COURT OF COMMON PLEAS
CIVIL DIVISION
ADAMS COUNTY, OHIO

SHAWN D. COOLEY, ET. AL.	:	
Plaintiffs	:	**CASE NO. CVH 20230069**
-vs-	:	**DECISION AND ENTRY DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS**
JOSEPH EDGAR FOREMAN KA AFROMAN, ET. AL.	:	
	:	Defendants

Shawn D. Cooley, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Justin Cooley, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Michael D. Estep, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Shawn D. Grooms, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Brian Newland, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Lisa Phillips, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Randolph L. Walters, plaintiff, Robert A. Klingler Co., L.P.A., Robert A. Klingler, 895 Central Avenue, Suite 300, Cincinnati, Ohio 45202.

Joseph Edgar Foreman, aka Afroman, defendant, Young & Caldwell, LLC, Tyler Cantrell, 225 N. Cross Street, West Union, Ohio 45693, Rivers Law Firm, P.A., Bruce Rivers, appearing *pro hac vice*, 701 Fourth Avenue South, Suite 300, Minneapolis, Minnesota 55415.

Hungry Hustler Records, defendant, Young & Caldwell, LLC, Tyler Cantrell, 225 N. Cross Street, West Union, Ohio 45693, and Rivers Law Firm, P.A., Bruce Rivers, 701 Fourth Avenue South, Suite 300, Minneapolis, Minnesota 55415.

Media Access, Inc., c/o Adam Corey Muniz, Director of Operations, defendant, Rivers Law Firm, P.A., Bruce Rivers, 701 Fourth Avenue South, Suite 300, Minneapolis, Minnesota 55415.

Defendant John Doe 1, address unknown.

Defendant John Doe 2, address unknown.

Defendant John Doe 3, address unknown.

ACLU of Ohio Foundation, *amicus curiae*, David J. Carey, 1108 City Park Avenue, Suite 203, Columbus, Ohio 43206, and Amy R. Gilbert and Freda J. Levenson, 4506 Chester Avenue, Cleveland, Ohio 44102

ACLU of West Virginia Foundation, *amicus curiae*, Jamie Lynn Crofts, P.O. Box 3952, Charleston, West Virginia 25339-3952

American Civil Liberties Foundation, *amicus curiae*, Vera Eidelman, 125 Broad Street, 18th Floor, New York, New York 10004.

Arthur West, *amicus curiae*, 120 State Avenue NE #1497, Olympia, Washington 98501, Jamie Lynn Crofts,

This case came before the court on a complaint that was filed on March 13, 2023, and an amended and supplemental complaint that was filed on May 10, 2023.

In the original and amended and supplemental complaints, the plaintiffs set forth five causes of action: 1) Violations of Ohio Rev. Code Chapter 2741- unauthorized use of individual's persona, 2) Invasion of privacy by misappropriation- Restatement (Second) of Torts, § 652(C) (1977), 3) Invasion of Privacy- false light publicity- Restatement (Second) of Torts, § 652(E) (1977), 4) Invasion of privacy- unreasonable publicity given to private lives- Restatement (Second) of Torts, §652(D) (1977), and 5) Defamation.

J527 P331

Among the remedies requested, the plaintiffs are seeking compensatory damages, punitive damages, injunctive relief, attorney's fees, expenses of litigation, and impoundment and destruction of merchandise, goods, and materials.

As to the original and amended and supplemental complaints, all of the plaintiffs are employed by the Adams County Sheriff's Department.[1] Shawn D. Cooley, Justin Cooley, Shawn D. Grooms, and Lisa Phillips are deputies, Michael D. Estep and Randolph L. Walters, Jr. are sergeants, and Brian Newland is a detective sergeant.[2]

The named defendants are Joseph Edgar Foreman, aka Afroman, Hungry Hustler Records, Media Access, Inc., and three John Doe defendants.

On April 11, 2023, the defendants filed a motion to dismiss and a motion to strike the plaintiffs' complaint. Subsequently, the plaintiffs filed their amended and supplemental complaint.

On May 24, 2023, in response to the filing of the plaintiffs' amended and supplemental complaint, the defendants filed an amended joint motion to dismiss and a motion to strike the plaintiffs' amended and supplemental complaint.

On June 9, 2023, the plaintiffs filed a memorandum in opposition to the plaintiffs' amended motion to dismiss and amended motion to strike the plaintiffs' complaint.

Amicus curiae briefs and/or memoranda/letter have been filed in the proceeding by Arthur West on March 27, 2023, Corey Muniz on April 5, 2023, the American Civil Liberties Union of Ohio Foundation on April 19, 2023, and Arthur West on May 30, 2023. All of these filings have been in support of the defendants' motions to strike and to dismiss.

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[1] *Id.*, ¶¶ 1-7.
[2] *Id.*

J527 P332

Neither side requested an opportunity to make oral arguments as to the motion to dismiss and the motion to strike the plaintiffs' complaint.

Upon consideration of the plaintiff's amended complaint, the defendants' motions to dismiss and to strike, the memoranda of counsel, the record of the proceedings, and the applicable law, the court now renders this written decision as to the motion to dismiss and the motion to strike.

STANDARD OF REVIEW- MOTIONS TO DISMISS AND TO STRIKE

The defendants have filed two motions- a Civ.R. 12(B)(6) motion to dismiss and a Civ.R. 12(F) motion to strike.

The standard of review for a trial court's review of a Civ.R. 12(B)(6) motion is as follows:

> "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). A trial court may not grant a motion to dismiss for failure to state a claim upon which relief may be granted unless it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' " *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus; *see also Taylor v. London*, 88 Ohio St.3d 137, 139, 723 N.E.2d 1089 (2000).
>
> Furthermore, when considering a Civ.R. 12(B)(6) motion to dismiss, the trial court must review only the complaint, accepting all factual allegations as true and making every reasonable inference in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988); *Estate of Sherman v. Millhon*, 104 Ohio App.3d 614,

J527 P333

617, 662 N.E.2d 1098 (10th Dist.1995); *see also JNS Ents., Inc. v. Sturgell*, 4th Dist. Ross No. 05CA2814, 2005-Ohio-3200, ¶ 8. The court, however, need not presume the truth of legal conclusions that are unsupported by factual allegations. *McGlone v. Grimshaw*, 86 Ohio App.3d 279, 285, 620 N.E.2d 935 (4th Dist.1993), citing *Mitchell* at 193.

"When reviewing a Civ.R. 12(B)(6) motion, courts are confined to the allegations contained in the complaint." *Cooper v. Highland Cty. Bd. Of Commrs.*, 4th Dist. Highland No. 01CA15, 2002-Ohio-2353, ¶ 9, citing *State ex rel. Alford v. Willoughby Civ. Serv. Comm.*, 58 Ohio St.2d 221, 223, 390 N.E.2d 782 (1979). "But courts may consider written instruments if they are attached to the complaint." *Id.*, citing *First Michigan Bank & Trust v. P. & S. Bldg.*, 4th Dist. Meigs No. 413, 1989 WL 11915 (Feb. 16, 1989), in turn citing *Slife v. Kundtz Properties, Inc.* 40 Ohio App.2d 179, 318 N.E.2d 557 (8th Dist.1974). "However, courts should avoid interpreting these written instruments at the pre-trial stage unless the instrument is clear and unambiguous on its face." *Id.*, citing *Slife* at 184-85. "Where a plaintiff's claim is predicated upon a written instrument attached to the complaint, a dismissal under Civ.R. 12(B)(6) is proper only where the language of the writing is clear and unambiguous and presents an insuperable bar to relief." (Internal quotations omitted.) *Demeraski v. Bailey*, 2015-Ohio-2162, 35 N.E.3d 913, ¶ 13 (8th Dist.)[3]

A Civ.R. 12(F) motion to strike has an entirely different purpose. While an insufficient complaint may be subject to a motion to strike, a motion to strike is not intended to be used as a substitute for a motion to dismiss for failure to state a claim upon which relief can be granted.[4] In this regard, a motion to dismiss for failure to state claim is directed to an entire pleading, whereas a motion to strike based on the insufficiency of a

[3] *Struckman v. Bd. of Edn. of Teay's Valley Local School Dist.*, 4th Pickaway No. 16CA10, 2017-Ohio-1177, ¶¶ 18-20.
[4] *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 14, 661 N.E.2d 170, 173 (1996).

J527 P334

claim may be used to attack individual claims which are not dispositive of the entire action.[5]

FACTUAL ALLEGATIONS IN AMENDED COMPLAINT

The plaintiffs are making the following factual allegations in their amended complaint:

The defendant Foreman is an individual who lives in Adams County, Ohio, and who creates, produces, and performs music and videos under the stage and commercial name "Afroman".[6]

Hungry Hustler Records is a business entity which is in business in Adams County, is owned and operated by Foreman, and markets and sells music, videos, merchandise, and other products.[7]

Media Access, Inc. is a Texas corporation in the business of video and music distribution and royalty collection and is used in these capacities by Foreman. Through its distribution of videos and music on behalf of Foreman and others, Media Access, Inc. has significant contacts with the state of Ohio.[8]

The three John Doe defendants are each a business entity doing business and with its principal place of business in Adams County. John Doe 1 is owned and operated by

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[5] *Id.*; Rules Civ.Proc., Rule 12(B)(6), (F).

[6] Amended Compl. at ¶¶ 8, 9, 14-16.
[7] *Id.* at ¶ 9.
[8] *Id.* at ¶10.

J527 P335

Foreman and is used by Foreman to market and sell music, videos, merchandise, and other products including beer, marijuana, and T-shirts.[9] The other John Doe defendants (John Doe 2 and John Doe 3, apparently Hungry Hustler) are owned and operated by Foreman and are used by him to market and sell music, videos, merchandise, and other products.[10]

On or about August 21, 2022, law enforcement officials from the Adams County Sheriff's Office conducted a search of Foreman's Adams County residence pursuant to a lawful warrant.[11] Foreman was not home at the time, but his wife was present, observed the search, and recorded portions of the search and of the officers involved, including videos of their faces and bodies, on her camera phone.[12] Additionally, the residence was equipped with several security cameras which were operating and which recorded the search which was occurring as well as the likenesses of the officers who were conducting the search.[13]

After the search was concluded, Foreman used portions of the recordings to create music videos about the search.[14] The videos portrayed the images, likenesses, and distinctive appearances of the officers involved in the search, including the plaintiffs.[15] They were posted on various social media platforms, including Facebook, You Tube, Snap Chat, TicTok, and Instagram and were viewed by thousands of people.[16] The videos and

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[9] *Id.* at ¶ 11.
[10] *Id.* at ¶ 12.
[11] *Id.* at ¶ 17.
[12] *Id.* at ¶ 18.
[13] *Id.* at ¶ 19.
[14] *Id.* at ¶ 20.
[15] *Id.*
[16] *Id.* at ¶ 21.

J527 P336

photos have been used by Foreman for commercial purposes, to promote his "Afroman" brand, to sell products, to promote his music tours, and to make money.[17]

Examples included in the complaint include:

> "a. Instagram post containing an image of Foreman wearing a shirt with an image of Plaintiff Shawn Cooley beside an image of Peter Griffin (Family Guy). Caption: "Good Morning Ladies !!! What up Fellas??? Congratulations to Police Officer Poundcake Thank you for getting me 5.4 MILLION hits on TikTok I couldn't have done it without you obviously! Congratulations again you're famous for all the wrong reasons. As you can see all my poundcake is gone officer poundcake confiscated my poundcake he said something happened to his body camera on the way to the evidence room lol https://www.instagram.com/p/CiaIG3Zu1B4/?igshid=NTdlMDg3MTY=
>
> b. Instagram Post containing depictions of fans holding merchandise that also contains images of Shawn Cooley. Caption: "LEMON POUNDCAKE !!!" https://www.instagram.com/p/CkBI8dyu5TM/?igshid=NTdlMDg3MTY=
>
> c. Instagram Post in which Foreman confirms that @ogafroman is his official account. Post contains images of Plaintiff Brian Newland, then advertises Afroman's new album.
>
> d. Instagram post containing image of Foreman wearing a shirt with images of Plaintiff Justin Cooley. Post promotes new album. Caption: "What's your favorite song on lemon pound cake so far? Also what's your favorite line?" https://www.instagram.com/p/CjLOpLcuBml/?igshid=NTdlMDg3MTY= https://www.instagram.com/p/CiFsuxuPEBj/?igshid=NTdlMDg3MTY=
>
> e. Instagram post containing image of Foreman wearing merchandise and promoting merchandise with images of Plaintiff Shawn Cooley. Caption: "I am pressing up merchandise for my up-and-coming Canada Tour which officer Poundcake shirt do you like the most the one to the left or the right? Let me know so I invest my money in the more popular shirt"

[17] *Id.* at ¶ 22.

J527 P337

https://www.instagram.com/p/CjMPZLzuOg1/?igshid=NTdlMDg3MTY=

f. Instagram post containing images of merchandise. Some of the merchandise contains images of Plaintiff Shawn Cooley. Caption: "Canada get ready for the most hunted to most wanted the most blunted rapper in the world!!! For the first time I will have branch new merchandise available on the month long Canada Tour bring ya merchandise money. I WILL SIGN EVERYTHING THAT IS BOUGHT. T-shirts: $35, Hoodies $70, Bini's $30"
https://www.instagram.com/p/CjN971HOR5D/?igshid=NTdlMDg3MTY=

g. Instagram post containing video of fans and defendant singing "Lemon Poundcake" while a fan wears merchandise that contains images of Plaintiff Shawn Cooley.
https:www.instagram.com/reel/Cjmix9CA3Z7/?igshid=NTdIMDg3MTY=

h. Interview on VLADTV during which Foreman discusses the use of the search as material for songs. Foreman admits to using images and clips from the search in videos and promotion. Foreman states that his "Will you repair my door?" song went viral. Foreman states that his "Lemon Pound Cake" clip went viral on Tik Tok. Foreman says, "Everybody understood what I was talking about when I said' Lemon Pound Cake.' That's the cop, on the viral video, TikTok, that was going through the house that wanted a slice of the lemon pound cake." (3:27 -3:40) Includes image of Plaintiff Shawn Cooley on video. (2:26 - 2:38)
https://www.youtube.com/watch?v=noYFt6hOHew

i. Instagram post that portrays Plaintiff Shawn Grooms next to an image of Quasimodo (The Hunchback of Notre-Dame). Caption: "Good Moring Ladies The hatchbacc of Adams KKKounty said to get my New Album LEMON POUNDCAKE SEPTEMBER 30TH." Snapchat-186486110
https://www.instagram.com/p/Ciw_ptkuPte/?igshid=NTdlMDg3MTY=

j. Instagram post that portrays Judge Gabbert (the judge who signed the search warrant) next to an image of Droopy. Caption: "This is the judge that signed the warrant that said kidnapping. His name is Roy Droopy Gabbert. Vote him out

J527 P338

before he signs a fictitious warrant then send some over reacting paranoid KKKops to your House jeopardizing the lives of you and your family, Stealing your money and disconnecting your home video security surveillance system. Vote out judge Roy Droopy Gabbert. Then go get my new album lemon pound cake September 30 on all platforms."
https://www.instagram.com/p/Civ1NJrOiGE/?igshid=NTdlMDg3MTY=

k. Instagram post that portrays Plaintiff Lisa Phillips next to an image of the Mona Lisa. Caption: "Good Morning Ladies ... here she is ... The Condescending C?nt ... ADAMS KKKOUNTY SHERIF LIEUTENANT MONA LICC'EM LOW LISA to serve and disconnect ... (your home video security surveillance system) so you won't have proof of the Adams County sheriff department stealing money and other things around your house even possibly planting false kidnapping evidence. I used to speak to this lady when I dropped my kids off to school 1 always wondered why she never spoke bacc just looked at me with the same condescending c?nt look you see in the picture. I spoke to her again at the metal detector in the Adams County courthouse her voice was three octaves lower than mine lo!"! Has anybody in Adams County verified her vagina? If you haven't you should or she might whoop out something bigger than yours. If this lady is your friend I wouldn't leave her alone in my house. Or I'll put it this way if you leave and your video system is messed up when you get bacc you know who did it. Why would a good cop want to disconnect a video security surveillance system Lt Licc'em Low Lisa? NEW ALBUM "LEMON POUNDCAKE " DROPPING SEPTEMBER 30 ! My name for this particular officer is Lieutenant Mona Licc em Low Lisa! What nice-name did you come up with for her? I'm good but I will admit yours might be better than mine! Whatcha got ?"
https://www.instagram.com/p/CinMvhkuqtA/?igshid=NTdlMDg3MTY=

l. YouTube videos depicting most or all of the officers involved in the search, set to music and used by Foreman to promote his brand and sell his products.
https://www.youtube.com/watch?v=oponIfu5L3Y

J527 P339

After the original complaint in this case was filed, the defendant Foreman continued with the same conduct and even intensified his efforts after the filing of the complaint in this case.[18]

In his complaint, the plaintiff sets forth various examples:

> a. Photo with Shawn Cooley's image on merchandise, with caption, "Order your t-shirt now www.ogafroman.com order the new album and Lemon Pound Cake on all platforms thank you for your support."
> https:www.instagram.com/p/CqTpKlEjMdt/
>
> b. Photo with Lisa Phillips's image on merchandise with caption, "Order your LTLICC'EM LOW LISA FULL OF SHIT PHILLIPS t-shirts from www.ogafroman.com see what the fuss is about!!! Get that new album called Lemon Pound Cake available on all platforms by Afroman"
> https://www.instagram.com/pCqU5o8D6fF/
>
> c. Photo with Randal Walker's image on merchandise, with caption, "Order your RANGER RANDY PRVATE PYLE BEETLE BAILEY WALTERS T-shirt Now www.ogafroman.com a portion of the proceeds will go to police reform, and fighting social injustice" https://www.instagram.com/p/CgZGgHzORem/
>
> d. Video of image of merchandise with Shawn Cooley's image with caption, "Thank you for all the support on the merch ! ! ! We sold so many shirts we had to order more, but trust, your orders are ON THE WAY!! New shirts are about to be available in the merch store so stay tuned"·
> https://www.instagram.com/p/CqeKbqwjFz8/
>
> e. Photo with Randal Walker's image on merchandise, with caption, "GOOD MORNING LADIES!!! PRE ORDER YOUR BABY MAKING BRIAN NEWBORN NEWLAND T-SHIRTS NOW" WWW.OGAFROMAN.COM
> https://www.instagram.com/p/CgnQq3bjPFl/
>
> f. New Police Officer Poundcake shirts are in let's goooooo WWW.OGAFROMAN.COM
> https://www.instagram.com/p/CrO64aYv8gR/

[18] *Id.* at ¶ 26.

J527 P340

> g. Order your LT LICC'EM LOW LISA FULL OF SHIT PHILLIPS T-shirts from www.ogafroman.com see what the fuss is about!!! Get that new album called Lemon Pound Cake available on all platforms by Afroman
> https://www.instagram.com/p/CqUu5o8D6fF/

According to the plaintiffs, Foreman, with the cooperation and assistance of the other defendants, performed, posted, and publicized these and other depictions of Plaintiffs' personas for commercial purposes without the authorization of the Plaintiffs to do so.[19] The plaintiffs allege that their personas have significant value, which Foreman and the other defendants are unlawfully exploiting for their own financial gain.[20]

In the course thereof and in connection thereto, according to the plaintiffs, the defendants made false statements, knowing them to be false, and with the intent to damage the plaintiffs' reputations and cause them emotional pain suffering , humiliation, and embarrassment.[21] The statements were injuries to the plaintiffs' reputations.

These statements were:

> a. On or about March 18, 2023, in an Instagram post, Foreman stated that the plaintiffs "stole my money" and were "criminals camouflaged by law enforcement."
> https://www.instagram.com/p/CqGTr5CuucV/
>
> b. On or about January 24, 2023, in an Instagram post, Foreman called the plaintiffs "white supremacists operating inside of the Adams County sheriff department."
> https://www.instagram.com/p/CnyTNKfjUs3/
>
> c. On or about April 6, 2023, in an Instagram post, Foreman stated that the plaintiff Newland "used to do hard drugs," "snitched on all his friends," and "now he steals money from traffic stops bogus raids and from the Adams KKKounty Sherriff evidence room."
> https://www.instagram.com/p/CqsylwGrQKT.

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[19] *Id.* at ¶ 22.
[20] *Id.*
[21] *Id.* at ¶ 28-32.

J527 P341

d. On or about April 19, 2023, through Instagram, Foreman stated that the plaintiff Newland "stole my money", https://www.instagram.com/pCrNCpB8LP0U, used to do hard drugs," and that he 'had stolen $400.00 out of the evidence money."
https://www.instagram.com/p/CrMycF7OacT/

e. Foreman through Instagram posts implies, with words and images, that Lisa Phillips is biologically male, is trans, or is lesbian.
https://www.instagram.com/p/CqNSmUZjiDH/

f. Foreman stated through various posts that a purpose of the Sheriff's Department was to kill Foreman, https:www.instagram.com/p/CqLZdiesXvE/, and that the plaintiffs "attempted to kill me in front of my kids" and "came to kill me in front of my children," and that the plaintiffs constituted "a hit squad * * * to kill me in front of my kids."
https: www.instagram.com/p/CqLdiesXvE/

APPLICATION OF MOTION TO DISMISS STANDARD AND MOTION TO STRIKE STANDARDS TO CAUSES OF ACTION IN COMPLAINT

The court previously set forth the standards for a trial court's review of a Civ.R. 12(B)(6) motion to dismiss and a Civ.R. 12(F) motion to strike. The court will now apply those standards to each of the plaintiffs' claims in their amended complaint.

In doing so, it is important to note that the court will not be assessing the sufficiency of the evidence as to each claim, which will be a matter to be ruled on through a subsequent summary judgment motion or at trial.

COUNT #1- VIOLATION OF OHIO REV. CODE CHAPTER 2741- UNAUTHORIZED USE OF INDIVIDUAL'S PERSONA

J527 P342

In Ct. #1, the plaintiffs allege the following:

> "37. The Plaintiffs are each law enforcement officers in Adams County, Ohio, whose names and personas are known in that community and beyond, both as public servants and private citizens. Plaintiffs' personas are distinct and recognizable within Adams County and the surrounding area, and Plaintiffs have built that distinct recognizability through years of public service and private activities, and exposure to the public, often at great risk to themselves. As such, the persona of each Plaintiff has significant commercial value because the reputation, prestige, social standing, public interest, and other values of Plaintiffs' recognizable personas add value to any product or service with which Plaintiffs' personas are associated.
>
> 38. Defendants used the personas of the Plaintiffs for commercial purposes, during Plaintiffs' lifetimes, without their authorizations to do so.
>
> 39. The personas of the Plaintiffs were not used by Defendants in connection with any news, public affairs, sports broadcast, or political campaign, and their unauthorized use of Plaintiffs' personas for commercial purposes was not justified or excused.
>
> 40. All Defendants had knowledge of the unauthorized use of Plaintiffs' personas as prohibited by Rev. Code § 2741.02.
>
> 41. Defendants' actions constitute the unauthorized commercial use of Plaintiffs' personas, in violation of Rev. Code § 2741.02.
>
> 42. Defendants' actions were willful, wanton, malicious, and done with conscious or reckless disregard for the rights of Plaintiffs.
>
> 43. As a result of Defendants' violations of the statute, Plaintiffs have been damaged in the amount of profits made by Defendants by the unauthorized use of their personas; have suffered embarrassment, ridicule, emotional distress, humiliation, and loss of reputation, and are entitled to injunctive relief and other remedies under the statute."

J527 P343

R.C. 2741.02, upon which the plaintiffs base their claim, states in pertinent part:

> (A) Except as otherwise provided in this section, a person shall not use any aspect of an individual's persona for a commercial purpose:
>
> (1) During the individual's lifetime."
>
> (B) A person may use an individual's persona for a commercial purpose during the individual's lifetime if the person first obtains the written consent to use the individual's persona from a person specified in section 2741.05 of the Revised Code.
> * * *
>
> (D) For purposes of this section:
>
> (1) A use of an aspect of an individual's persona in connection with any news, public affairs, sports broadcast, or account does not constitute a use for which consent is required under division (A) of this section."

"Persona" is defined as "an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value." R.C. 2741.01(A).

"Commercial purpose" is defined to mean:

> "[T]he use of or reference to an aspect of an individual's persona in any of the following manners:
>
> (1) On or in connection with a place, product, merchandise, goods, services, or other commercial activities not expressly exempted under this chapter;

J527 P344

(2) For advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities not expressly exempted under this chapter;

(3) For the purpose of promoting travel to a place;

(4) For the purpose of fundraising."

The pertinent facts which have been alleged by the plaintiffs in this case are that they are peace officers who, while engaged in a search of the defendant Joseph Foreman's residence, were video recorded by Foreman and/or others, and the video recording was subsequently publicized, along with commentary related to the video, afterwards. The plaintiffs further allege that the use of their likenesses was in connection with a place, product, merchandise, goods, services, or other commercial activities not expressly exempted under Chapter 2741 of the Revised Code.

A person is not required to have "celebrity status" to recover for statutory or common law appropriation.[22] However, the plaintiffs, who are local law enforcement officers, have related no facts to show that their names and/or likenesses have any commercial value. While they may be well-known in their community, and unquestionably are public servants who frequently come into contact with the public, this is not sufficient to demonstrate that there is any value in associating an item of commerce with any of their individual identities.

In this regard, no facts have been suggested that this is a case similar, for comparison, to that of the well-known football coach and sports commentator Urban

[22] Harvey v. Systems Effect, LLC, 154 N.E.3d 293, 2020-Ohio-1642, ¶ 56 (2nd Dist., 2020).

J527 P345

Meyer, who sued successfully for the use of his likeness in selling merchandise capitalizing on his name to make money. In contrast to Urban Meyer's claim, it appears, absent the plaintiffs demonstrating any particular commercial value, which has not been alleged in the plaintiffs' complaint, that the defendant Foreman felt aggrieved by the execution of a search warrant at his house and chose to demonstrate his displeasure while at the same time selling his merchandise based on his own celebrity.

Quite simply, the court finds that there are no facts which have been set forth in the complaint which lend support to a viable claim for unauthorized use of individual's persona. The plaintiffs have failed to state sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Furthermore, after presuming the truth of all material factual allegations in the complaint and all reasonable inferences therefrom in relators' favor, it appears beyond doubt that relators can prove no set of facts as to Ct. #1 warranting relief.

COUNT #2- INVASION OF PRIVACY BY MISAPPROPRIATION-

RESTATEMENT (SECOND) OF TORTS, ¶ 652(C) (1977)

In Ct. #2, the plaintiffs allege the following:

> "44. Plaintiffs repeat the allegations contained in paragraphs 1 through 43 of the Complaint as if fully rewritten herein.
>
> 45. In using Plaintiffs' personas as alleged herein, Defendants have appropriated for their own use and benefit the reputation, prestige, social standing, public interest, and other values of Plaintiffs' names and other likenesses, which have intrinsic value, in contravention of Plaintiffs' right to privacy.

J527 P346

46. Defendants' actions were willful, wanton, malicious, and done with conscious or reckless disregard for the rights of Plaintiffs.

47. As a result of Defendants' Invasion of Privacy by Misappropriation, Plaintiffs have been damaged monetarily, and have suffered embarrassment, ridicule, emotional distress, humiliation, and loss of reputation, and are entitled to monetary and injunctive relief and other remedies.

Restatement of the Law 2nd § 652C states: "Appropriation of Name or Likeness. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

The comments to this section of the Restatement are:

"a. The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.

b. How invaded. The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness."

J527 P347

A defendant is subject to liability for invasion of privacy under Ohio law when he appropriates to his own use or benefit the name or likeness of another, and the name or likeness has commercial or *other* value.[23]

In this case, the value that seems to be at issue here is not the monetary value of the officers' likenesses, which appears to be nominal. Instead, the issue appears to be the humiliation and outrage that the officers feel at having their likenesses displayed and mocked by the defendant. Undoubtedly, they also feel aggrieved by their investigative actions being questioned publicly.

In this regard, while the parties might debate the artistic quality of the defendants' videos, music, and commentary, it appears without question that they were made as part, and in the course of, criticism and commentary by the defendant Foreman of the search and seizure that occurred at the defendant's residence.

The court finds that the plaintiffs have a minimal interest here in terms of their right of publicity. Certainly, as public servants, the plaintiffs have to expect that they may from time to time be subject to commentary and criticism regarding their performance of their duties.

After considering that commentary and criticism, as well as all the other facts contained in the complaint, the court finds, as a matter of law, that while their quality and appropriateness may be questioned, the defendants' artistic and musical renderings have substantial and creative content which outweighs any adverse effect on the plaintiffs in terms of their right of publicity.

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[23] Wilson v. Ancestry.com LLC,

Finally, after balancing the societal and personal interests embodied in the First Amendment against the plaintiffs' property rights, the court finds, as a matter of law, that the effect of limiting the plaintiffs' right of publicity in this case is negligible and is significantly outweighed by society's interest in the freedom of artistic expression.[24]

Accordingly, the court finds that, in accordance with the foregoing, the defendants' motion to dismiss as to Ct. #2 is well-taken and shall be granted.

COUNT #3- INVASION OF PRIVACY- FALSE LIGHT PUBLICITY- RESTATEMENT (SECOND) OF TORTS, ¶ 652(E) (1977)

In Ct. #3, the plaintiffs allege the following:

> 48. Plaintiffs repeat the allegations contained in paragraphs 1 through 47 of the Complaint as if fully rewritten herein.
>
> 49. In their depictions and descriptions of Plaintiffs on social media postings and elsewhere, Defendants made statements that were false, and that they knew to be false, and which portrayed Plaintiffs in a false light, subjecting them to r reputational injury, undue ridicule, embarrassment, mental distress, and danger.
>
> 50. The false light in which Defendants placed Plaintiffs would be highly offensive to a reasonable person.
>
> 51. Defendants' actions were willful, wanton, malicious, and done with conscious or reckless disregard for the rights of Plaintiffs.
>
> 52. As a result of Defendants' false depictions of Plaintiffs, they have suffered loss of reputation, embarrassment, ridicule, emotional distress, humiliation, and loss of reputation, and are entitled to monetary and injunctive relief and other remedies.

[24] See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir.2003).

J527 P349

Restatement 2nd of Torts, Section 652(E), cited by the plaintiffs herein, states:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

The Comments to Section 652(E) state:

> *"a. Nature of Section.* The form of invasion of privacy covered by the rule stated in this Section does not depend upon making public any facts concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true. The rule stated here is, however, limited to the situation in which the plaintiff is given publicity. On what constitutes publicity and the publicity of application to a simple disclosure, see § 652D, Comment *a*, which is applicable to the rule stated here.
>
> *b. Relation to defamation.* The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.
>
> It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff

J527 P350

is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

c. Highly offensive to a reasonable person. The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. Complete and perfect accuracy in published reports concerning any individual is seldom attainable by any reasonable effort, and most minor errors, such as a wrong address for his home, or a mistake in the date when he entered his employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable person. The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.

d. Constitutional restrictions on action. The free-speech and free-press provisions of the First Amendment have been held to apply to the common law of defamation and to impose certain restrictions on the availability of defamation actions. *In New York Times Co. v. Sullivan (1964) 376 U.S. 254,* it was held that a public official could not recover for a false and defamatory publication unless he proved by clear and convincing evidence that the defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth or falsity. This rule was later extended to public figures. (See § 580A, where the rule is discussed in detail). In the case of *Time, Inc. v. Hill* (1967) 385 U.S. 534, involving a magazine pictorial treatment of a play based upon a real episode, which implied that certain fictitious incidents in the play transpired with the real-life parties, the Supreme Court held that the rule of *New York Times Co. v. Sullivan* also applies to the false-light cases covered by this Section. It is on the basis of *Time v. Hill* that Clause (b) has been set forth. The full extent of the authority of this case, however, is presently in some doubt.

Although the Supreme Court had extended the rule of *New York Times Co. v. Sullivan* in defamation cases beyond public

officials and public figures to all "matters of public or general interest," by a plurality opinion in *Rosenbloom v. Metromedia, Inc.*, (1970) 403 U.S. 29, this position was subsequently repudiated in ***Gertz v. Robert Welch, Inc., (1974) 418 U.S. 323***, which restricted the knowledge-or-reckless-disregard rule again to public officials and public figures, but held that in other cases the plaintiff must show that the defendant was at fault, at least to the extent of being negligent, regarding the truth or falsity of the statement. (See **§ 580B**, where the matter is discussed in detail). The effect of the *Gertz* decision upon the holding in *Time, Inc. v. Hill* has thus been left in a state of uncertainty. In *Cantrell v. Forest City Pub. Co.* (1974) 419 U.S. 425, the court found that the defendant was shown to have acted in reckless disregard as to the truth or falsity of the statement, and it consciously abstained from indicating the present authority of *Time v. Hill.*

Pending further enlightenment from the Supreme Court, therefore, this Section provides that liability for invasion of privacy for placing the plaintiff in a false light may exist if the defendant acted with knowledge of the falsity of the statement or in reckless disregard as to truth or falsity. The Caveat leaves open the question of whether there may be liability based on a showing of negligence as to truth or falsity. If Time v. Hill is modified along the lines of Gertz v. Robert Welch, then the reckless-disregard rule would apparently apply if the plaintiff is a public official or public figure and the negligence rule will apply to other plaintiffs. If Time v. Hill remains in full force and effect because the injury is not so serious when the statement is not defamatory, the blackletter provision will be fully controlling.

Reference is made again to §§ 580A and 580B, and to their Comments. Many of these Comments will apply specifically to this Section.

e. Application of defamation restrictions in this Section. In addition to the constitutional questions discussed in Comment *e*, another important question is that of the extent to which common law and statutory restrictions and limitations that have grown up around the action for defamation are equally applicable when the action is one for invasion of privacy by publicity given to falsehoods concerning the plaintiff. These restrictions include, for example, the requirement that special damages be pleaded and proved by the plaintiff in any case in which the defamatory words are not actionable per se. (See §

J527 P352

> 569). They may include also the limitations imposed by retraction statutes, or statutes requiring the filing of a bond for costs in order to maintain a defamation action, as well as other possible restrictions. When the false publicity is also defamatory so that either action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations. As yet there is little authority on this issue. The answers obviously turn upon the nature of the particular restrictive rule, the language of a particular statute and the circumstances of the case, and no generalization can be made.
>
> *f. Damages.* On damages recoverable and whether suit can be maintained without proof of actual injury, see ***§ 652H."***

The Ohio Supreme Court has recognized "(d) publicity that unreasonably places the other in a false light before the public * * * " as one of the four separate branches of "tortious invasion of privacy."[25]

There are certain requirements for a false light claim. First, in a false light claim, the statement which is the basis of the claim must be untrue.[26]

Secondly, it must be publicized, which is different than published. " 'Publication,' in that sense, is a word of art, which includes any communication by the defendant to a third person. 'Publicity,' on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not

[25] Welling v. Weinfeld, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051.
[26] Id. at ¶ 52.

J527 P353

one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public."[27]

Next, the misrepresentation made must be serious enough to be highly offensive to a reasonable person. In this regard, "[t]he rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. * * * The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."[28]

The Restatement also accounts for multiple claims arising under the same set of facts.[29] " The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the

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[27] *Id.*, ¶ 53, citing Restatement of the Law 2d, Torts, Section 652D, Comment *a.*

[28] *Id.* at ¶ 55, citing Restatement of the Law 2d, Torts, Section 652E, Comment *c.*

3.

[29] *Id.* at ¶ 57, citing and quoting Restatement of the Law 2d, Torts, Section 652E, Comment *b.*

J527 P354

publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander * * *. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity."[30]

First Amendment concerns are addressed by following the Restatement standard, requiring that the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed," in cases of both private and public figures.[31]

In construing the allegations of the complaint in the plaintiffs' favor, as the court must do in considering a motion to dismiss for failure to state a claim for relief, the plaintiffs allege the following: The plaintiffs stole the defendants' money and are criminals. They are white supremacists. One plaintiff used "hard drugs" and steals money from traffic stops and bogus raids and from the Sheriff's property room. One plaintiff stole $400.00 of the money placed into evidence. One plaintiff is biologically male, is trans, or is lesbian. The purpose of the Sheriff's Department was to kill Foreman.

The plaintiffs aver all of these things are untrue. The defendants are alleged to have publicized the things set forth above, and the publicity was of a type that would be highly offensive to a reasonable person. The plaintiffs are public figures, but it can reasonably be inferred that the defendants acted in reckless disregard of the truth or falsity of the

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[30] *Id.*

[31] *Id.* at ¶ 58, citing Restatement of the Law 2d, Torts, Section 652E(b).

J527 P355

statements made. The fact that the things that were said may be defamatory and give rise to a claim for defamation does not affect the validity of the false light claim.

The court finds that there is a triable issue in this case as whether the defendants committed a false light violation, and the claim can go forward at least at this stage in the proceedings.

COUNT #4- INVASION OF PRIVACY- UNREASONABLE PUBLICITY GIVEN TO PRIVATE LIVES- RESTATEMENT (SECOND) OF TORTS, ¶ 652(D) (1977)

In Ct. #4, the plaintiffs allege the following:

> "53. Plaintiffs repeat the allegations contained in paragraphs 1 through 52 of the Complaint as if fully rewritten herein.
>
> 54. Some of Defendants' postings as described above gave publicity to matters concerning the private lives of Plaintiffs which were not of legitimate concern to the public, and the exposure of which a reasonable person would find to be highly offensive.
>
> 55. For example, postings alluding to the alleged sexual orientation or gender identity of Plaintiffs, or the alleged criminality of family members of Plaintiffs, are not of legitimate concern to the public and would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
>
> 56. Defendants' actions were willful, wanton, malicious, and done with conscious or reckless disregard for the rights of Plaintiffs.
>
> 57. As a result of Defendants' unreasonable publicity of the private lives of Plaintiffs, they have suffered embarrassment, ridicule, emotional distress, humiliation, and loss of reputation, and are entitled to monetary and injunctive relief and other remedies."

J527 P356

This claim, for unreasonable publicity given to the plaintiffs' private lives, is brought under the "publicity" tort for invasion of privacy.[32]

"In order for a plaintiff to state a claim for which relief can be granted under the "publicity" tort of invasion of privacy: (1) there must be publicity, *i.e.,* the disclosure must be of a public nature, not private; (2) the facts disclosed must be those concerning the private life of an individual, not his public life; (3) the matter publicized must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) the publication must have been made intentionally, not negligently; and (5) the matter publicized must not be a legitimate concern to the public."[33]

The Restatement, 2 Ohio App.3d at 383, 442 N.E.2d 129, presents this definition of the tort:

> "§ 652D. Publicity Given to Private Life
>
> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that "(a) would be highly offensive to a reasonable person, and "(b) is not of legitimate concern to the public."

With these standards in mind, and in reviewing the plaintiffs' allegations as set forth above, the court is unable to say that it appears beyond doubt from the complaint that plaintiff can prove no set of facts entitling them to recovery under the "publicity" theory of invasion of privacy.

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[32] Killilea v. Sears, Roebuck & Co., 27 Ohio App.3d 163, 499 N.E.2d 1291, syllabus (10th Dist., 1985).
[33] Killilea, at the syllabus.

J527 P357

COUNT #5- DEFAMATION

In Ct. #5, the plaintiffs allege the following:

> "58. Plaintiffs repeat the allegations contained in paragraphs 1 through 57 of the Complaint as if fully rewritten herein.
>
> 59. Many of the above-enumerated statements published by Defendants, specifically but not limited to those set forth in paragraph 28 above, are false. They were known by the Defendants at the time of their publication to be false, and were published in spite of Defendants' knowledge of their falsity, or with reckless disregard as to their truth or falsity.
>
> 60. Specifically, Defendants' statements that Plaintiffs stole money from Foreman; that Plaintiffs threatened to kill Foreman; that Plaintiffs threatened to kill Foreman in front of his children; that Plaintiffs were sent as a hit squad for the purpose of killing Foreman; that Plaintiffs are white supremacists; that Plaintiffs are criminals; that Plaintiff Newland "used to do hard drugs," is a "snitch," that he "steals money from traffic stops and bogus raids," and "stole $400" from Foreman; and that Plaintiff Phillips is not a female and is trans or lesbian, are all false statements.
>
> 61. These and other false statements about Plaintiffs were made and published by Foreman and the other Defendants with actual malice. Defendants knew that these statements were false, but made them anyway for the purpose of injuring Plaintiffs.
>
> 62. These and other false statements about Plaintiffs have damaged Plaintiffs' reputations, and have caused them additional harm, including but not limited to embarrassment, ridicule, emotional distress, and humiliation."

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

J527 P358

public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.' "[34]

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.[35]

"Publication" for defamation purposes is a word of art, which includes any communication by the defendant to a third person.[36]

A statement is "defamatory" if it reflects injuriously on a person's reputation, or exposes a person to public hatred, contempt, ridicule, shame or disgrace, or affects a person adversely in his or her trade, business or profession.[37]

In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court held that a higher standard—actual malice—applies to actions brought by public officials against critics of their official conduct.[38] Actual malice prohibits a public official from recovering any damages for a defamatory falsehood unless

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[34] *Lograsso v. Frey*, 8th Dist. Cuyahoga No. 100104, 2014-Ohio-2054, 10 N.E.3d 1176, ¶ 13, citing *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9, quoting *A & B–Abell El evator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995).

[35] *Lograsso*, ¶ 14, citing *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist.1996).

[36] *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, ¶ 53.

[37] *Holtrey v. Wiedeman*, 12th Dist. Warren No. CA2023-01-011, 2023-Ohio-2440, ¶ 23.

[38] *Id.* at 283, 84 S.Ct. 710.

J527 P359

he proves that the communication was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[39]

The determination of whether a party is a private or public figure in a defamation action is a matter of law; this includes the determination of whether a party is a limited-purpose public figure.[40]

Police officers acting within the scope of their official capacity are public officials under Ohio's libel law, and therefore enjoy only limited protection from public discussion and criticism of their performance as public officials.[41] Accordingly, the officers in this case are classified as "public officials" for purposes of their claims of defamation.

Statements made about public officials are constitutionally protected when the statements concern anything that may touch on an official's fitness for office. [42] "The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws."[43]

Additionally, "[u]nder the standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that

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[39] *Id.* at 280, 84 S.Ct. 710.

[40] *Holtrey v. Wiedeman*, 12th Dist. No. CA2023-01-011.

[41] *Mueller v. Storer Communications, Inc.*, 46 Ohio App.3d 57, 545 N.E.2d 1317 (8th Dist. 1988), paragraph one of the syllabus

[42] *Betzko*, at ¶17, citing *Burns v. Rice*, 10th Dist., 157 Ohio App.3d 620, 2004-Ohio-3228, 813 N.E.2d 25, ¶ 20; *Soke v. Plain Dealer*, 69 Ohio St.3d 395, 397, 632 N.E.2d 1282 (1994).

[43] *Id.*, citing and quoting *Coursey v. Greater Niles Twp. Publishing Corp.* (1968), 40 Ill.2d 257, 265, 239 N.E.2d 837, 841. *Id.* at 265, 239 N.E.2d at 841.

J527 P360

the statement was made with 'actual malice,' that is, with knowledge that it was false or with reckless disregard of whether it was false."[44] Additionally, proof of actual malice must be clear and convincing.[45]

The defendants argue that every statement made by them was a statement of opinion which is protected under the First Amendment.

The defendants are correct that expressions of opinion are generally accorded absolute immunity from liability under the First Amendment.[46] In this regard, to be defamatory, a statement must be a statement of fact and not of opinion.[47]

The defendants maintain that there is no evidence of any false statement made by them.

In contrast, the plaintiffs assert that the defendants made the following statements of fact, and not opinion, which are false: 1) that the plaintiffs stole money from Foreman; 2) that the plaintiffs threatened to kill Foreman; 3) that the plaintiffs threatened to kill Foreman in front of his children; 4) that the plaintiffs were sent as a hit squad for the purpose of killing Foreman; 5) that the plaintiffs are white supremacists; 6) that the plaintiffs are criminals; 7) that the plaintiff Newland "used to do hard drugs," is a snitch, that he steals money from traffic stops and bogus raids, and that he stole $400 from

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[44] *Betzko*, at ¶18, citing and quoting *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988) (law of Ohio and federal law are in accord on these principles).
[45] *Id.*, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

[46] *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986), citing *Trump v. Chicago Tribune Co.* (D.N.Y.1985), 616 F.Supp. 1434, 1435; *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 339, 94 S.Ct. at 3006; *Chaves v. Johnson* (Va.1985), 335 S.E.2d 97, 102.
[47] *Gibson v. Am. Inst. of Alternative Medicine*, 10th Franklin Dist. No. 15AP-548, 2016-Ohio-1324, citing *Fuchs v. Scripps Howard Broadcasting Co.*, 170 Ohio App.3d 679, 2006-Ohio-5349, 868 N.E.2d 1024, ¶ 39 (1st Dist.), citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995).

J527 P361

Foreman; and that 8) the plaintiff Phillips is not a female and is trans or lesbian. They further assert that each of these statements is patently false.

In determining whether a statement is actionable as defamation, the court must consider the totality of circumstances to ascertain whether a statement is opinion or fact, and this involves at least four factors. First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement, and fourth is the broader context in which the statement appeared.[48]

"Whether certain statements alleged to be defamatory are actionable or not is a matter for the court to decide as a matter of law."[49] Specifically, the determination of whether an averred defamatory statement constitutes opinion or fact is a question of law, properly within the court's purview.[50]

In this regard, "[a]" court must review the totality of the circumstances, consider the statement within its context rather than in isolation, and determine whether a reasonable person would interpret that statement as defamatory.[51]

This determination is very difficult to make on a motion to dismiss. Many of the statements referred to by the plaintiffs appear to be exactly that- statements and not opinions.

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[48] See, generally, *Ollman v. Evans, supra,* at 979; *Janklow v. Newsweek, Inc.* (C.A.8, 1985), 759 F.2d 644, 649.

[49] *Holtrey,* ¶ 23 , citing and quoting *Webber v. Dept. of Pub. Safety*, 10th Dist. Franklin, 2017-Ohio-9199, 103 N.E.3d 283, ¶ 37.

[50] *Scott, supra,* citing *Ollman v. Evans* (C.A.D.C.1984), 750 F.2d 970, 978; *Rinsley v. Brandt* (C.A.10, 1983), 700 F.2d 1304, 1309; Lewis v. Time, Inc. (C.A.9, 1983), 710 F.2d 549, 553; *Slawik v. News-Journal Co.* (Del.1981), 428 A.2d 15, 17.

[51] Id., citing Am. Chem. Soc. v. Leadscope, Inc., 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 79.

J527 P362

This court cannot conclude as a matter of law at this point in the proceeding that the statements made by the defendants were not made with actual malice. Furthermore, the court cannot find beyond doubt from the complaint that the plaintiff can prove no set of facts entitling them to recovery as to Ct. #5.

COUNT SIX

(Injunctive Relief)

A preliminary injunction is a remedy; it is not a cause of action or a claim for relief.[52]

The court will consider the plaintiffs' request for injunctive relief if and when the plaintiff prevails on one or more of Cts. #1-5. At that time, counsel may brief and argue the authority and appropriateness of the court ordering injunctive relief in the manner requested by the plaintiffs.

SUMMARY AND COMMENTS

The court finds that, as to each of Cts. #1 and 2, it appears beyond doubt from the complaint that the plaintiffs can prove no set of facts entitling them to recovery, and a judgment of dismissal shall be entered as to those counts.

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[52] *Premier Health Care Services, Inc. v. Schneiderman*, 2nd Dist. Montgomery No. 18795, 2001 WL 1479241 (Aug. 21, 2001).

J527 P363

The court finds that, as to each of Cts. #3, 4, & 5, it is unable to find at this stage of the proceedings that the plaintiffs can prove no set of facts entitling them to recovery, and the defendants' motion to dismiss as to these counts is overruled.

The court would make several additional comments which hopefully will be of some assistance to counsel moving forward: In future pretrial and trial memoranda and briefs, each side needs to be specific in its arguments and memoranda. For instance, counsel should be specific in differentiating which statements that were made were opinions, and which were statements of fact, and the basis therefor. The same differentiation needs to be made between what is characterized as "art,." "news," and "accounts."

IT IS SO ORDERED.

DATED: 10-9-23 _____

Retired Judge Jerry R. McBride

J527 P364