court of Common Pleas denying their collective motion for summary judgment on Plaintiff-Appellee, Randolph Stepp's, claims for breach of contract, defamation, and false light invasion of privacy. Defendant-Appellant, James Shields, also appeals the judgment of the Medina County Court of Common Pleas denying his separate motion for summary judgment on Stepp's tort claims. For the reasons set forth below, we affirm.

I.

{¶2} The Medina City Schools Board of Education ("the Board") and Stepp entered into a three-year contract in 2006 to make Stepp the school district's superintendent. At the expiration of this initial contract in 2009, the Board elected to retain Stepp as superintendent and the parties entered into a new five-year contract. Under the terms of the new contract, Stepp was

to receive an annual base salary with benefits. Stepp had the potential to earn annual raises and merit bonuses under the new contract. The Board also agreed to pay Stepp $10,000.00 annually ($50,000.00 for the duration of the contract) to discourage him from accepting other job offers. Lastly, the Board explicitly encouraged Stepp to continue with his professional growth and development. To advance this last objective, the Board included a provision within the new contract agreeing to "reimburse [Stepp] for any college coursework completed for the purpose of expanding his professional knowledge and skills or to keep his license current, including tuition, fees, books and any other classroom materials required by the institution providing the services."

{¶3} After the Board and Stepp entered into the new five-year contract, Stepp voluntarily forwent receiving any raises and merit bonuses at first. However, Stepp eventually approached Susan Vlcek, the president of the school board, in 2011 and discussed amending his contract to include a provision whereby the school district would pay the costs of his education. Specifically, Stepp proposed that the school district pay a sum of $30,000.00 annually for five years to cover the costs of his education and that these payments be disbursed from the Medina County Educational Service Center (ESC)[1] rather than the school district treasurer, James Hudson. Stepp and Vlcek exchanged correspondence regarding this topic, with some of the correspondence being sent to James Shields, the school district's director of human relations and legal in-house counsel.

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[1] Most Medina County school districts contract with the ESC to provide services to schools. The school districts that contract with the ESC prepare an annual budget with the ESC, which must be approved by the district's school board. Any money paid to the ESC that goes unspent results in a surplus of school district funds accumulating with the ESC. All surplus funds belong to the school district and the school district can direct the ESC how to spend this money. The unspent money can also be either withdrawn or returned to the school district if requested. As of early 2012, no formal documentation was required prior to the ESC disbursing requested funds.

{¶4} In September 2011, Stepp sent a proposed amended contract to Vlcek. This amended contract was identical to the 2009 contract but for the addition of the following provision: "The board also agrees to pay the costs associated with [Stepp's] acquisition of past academic degrees as they relate to education." The Board voted to accept the proposed amended contract on November 7, 2011, without any changes. Thus, on January 9, 2012, Stepp received a check payable to the U.S. Department of Education from the ESC in the amount of $172,011.00, which fully paid all of Stepp's student loans.[2] The Board Members and Shields assert that the added provision to the amended contract was intended to reimburse Stepp for costs associated with obtaining any degree during his tenure as superintendent, not for degrees that pre-dated his tenure as superintendent. Thus, the Board Members and Shields maintain that they believed that the 2011 amended contract was only intended to cover the costs Stepp incurred to obtain his doctorate degree from Ashland University in 2010 and his M.B.A. from Case Western Reserve University.[3] The Board Members and Shields also claim that they did not learn about the ESC's $172,011.00 payment to the U.S. Department of Education until March of 2013.

{¶5} In the fall of 2012, prior to when the Board Members allege that they learned about the ESC's $172,011.00 disbursement, Stepp and the school board began discussing a new contract to retain Stepp as the school district's superintendent. Stepp proposed a new contract

[2] This disbursement paid for up to 15 years worth of Stepp's student loans. Specifically, this payment covered the costs affiliated with Stepp obtaining his undergraduate degree in education from Ashland University in 1993, his master's degree in education administration from Ashland University in 1998, and his doctorate degree in educational leadership from Ashland University in 2010. This payment also encompassed loans that Stepp acquired to attend the University of Akron for one year in 1983 and Ohio State University from 1984 to 1988 and again in 1992.

[3] Stepp was admitted to the Case Western Reserve University Weatherhead School of Management in 2010. He graduated with his M.B.A. in 2012, after the Board had already approved the 2011 amended contract.

that amended the 2009 contract for the remainder of its duration and also included a new five-year term. The proposed contract was primarily based off of his 2009 contract and also contained a bonus provision that was intended to discourage Stepp from accepting other job offers. However, instead of the $50,000.00 bonus provision that was contained in the 2009 contract, the proposed 2013 contract contained a provision drafted by Stepp whereby his bonus was to be determined using a formula that was dependent on the number of his accumulated sick days. The proposed contract also reimbursed Stepp for an unstated amount of income taxes that he would have to pay on the educational reimbursement. The Board met in executive session on January 7, 2013, to discuss Stepp's contract proposal. Regarding the contract's bonus provision, Stepp represented to the Board during this meeting that his bonus was worth between $50,000.00 and $60,000.00. The Board unanimously approved Stepp's new contract that evening.

{¶6} On March 6, 2013, the Board met again and discovered that Stepp's 2013 contract bonus was actually worth $83,017.06 and had already been paid to him. The Board also purportedly first learned at this meeting about the ESC's $172,011.00 payment covering all of Stepp's student loans dating back to 1983. This information purportedly shocked the Board Members. This information also quickly became public knowledge and caused a major outcry from the community. The Board subsequently held numerous meetings with the general public to discuss Stepp's compensation.

{¶7} In March of 2013, a local newspaper sent a list of questions to the Board regarding Stepp's compensation. The Board subsequently issued a press release on March 22, 2013, wherein they provided answers to the newspaper's questions. Around this time, Shields made numerous statements to the Board, the teacher's union, and the school district's director of community relations denying any knowledge that the 2011 contract amendment was intended to

have the school district pay for all of Stepp's past academic degrees. Stepp maintains that the Board's press release and Shields' comments included false and defamatory statements about him.

{¶8} As time passed, Stepp faced mounting pressure from the public and from individual Board members to resign his post as superintendent. The Board asked the school district's treasurer and the state auditor's office to separately investigate Stepp's use of school district funds. On April 8, 2013, the Board placed Stepp on paid administrative leave pending the results of the state auditor's investigation. The following week, the Board determined that they had violated Ohio's Open Meeting Act when they approved Stepp's 2013 contract. As such, the Board adopted a resolution rescinding the 2013 contract. The school district's treasurer, acting at the behest of the Board, then informed Stepp that his paychecks would be adjusted prospectively to recover amounts already paid to him under the 2013 contract. The treasurer also demanded that Stepp return the $83,017.06 bonus that was paid to him under the 2013 contract. In early October 2013, the Board adopted a resolution to not renew Stepp's 2009 contract when it expired on July 31, 2014.

{¶9} On October 22, 2013, the state auditor issued an interim report detailing $4,121.00 worth of inappropriate expenditures that Stepp had made during his tenure using ESC surplus funds that belonged to the school district. This report also determined that Stepp's use of ESC funds for certain non-service purposes violated the school district's purchasing rules. On October 28, 2013, the Board held a *Loudermill* hearing and passed a resolution to begin formal termination proceedings against Stepp. However, Stepp filed a federal lawsuit against the school district in November 2013 and the district court stayed the *Loudermill* hearing process. The district court did not lift the stay of the administrative process until April 17, 2014. In April

2014, the Board approved a contract making the school district's interim superintendent the new permanent superintendent. Stepp officially resigned from his position as superintendent of Medina City School District on April 25, 2014.

{¶10} Stepp filed a lawsuit against the Board Members and Shields on August 20, 2014, in the Medina County Court of Common Pleas[4] asserting the following claims: (1) breach of contract against the Board Members with regard to the 2011 amended contract and the 2013 contract; (2) breach of contract against the Board Members by effectively and/or constructively discharging him; (3) defamation against the Board Members[5] for the March 22, 2013 press release responding to the newspaper's written questions; (4) defamation against Shields for certain public statements that he made to the Board, the teacher's union, and the Director of Community Relations concerning the ECS's $172,011.00 payment covering Stepp's student loans; (5) false light invasion of privacy against the Board for the March 22, 2013 press release; (6) false light invasion of privacy against Shields for his public comments to the Board, the teacher's union, and the Director of Community Relations; and (7) a request for injunctive relief requiring the Board to correct the minutes from the January 7, 2013 meeting to reflect that the Board entered into executive session for one or more of the permissible purposes under R.C. 121.22(G).

{¶11} The Board Members and Shields both denied the allegations contained in Stepp's complaint. The Board Members' answer listed several affirmative defenses. The Board

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[4] Stepp initially filed a lawsuit against the Board Members and Shields, among others, in the United States District Court for the Northern District of Ohio. However, the district court dismissed Stepp's state law claims without prejudice. Stepp then filed the present lawsuit in state court.

[5] Stepp voluntarily dismissed Claim III (defamation) of his complaint as it pertained to board member Charles Freeman.

Members also filed a counterclaim asserting three causes of action against Stepp. The first cause of action concerns Stepp's refusal to return the $83,017.06 bonus that he received under the 2013 contract. The second cause of action concerns two payments that the ESC issued at the direction of Stepp, which were the $172,011.00 payment covering Stepp's student loans and $4,121.00 worth of payments that the state auditor's interim report deemed to be improper. The third cause of action asserts that Stepp violated his duty of good faith and fair dealing by not returning his 2013 bonus and by improperly directing the ESC to make payments for his benefit. Stepp filed an answer denying the Board Members' counterclaim.

{¶12} At the close of discovery, the Board Members and Shields filed separate motions for summary judgment on Stepp's claims. Stepp filed briefs opposing both defendants' motions for summary judgment. Stepp then filed a motion for partial summary judgment on the Board Members' affirmative defense to his breach of contract claims where the Board Members assert that Stepp's 2013 employment contract is invalid because the Board violated Ohio's Open Meetings Act when it approved the contract. Stepp also filed a motion for summary judgment on the Board Members' counterclaim. The Board Members filed briefs in opposition to Stepp's motions for summary judgment.

{¶13} On August 13, 2015, the trial court issued a judgment entry ruling on the parties' respective summary judgment motions. In its entry, the trial court denied the Board Members and Shields' respective motions for summary judgment in their entirety. The trial court also denied Stepp's motion for summary judgment with regard to the Board Members' counterclaim, but granted Stepp's motion for summary judgment with regard to the Board Members' Open Meetings Act affirmative defense.

{¶14} The Board Members and Shields both timely appealed from the trial court's denial of their respective summary judgment motions and this Court subsequently consolidated the appeals. Stepp has not appealed the trial court's judgment. The trial court has stayed the proceeding pending the outcome of this appeal. The Board Members have raised four assignments of error for our review while Shields has raised one. To facilitate our analysis, we elect to address Appellants' assignments of error out of order.

II.

The Board Members' Fourth Assignment of Error

The trial court did not have subject matter jurisdiction over the constructive termination claim.

{¶15} In their fourth assignment of error, the Board Members argue that the trial court lacked jurisdiction over Stepp's breach of contract claims because Stepp resigned from his position without exhausting his administrative appeal remedies as required by R.C. 3319.16. We disagree.

{¶16} R.C. 3319.01 states that "[t]ermination of a superintendent's contract shall be made pursuant to [R.C. 3319.16]." R.C. 3319.16 provides teachers and superintendents with an administrative appeal procedure to address the termination of their contract. When a school board commences termination proceedings against a teacher or superintendent, the teacher or superintendent may request a hearing before the school board or before an appointed referee. R.C. 3319.16; R.C. 3319.161. A teacher or superintendent whose contract has been terminated pursuant to this process may appeal the decision through an original action before the court of common pleas. R.C. 3319.16.

{¶17} R.C. 3319.16 provides the exclusive rights and remedies for a teacher or superintendent facing termination of his or her employment contract. *Elsass v. St. Marys City*

School Dist. Bd. of Edn., 3d Dist. Auglaize No. 2-10-30, 2011-Ohio-1870, ¶ 66. The Supreme Court of Ohio has stated that "[w]here the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy." *Id.*, citing *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006–Ohio–5202, ¶ 34, quoting *Fletcher v. Coney Island Inc.*, 165 Ohio St. 150, 154 (1956). Thus, R.C. 3319.16 provides the sole process by which teachers and superintendents may challenge their termination.

{¶18} Here, the Board Members contend that the trial court did not have subject matter jurisdiction over Stepp's breach of contract claim because Stepp resigned without fully undergoing the process set forth R.C. 3319.16. Thus, the Board Members assert that because Stepp did not exhaust his administrative remedies, he was barred from filing his breach of contract claims in the present lawsuit. We note, however, that the Board Members did not raise this argument below. The Supreme Court of Ohio has held that "the doctrine of failure to exhaust administrative remedies is not a jurisdictional defect to a declaratory judgment action; it is an affirmative defense that may be waived if not timely asserted and maintained." *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462 (1997), citing *Gannon v. Perk*, 46 Ohio St.2d 301 (1976). Because the Board Members are the party seeking to benefit from the doctrine of failure to exhaust administrative remedies, it was their responsibility to raise this argument in the trial court. *Id.* Having failed to do so, we determine that the Board Members have forfeited this issue for appellate review. *See New Franklin v. Hutfles*, 9th Dist. Summit No. 27098, 2014-Ohio-1335, ¶ 6 (failure to timely raise the doctrine of failure to exhaust administrative remedies affirmative defense waives appellant's ability to raise the defense on appeal.).

{¶19} The Board Members' fourth assignment of error is overruled.

The Board Members' Second Assignment of Error

The trial court erred in denying immunity to the individual board member defendants.

{¶20} In their second assignment of error, the Board Members argue that the trial court erred by denying their motion for summary judgment on Stepp's tort claims because they are entitled to immunity as employees of a political subdivision. We disagree.

A. Jurisdiction

{¶21} "The denial of a motion for summary judgment is not ordinarily a final, appealable order." *Buck v. Reminderville,* 9th Dist. Summit No. 27002, 2014–Ohio–1389, ¶ 5. However, R.C. 2744.02(C) provides that "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." In the present case, the Board Members maintain, and Stepp does not dispute, that they qualify as a political subdivision and an employee of a political subdivision, respectively. Thus, because the trial court's judgment denied the Board Members the benefit of R.C. Chapter 2744 statutory immunity, the judgment is a final, appealable order.

B. Standard of Review

{¶22} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 (1996). Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 358-359 (1992).

{¶23} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

C. Immunity of Political Subdivision Employees

{¶24} R.C. 2744.03(A)(6) provides immunity for employees of political subdivisions, and it pertinently provides as follows:

> In a civil action brought against * * * an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, * * * the employee is immune from liability unless one of the following applies:
>
> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
>
> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code.

Here, the parties do not dispute that the Board Members are employees of a political subdivision. *See* R.C. 2744.03(A); R.C. 2744.01(B). Moreover, the Board Members maintain that they were acting within the scope of their employment, and thus, R.C. 2744.03(A)(6)(a) does not apply.

They further maintain that R.C. 2744.03(A)(6)(c) does not apply because there is no section of the Ohio Revised Code that expressly imposes liability on them. Stepp does not dispute these claims. Rather, the dispute in this case concerns whether the Board Members acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. *See* R.C. 2744.03(A)(6)(b).

{¶25} "One acts with a malicious purpose if one willfully and intentionally acts with a purpose to cause harm." *Moss v. Lorain Cty. Bd. of Mental Retardation*, 185 Ohio App.3d 395, 2009-Ohio-6931, ¶ 19 (9th Dist.). "Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Anderson v. Massillon,* 134 Ohio St.3d 380, 2012–Ohio–5711, paragraph two of the syllabus. "The term 'bad faith' embraces more than bad judgment or negligence; it is conduct that involves a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." (Internal quotations and citations omitted.) *Thomas v. Bauschlinger*, 9th Dist. Summit No. 26485, 2013-Ohio-1164, ¶ 22. "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson* at paragraph three of the syllabus. Meanwhile, "[r]eckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Id.* at paragraph four of the syllabus. "The actor must be conscious that his conduct will in all probability result in injury." *O'Toole v. Denihan,* 118 Ohio St.3d 374, 2008–Ohio–2574, paragraph three of the syllabus. There must be a "perverse disregard of a known risk." *Id.*

{¶26} In this case, Stepp's defamation and false light invasion of privacy claims against the individual Board Members concern the March 22, 2013 press release that the Board issued in response to written questions from the local newspaper. In response to specific questions, the press release contained the following language which form the basis of Stepp's tort claims:

(1) "The Board was not aware of the extent of the reimbursement or that it applied to all [past] degrees."

(2) "The past procedure for reimbursement was such that the Board was not informed of the payments/contracts between the Board and the Medina County Educational Service Center (ESC)."

(3) "The Board learned of [the ESC's $172,011.00] expenditure on March 6, 2013, as the result of the public records request."

Stepp asserts that the language of the press release insinuates that he lied, concealed information, or misled the Board concerning the total cost of his degrees, the number of degrees for which he would obtain reimbursement under the 2011 contract amendment, and that he obtained reimbursement through the ESC to avoid detection due to the Board's lack of oversight of ESC contracts or payments. At the close of discovery, the Board Members filed a motion for summary judgment arguing, in part, that they are entitled to immunity as employees of a political subdivision. Stepp filed a motion opposing the Board Members' request for summary judgment. The trial court ultimately denied the Board Members' summary judgment motion, concluding that a question of material fact exists regarding whether the Board Members acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶27} In their motion for summary judgment, the Board Members assert that they did not act with a malicious purpose, in bad faith, or in a wanton or reckless manner. In support of their motion for summary judgment, the Board Members rely solely upon Stepp's deposition testimony where Stepp could not say that the Board Members possessed sinister motives and

where Stepp admitted that he never heard the Board Members say anything disparaging to him, that the Board Members never yelled at him, and that the Board Members never exhibited any hatred towards him.

{¶28} After reviewing the record in this matter, we conclude that the Board Members failed to carry their initial *Dresher* burden. The only evidence cited within the Board Members' motion for summary judgment as it pertains to the issue of immunity is Stepp's deposition testimony where Stepp comments on how the Board Members personally treated him during his tenure as superintendent. Stepp's testimony on this point, however, has absolutely no bearing on either intent or the level of knowledge that the individual Board Members possessed when they signed off on the press release. Additionally, we conclude that the Board Members' conclusory assertion that their request for the state auditor to investigate Stepp's past expenses was not evidence of malice is insufficient for a moving party to discharge its initial burden on summary judgment. *See Dresher v. Burt*, 75 Ohio St.3d at 293. As such, we determine that the trial court did not err by denying the Board Members' motion for summary judgment.

{¶29} The Board Members' second assignment of error is overruled.

Shields' Assignment of Error

The trial court committed prejudicial error when it denied Mr. Shields – a political subdivision employee – full, statutory immunity pursuant to Ohio Revised Code Chapter 2744 from Randolph Stepp's defamation and false light invasion of privacy claims where no evidence supports a finding of actual malice by Mr. Shields.

{¶30} Here, Stepp's defamation and false light invasion of privacy claims against Shields concern Shields' March 2013 statements that were made to various people, such as the Board, the teacher's union, the school district treasurer, and the school district community relations director. As with Stepp's claims against the Board Members, the sole issue here

concerns whether Shields acted with a malicious purpose, in bad faith, or in a wanton or reckless manner when he made the statements in question. *See* R.C. 2744.03(A)(6)(b). The crux of Shields' statements that Stepp claims to be injurious to him are: (1) Shields denying any involvement with the 2011 amended contract; (2) Shields claiming that he thought that the 2011 contract amendment was only intended to reimburse Stepp for his M.B.A., not his past degrees; and (3) Shields insisting that he did not know that the 2011 contract amendment would cost upwards of $175,000.00. At the close of discovery, Shields filed a motion for summary judgment arguing, in part, that he is entitled to immunity as an employee of a political subdivision. Stepp filed a brief in opposition. The trial court ultimately denied Shields' motion on the basis that Stepp submitted evidence which, if believed, "would cause reasonable minds to differ" on whether Shields acted maliciously.

{¶31} After reviewing the record and applying the aforementioned summary judgment standard, we determine that Shields satisfied his initial *Dresher* burden. In his motion for summary judgment, Shields asserts that no genuine issue of material fact exists concerning whether he acted with a malicious purpose, in bad faith, or in a wanton or reckless manner when he addressed the Board Members, the teacher's union, and the director of community relations in March 2013 regarding Stepp's 2011 amended contract. In support of his motion for summary judgment, Shields cites to the deposition transcripts of board members Freeman and Grenfell, board president Vlcek, school district treasurer Hudson, and school district communications director Jeanne Hurt to support his assertion that he was not aware of the extent to which the school district would reimburse Stepp for his past academic degrees under the terms of the 2011 contract amendment prior to March of 2013. Additionally, Shields' motion cites to the affidavit

of John Leatherman, the president of the Medina City Teacher's Association, which attests to the following:

> Based upon [Shields'] verbal and non-verbal response and demeanor during [their February and March 2013] meetings, it was clear to me that until [the March 2013 board meeting] Shields was completely unaware of certain matter pertaining to [Stepp's 2011 amended contract], specifically:
>
> i. that Stepp's Contract provided for the payment or reimbursement to Stepp for educational loans and expenses as far back as Stepp's undergraduate degrees;
>
> ii. that payment to Stepp under the terms of his Contract would be as high as $175,000; and
>
> iii. that the Contract's payment or reimbursement provision applied to any degree other than Stepp's M.B.A. which was being pursued at Case Western Reserve University at the time of the Contract.

Shields contends that this evidence demonstrates that his various statements in March 2013 regarding the 2011 amended contract were not made with a malicious purpose, in bad faith, or in a wanton or reckless manner. We agree that the evidence cited in Shields' motion for summary judgment negates Stepp's contention that Shields' March 2013 comments to the Board, the school district treasurer, the teacher's union, and the school district's communications director concerning the 2011 amended contract were made with malice, in bad faith, or in a wanton or reckless manner. As such, we conclude that Shields has satisfied his initial burden on summary judgment.

{¶32} With Shields having satisfied his initial burden, the burden then shifts to Stepp as the non-moving party to provide specific facts which would demonstrate the existence of a "genuine triable issue" to be litigated for trial. *Tompkins,* 75 Ohio St.3d at 449. In his brief in opposition to Shields' summary judgment motion, Stepp asserts that Shields acted with malice when discussing the 2011 contract amendment with the Board, the teacher's union, the school

district treasurer, and the school district community relations director. In support of this assertion, Stepp cites to record evidence concerning Shields' direct involvement in both negotiating and drafting the 2011 contract amendment. Specifically, Stepp cites to his own deposition testimony concerning his communications with Shields while negotiating the 2011 contract amendment, as well as his own handwritten notes taken contemporaneously during those negotiations. Stepp also cites to the 2011 contract amendment itself in support of his claim that Shields acted with malice. Specifically, Stepp claims that because Shields drafted the 2011 contract amendment, Shields' statements to the Board, the teacher's union, the school district treasurer, and the school district community relations director were both false and made with the intent of causing harm to him.

{¶33} Additionally, Stepp argues in his opposition brief that even if Shields "did not have actual knowledge that his statements were false, he certainly had a high degree of awareness of their probable falsity or serious doubts as to the truth of [his] statements[.]" On this point, Stepp appears to be arguing that Shields made the March 2013 statements in question in a reckless manner. In support of this assertion, Stepp cites to Shields' own deposition testimony. Specifically, Stepp cites to the testimony where Shields admits: (1) that the language of the 2011 amended contract refers to "past *degrees*" (plural); (2) that Stepp had not obtained his M.B.A. at the time that the Board approved the 2011 amended contract and, thus, Stepp's M.B.A. did not constitute a "past academic degree" at that point in time; (3) that he was aware of Stepp's past academic degrees; (4) that Stepp expressly listed all three of his previously earned academic degrees in an August 4, 2011 email concerning the 2011 amended contract that was emailed to both Vlcek and himself; and (5) that he prepared the actual language of the 2011 amended contract based upon his prior discussions with Stepp and Vlcek.

{¶34} In light of the foregoing, we conclude that Stepp met his reciprocal burden of demonstrating the existence of a genuine issue of material fact concerning whether Shields acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. The trial court therefore did not err in denying Shields' motion for summary judgment as a genuine issue of material fact exists as to whether Shields is entitled to immunity.

{¶35} Accordingly, Shields' sole assignment of error is overruled.

The Board Members' First Assignment of Error

The trial court erred in failing to consider the finalized State Auditor's Opinion as admissible evidence.

{¶36} In their first assignment of error, the Board Members argue that the trial court erred by denying their motion to substitute the state auditor's interim report with the state auditor's final report. We decline to address the merits of the Board Members' argument, however, as we determine that their argument was not properly preserved for appellate review.

{¶37} "Generally, the denial of summary judgment is not a final, appealable order." *Hubbell v. City of Xenia,* 115 Ohio St.3d 77, 2007–Ohio–4839, ¶ 9. "[If] a trial court denies a motion in which a political subdivision * * * seeks immunity," however, its "order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)." *Id.* at syllabus. This Court has held that "an appeal from such a decision is limited to the review of alleged errors in the portion of the trial court's decision which denied the political subdivision the benefit of immunity." *Makowski v. Kohler,* 9th Dist. Summit No. 25219, 2011–Ohio–2382, ¶ 7, citing *Essman v. City of Portsmouth,* 4th Dist. Scioto No. 08CA3244, 2009–Ohio–3367, ¶ 10; *Carter v. Complete Gen. Constr. Co.,* 10th Dist. Franklin No. 08AP–309, 2008–Ohio–6308, ¶ 8; *CAC Bldg. Props. v. City of Cleveland,* 8th Dist. Cuyahoga No. 91991, 2009–Ohio–1786, ¶ 9 fn. 1.

{¶38} Here, the parties all filed their respective motions for summary judgment on April 16, 2015. The state auditor issued its final report on April 21, 2015. While the parties' summary judgment motions were still pending, the Board Members filed a motion on May 4, 2015, asking the trial court to substitute the state auditor's October 22, 2013 interim report with the final report. The final report is similar in substance to the interim report except that it contains an addendum which discusses the auditor's findings regarding the ESC's $172,011.00 payment covering all of Stepp's student loans. Stepp did not oppose the Board Members' motion to substitute. However, the trial court never ruled on the Board Members' motion prior to issuing its judgment entry ruling on the parties' respective motions for summary judgment wherein it denied the Board Members' request for immunity. As such, because the trial court did not explicitly rule on the Board Members' motion, this Court must presume that the trial court implicitly denied this motion. *Koballa v. Twinsburg Youth Softball League*, 9th Dist. Summit No. 23100, 2006-Ohio-4872, ¶ 17, citing *Akron v. Molyneaux*, 144 Ohio App.3d 421, 425 (2001).

{¶39} Although the Board Members argue on appeal that the auditor's final report "goes to the heart of the immunity issue" and is relevant to negating Stepp's defamation claim, they did not make these arguments in their motion. The Board Members' motion merely asks the trial court to substitute the interim report with the final report while omitting any discussion or argument as to why the final report is integral to their defense. By not providing the trial court with this argument, the Board Members cannot now argue on appeal that the final report is crucial to their immunity affirmative defense. As such, we decline to address the Board Members' first assignment of error.

{¶40} The Board Members' first assignment of error is overruled.

The Board Members' Third Assignment of Error

Because there was no malice, bad faith, reckless or wanton behavior, there is no actual malice necessary to sustain Plaintiff's defamation and invasion of privacy claims.

{¶41} In their third assignment of error, the Board Members argue that if they are entitled to immunity, then they are also entitled to summary judgment on Stepp's tort claims. As noted earlier in this opinion, however, we affirm the trial court's denial of the Board Members' request for immunity in their summary judgment motion and overrule their second assignment of error. Additionally, since this assignment of error pertains to the merits of Stepp's tort claims, it is beyond the scope of our review at this juncture. *Makowski*, 2011–Ohio–2382, at ¶ 7. Accordingly, we decline to address the Board Members' third assignment of error as we are without authority to do so.

{¶42} Therefore, the Board Members' third assignment of error is overruled.

III.

{¶43} The Board Members' and Shields' assignments of error are overruled. Accordingly, the judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

JULIE A. SCHAFER
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

JONATHAN D. GREENBERG, ERIC J. JOHNSON, and SARA RAVAS COOPER, Attorneys at Law, for Appellant.

DAVID DRECHSLER and MICHAEL J. MATASICH, Attorneys at Law, for Appellee.

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STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
2016 OCT 24 PM 12:25

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

RANDOLPH S. STEPP

Appellee

v.

MEDINA CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.

Appellants

C.A. Nos. 15CA0071-M
15CA0073-M

JOURNAL ENTRY

Appellant, Charles W. Freeman, has moved this Court to reconsider its September 19, 2016 decision, affirming the trial court's denial of Appellants' motions for summary judgment. Specifically, Freeman asks this Court to clarify its decision by noting that he resigned from the Medina City School Board on March 27, 2013, and he, therefore, was not involved in any of the school board's conduct following this date. Additionally, Freeman asks that we clarify that the only remaining claim within Plaintiff-Appellee, Randolph S. Stepp's, complaint that is still pending against him is Count Five (false light invasion of privacy).

In determining whether to grant an application for reconsideration under App.R. 26(A)(1), a court of appeals must review the application to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *State v. Fry*, 9th Dist. Summit No. 23211, 2007-Ohio-3240, ¶ 2, citing *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117 (10th Dist.1992).

Upon review of Freeman's application, we find no obvious error or issue that we did not properly consider. For this reason, Freeman's application for reconsideration is denied. We note, however, that although our decision indistinguishably grouped Freeman together

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with the other school board members for ease of analysis, the record is clear that he does not stand on equal footing with the other board members as it pertains to most of Stepp's claims.

Judge Julie A. Schafer

Concurs:
Carr, P.J.
Moore, J.