MARCELLUS ALLEN Plaintiff, Vs. CITY OF NEWARK, JOSEPH A. MCCALLUM, JR.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002366-23 On Appeal From: Superior Court of New Jersey LAW DIVISION-ESSEX COUNTY DOCKET NO. ESX-L-273-20 Sat below: Honorable Bridget A. Stetcher, J.S.C.

PLAINTIFF/APPELLANT's BRIEF IN SUPPORT OF MARCELLUS ALLEN

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PROCEDURAL HISTORY

This matter arises out of a wrongful termination on or about January 12, 2018(pa3) where the Defendants Respondent terminated the Plaintiff Appellant Marcellus Allen for exercising his right to run for elective office and then being blackballed, disparaged, and cast in a false light based on his prior involvement with the criminal justice system. Plaintiff filed his Complaint on or about January 10, 2020 (pa3). The City of Newark filed its Answer on behalf of the City of Newark and Joseph McCallum, Jr. on or September 22, 2020 (pa14). Discovery ended on March 12, 2022. On June 24, 2022 Defendants Newark and McCallum filed their Motion for Summary Judgment (pa29). Plaintiff/Appellant filed his Opposition to the Defendant/Respondents Motion for Summary Judgment on or July 15, 2022 (pa81). The Court heard the matter on February 29, 2024 (T1) and decided on the record no genuine issues of material facts exist to send to a jury. On or about April 8,

2024 Plaintiff/Appellant filed a Notice of Appeal (pa186).

STATEMENT OF FACTS

Plaintiff- Appellant, Marcellus Allen, an employee of the City of Newark, New Jersey in the position as West Ward Aide belong to a Collective Bargaining Unit as an Aide 1 to which he was entitled to all benefits deriving therefrom.PA99; PA146 P.33 L19-25; PA142 p.19L1-18. In or about January of 2018 while on a vacation authorized by West Ward Chief of Staff Rufas Johnson, Mr. Allen obtained petitions to run for elective office in the City of Newark, New Jersey.PA168 P. 53L 21-25. Mr. Allen sought the position of Councilman of the West Ward in the City of Newark, which Councilman McCallum "thought was crazy" PA 132 P. 50 L24-25; P.51L1-16. Councilman McCallum was advised

during Mr. Allen's vacation that he was seeking signatures on the petition to become certified a viable candidate. PA127 P.32L15-25. On or about January 12, 2018, immediately upon Mr. Allen's return from vacation he was met with a letter of termination by the secretary of Councilman McCallum. PA164 P.70 L12-25. The letter of termination was never provided to the Union Representative or Shop Stewart for Mr. Allen's unit of the Collective Bargaining Union, nor was a member of the collective bargaining unit present when Mr. Allen was terminated via the letter of termination.PA149 p. 46L14-25; p. 46L1-20; PA121 p.8L1-25; PA126 p. 26L1.

The Letter of termination did not set forth any reason for his termination, but stated only that his services were no longer required and wished him success in the future. PA69. In addition to Mr. Allen's reliance on his first amendment freedom of speech rights, Mr. Allen also relied on the Executive Order

signed by former Mayor Cory Booker indicating that all employees shall maintain or otherwise be reinstated to their position when running for an elective position once they become a certified candidate.PA75; PA111. Mr. Allen was terminated less than two weeks after obtaining the petitions necessary for his certification as a candidate and before he could submit his signed petitions to become a certified candidate. PA69.

Mr. Allen was not a policy maker and the City of Newark does not hold partisan elections, therefore there are no political party slates or designations in its Municipal Elections.PA126 p.27L3-25; P.28L1-9. Councilman Joseph McCallum was an elected official and employee of the City of Newark. The City of Newark was the employer of Mr. Allen. PA95; PA97; 146 p.34L19-25. Councilman McCallum terminated Mr. Allen when he learned he was taking out petitions to run for elected office in the City of Newark. PA122-PA124; PA127 p.32L 15-25. The City of Newark hires and fires employees

without council ratification. PA144 p.26L1-9. Mr. Allen was disparaged and degraded by Councilman McCallum. PA171 p.66L20-25; p.67 L1-20. Although Mr. Allen was maintained on the employment roster as a member of the collective bargaining agreement, he was never reinstated to his position. PA146 p.33L19-25; PA119.

Mr. Allen's employment record was devoid of any counseling or other disciplinary notices.PA127 p.21L1-25; P. 32l1-5. Mr. Allen was not afforded progressive discipline prior to his termination. PA129 p.38L1-25; p.39L1-2; PA141 P. 15L4-25; PA142 p.16L1-25; p.17L1-10; p.18L1-25; p.19L1-20.

STANDARD OF REVIEW

It is well established that Appellate review of a trial court is *de novo*, and applies the same standard under Rules 4:46-(c). Oyola v. Xing Lan Liu, 493 N.J. Supe. 493, 497 (App. Div. 2013). A moving party is entitled to Summary Judgment if: The pleadings, deposition, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to a judgment order as a matter of law.
Brill v. Guardian Life Ins. Comp of America, 142 N.J. 520, 528-29 (1995) citing R. 4:46-2. The New Jersey Supreme Court in Brill modified the previously established standards for summary judgment, which had been set forth in Judson:

[W]hen deciding summary judgment motions trial Courts are required to engage in the same type of Evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b)….

Id. at 541.

Further, once there are inferences raised that relate to the Defendant's intent a genuine issue has been raised and the matter must be sent before a jury. Leahey v. Singer Sewing Co., 302 N.J Super. 68,79 (App. Div. 1996). Additionally, a party's state of mind is clearly a fact which must be decided by a jury. In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. D iv. 2013). In the case *sub judice*, the facts all hinge on Defendant McCallum's state of mind, intent and whether he deliberately acted in bad faith. These facts question the complicity of the City of Newark in the various ways in which Mr. Allen's rights were violated. The Judge's function is not to weigh the evidence and determine the truth, but to determine whether there is a "genuine issue" for trial. Brill at 540.

Therefore, it is indisputable that questions exist necessitating this matter be sent to trial. Thus, the Trial Court erred in deciding as a matter of law questions that are reserved for the jury. Intent, state of mind and

bad faith are at the corner stone of this case and as such, only a jury can weigh the credibility of the witnesses and determine whether Defendants violated Mr. Allen's rights. Supra. Thus, the "genuine issues" of material facts in dispute herein cannot be decided as a matter of law.

LEGAL ARGUMENT

POINT I. THE COURT ERRED IN DISMISSING THE WRONGFUL TERMINATION COUNT OF THE COMPLAINT WHERE GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE EXIST REGARDING THE CITY OF NEWARK'S FAILURE TO SET, ENFORCE AND OR ADHERE TO THEIR POLICIES AND INTENTIONALLY VIOLATED MR. ALLEN'S RIGHTS BY WRONGFULLY TERMINATING HIM IN VIOLATION OF ESTABLISHED RIGHTS (T1 P63 L15-18)

The Court erred in deciding as a matter of law that neither Joseph McCallum nor the City of Newark wrongfully terminated Mr. Allen. Specifically, the court opined that "Plaintiff was terminated for reasons relating to his poor performance and unprofessionalism… [h]e was not yet certified as a candidate prior to being fired and therefore is not subject to the protections of the executive order…[and] Plaintiff is

not part of a class of citizens that the executive order intended to protect….” T1 p.62 L16-23. For the reasons set forth below the Court failed to understand the allegations set forth in the Complaint, circumstances surrounding the Plaintiff’s termination, the law governing the same and the questions necessitated by “genuine issues” of material facts in dispute which can only be answered by a jury.

The testimony of Ms. Daniels was that Mr. Allen was in fact a member of the collective bargaining unit, supported by not only her testimony under oath, but through the personnel action sheets of Mr. Allen which were updated to reflect a CBA negotiated raise, long after Mr. Allen’s termination. Mr. Allen was not afforded the notice or protection of the Union into which he paid dues. Defendant McCallum made sure that his formal termination was processed and his personnel action sheet reflecting his termination was sent to the State of New Jersey within a week after he received his

termination letter. Kecia Daniels testified that no notice was sent to the Union, no exit interview as afforded to Mr. Allen and no progressive discipline, notwithstanding termination is a major disciplinary action, was afforded. Ms. Daniels also admitted that although Aide 1s are protected by the Union, they were not treated the same as other Union Members and she could not explain why.

The failure to afford Mr. Allen his due process began with Defendant McCallum, who admits and acknowledges that Mr. Allen, was a member of the Collective Bargaining Agreement. But the eventual non ratified unlawful termination by those purportedly entrusted to uphold the laws of the City of Newark Municipality were and are just as responsible for his rights being violated because they failed to take corrective action to reinstate Mr. Allen. Defendant McCallum was deliberate in his actions and the rest of the day-to-day policy makers were complicit.

Defendant City of Newark is liable to Mr. Allen under the principles of agency. The City of Newark was Mr. Allen's employer and the City of Newark was Defendant McCallum's employer when he was elected as a Councilman. A Master is responsible for the torts of his servants who are acting within the scope of their employment. Lehman v. Toys 'R' Us, 132 N.J. 587, 619 (1993). The City of Newark encouraged and aided in an environment rift with reckless disregard for its own policy, legislation, and the rights of its employees. Newark is responsible for Defendant McCallum as it has cultivated this behavior and took no corrective actions once it was aware of Mr. Allen's termination.

Mr. Allen is the victim of a system that picks and choses when it will abide by the law, the Collective Bargain Agreement, or its own policies. Mr. Allen is the victim of a person who has been established as someone who cannot be trusted and who admittedly

stopped Mr. Allen when he attempted to exercise his constitutional freedom of speech.

POINT II. THE COURT ERRED IN DISMISSING THE BREACH OF CONTRACT AND IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING COUNT OF THE COMPLAINT WHERE GENUINE ISSUES OF MATERIAL FACTS EXIST REGARDING THE UNDERLYING MALICE THAT JOSEPH MCCALLUM, JR. HELD AGAINST MR. ALLEN; AND THE CITY OF NEWARK'S FAILURETO ABIDE BY ITS EXECTUIVE ORDER 008 AND THE APPLICABILITY OF THE ORDER, FACTS WHICH ONLY A JURY CAN DECIDE.(T1 P62 L22-25;P62 L1-5)

Mr. Allen's purpose for running for elective office was to make a positive impact on the West Ward of Newark and believed his job would be protected as set forth in MEO-08-2008, trusting words and sentiments of former Mayor Booker. Indeed, even former Personnel Director and current Assistant Business Administrator Kecia Daniels said Mayor Booker meant what he wrote in the Executive Order and believed in the tenants set forth therein. It is essential that the Court not simply conclude a meaning "according to the strict letter" but rather advance to the true meaning the

document has deduced from the context in which it was written. Lesniak v. Budzash, 133 N.J. 1, 14 (1993).

The Court is urged to look to the history and legislative statements which serve as valuable interpretive aids in determining the legislative intent. State v. McQuaid, 147 N.J. 464, 480 (1997). Here, the body of Executive Order MEO-08-2008, the news article quoting Mayor Booker and the testimony and affirmation of Mayor Booker's ideology and intent vaults the narrow plain reading of the text and the small portion of the Executive Order which sets forth certification as a parameter or otherwise condition to saving an employees' job. Mayor Booker's news article statement that "everyone will be reinstated" to their jobs, speaks volumes and overrides the limited "Wherefore" clause in MEO-08-2008. Executive Orders, statutes and other legislative documents are to be read sensibly rather than literally. Roig v. Kelsey, 135 N.J. 500, 515 (1994).

This is not a complex matter; it is fact driven and the self-contradictions between McCallum, his lack of knowledge of his duties as a Councilman and his malicious intent exhibited in his own words, combined with the complicity of the City of Newark policy makers are mere examples of questions requiring resolution by a jury. Through this case, the veil has been lifted on that which is apparently a custom of misconduct by the City of Newark, which intentionally, deliberately; and recklessly breaches the rights of its employees in innumerable ways. This is a matter that is rift with issues of credibility. Credibility is a question for the jury. Infra. at In re DeFrank, 266.

Mr. Allen had no prior disciplinary history, not even a counselling nor reprimand in his file, thereby defeating the Court's decision indicating the reason for his termination. Defendant McCallum testified that he never wrote him up, nor did he afford him a

counselling session before terminating him. Defendant McCallum testified that he afforded both his brother Brian McCallum and Louis Stokely counselling sessions, but not Mr. Allen. It is evident but more specifically, admitted, that Mr. Allen's termination was only because he took out petitions to run for Councilman in the West Ward of Newark, and any purported justification is pre-textual, which considering credibility and state of mind standard, it is a question left for the jury. This case is not about political affiliation because none exist in the City of Newark Municipal Elections.

This is not about being an At Will employee, because all the testimony, and record evidence points to Mr. Allen as a due's paying member of a Collective Bargaining Agreement. The Executive Order makes no distinction whether the elective office sought is for that of one's boss or someone with whom the employee is unaffiliated. Executive Order MEO-08-2008 encourages all employees to seek elective office without fear of

retribution or retaliation for exercising their Freedom of Speech.

> *Whereas, City of Newark recognizes the great value in its employees or appointees…Whereas elected office is a significant and powerful way to make contributions to the larger good of the City; and …[l]oss of employment to pursue these higher ideals run contrary to the fundamental principles of democracy….* PA75.

Notwithstanding Mr. Allen not being reinstated after he lost his job and then became certified, a year after his termination, he received retroactive pay increases negotiated by his Union for all its' members. The City of Newark failed to adhere to and otherwise breached an actual Order of former Mayor Booker. Mayor Booker stated in the news article dated September 24, 2008 that all employees terminated due to their running for elective office shall receive their jobs back.

Mr. Allen became certified after being denied the right to maintain his employment with the City of Newark while gathering signatures on his election

petition. Contrary to the Trial Court's Opinion, Mayor Booker's Executive Order 008 did not make a distinction nor set forth a timeline when the certification occurs as it relates to the improperly terminated employee receiving his or her job back, if he was terminated as a result of running for office.

Indeed, it would certainly defeat the underlying ideals and intent to only extend the rights afforded through MEO-08-2008 to employees who have reached the threshold of certification. Joseph McCallum sought to find a way to usurp the Executive Order by interfering with the certification process by terminating Mr. Allen while he was still in the process of seeking certification. If this Executive Order is to be read literally, no one seeking elective office would vault the threshold of certification as their employment would be terminated prior thereto, as was the case for Mr. Allen. The legislative intent behind Executive Order 08 is a question for the jury.

Legislative intent must be given effect and the sources of the intent include the language of the statute and policy behind it. Coletti v. Union County Board of Chosen Freeholders, 217 N.J. Super 31,35 (App. 1987). Hence, the News article one day after Mayor Booker signed Executive Order MEO-08-2008, must be read as part of the legislative intent. In the case at bar, Mr. Allen did not seek to become certified as a candidate for elective office after he was terminated, he began the process of certification and was terminated as result of obtaining petitions.

Mr. Allen did not decide to run for office after he was terminated. Mr. Allen took out petitions before he was terminated and Mr. Allen became certified, shortly after he was terminated. He decided to run and it was known he was running by the very tortfeasor who terminated him in retaliation for Mr. Allen's exercise of his constitutional rights to run for West Ward Councilman. The Executive Order would be for naught,

and based on the testimony of Kecia Daniels and the news article of September 24, 2008, this termination or denial of rights was not the intent of the Executive Order MEO-08-2008 or Mayor Booker's reason for enacting the Order.

But it is not of what I am certain, it is what a reasonable fact finder believes. This is not a case which rest on quantifiable proofs or analogous caselaw. It is pure credibility, who does the Jury believe. "Thus, it is clear that questions of a party's state of mind, knowledge, intent, or motive should not generally be decided on a summary judgment. The Court erred by deciding as a matter of law that Mr. Allen's rights were not violated, when the decision should have been that a jury must decide whether Mr. Allen's rights were violated.

The allegations in his case, which through the record evidence adduced during discovery, are so fact sensitive that there are no questions that can be

decided as a matter of law. Defendants breached the collective bargaining contract, as well as, the implied contract which existed between Plaintiff and Defendants and Defendants breached both the contract and the covenant of good faith and fair dealing, and Mr. Allen may recover for them both. Wade v Kessler Institute, 343 N.J. Super. 338, 348 (App. Div. 2001).

The Court's focus should be directed at the violation of Executive Order MEO-08-2008 and the Defendants failure to afford Plaintiff any of the due process rights and remedies set forth in the law, the collective bargain agreement, the employee handbook, Civil Service, and the requirements set forth by the legislation governing the job duties of Councilman.

Mr. Allen's position with the City required no political affiliation because Newark is a nonpartisan Municipality. His efforts to seek elected office was constitutionally protected activity and Defendant McCallum intimated as much that Mr. Allen's termination

was retaliation, motivated when he learned that Mr. Allen sought the West Ward Council seat that he currently held. Therefore, Mr. Allen has established a *prima facie* showing that a violation of protected speech has been met. Lapolla v. County of Union, 449 N.J. Super. 288,289 (2017), The Trial Court failed to appreciate this standard and therefore erred in dismissing the Complaint.

Mr. Allen was not a policy maker and should not could not be terminated for his political beliefs when he was performing his job satisfactory and there is nothing in his personnel records reflective of poor performance or disciplinary actions. Morgan v. Union County Bd. Of Chosen Freeholders, 268 N.J. Super. 337 (1993) (citing Elrod v Burns, 427 US 347, 375 (1976). It is in this respect that Mr. Allen has established a *prima facie* case of his constitutional rights being violated which requires the case be heard before a jury of his peers.

This case is strictly and specifically about defendants' violation of Executive Order MEO-08-2008, Newark's Employee Handbook and the Collective Bargaining Agreement. These are the policies in question that have been violated, these are the documents to which the contents must be searched. Defendants have not set forth a challenge to the legitimacy of any of the governing documents. It is of no moment as the Plaintiff/Respondent may argue and to which the Trial Court accepted that Mr. Allen slept on his administrative remedy rights by not filing a civil service appeal after his termination. This is not the issue before the Court.

There is no dispute regarding his failure to file an appeal through civil service for administrative remedies. The failure of the City to ensure Mr. Allen's union rights, notify the union and otherwise provide progressive discipline is not a cause of action in the Complaint, it is evidence of bad faith. The totality of

the egregious mistreatment of Mr. Allen once he sought elective office, and the timing of this treatment which is remarkable and cannot be denied, are questions for the jury to decide which the Court did not appreciate and therefore, the decision to grant Summary Judgment to the Plaintiff/Respondents was error which must be reversed.

POINT III. THE COURT ERRED IN DISMISSING ARTICLE 1 PARAGRAPHS 1& 6 OF THE COMPLAINT WHERE GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE EXIST REGARDING THE DEFENDANT JOSEPH MCCALUM'S MALICE TOWARD MR. ALLEN AND HIS DELIBERATE EFFORTS TO C HIL MR. ALLEN'S FREEDOM OF SPEECH BY ILLEGALLY TERMINATING MR. ALLEN WHEN HE SOUGHT ELECTIVE OFFICE.(T1 62 L15-18)

Defendant McCallum testified that he knew Mr. Allen was taking out petitions the day before he obtained them. Defendant McCallum testified that he thought it was crazy and could not have someone in his office running for his position. He admitted that he terminated him because he was running for the same elected position that he held, by uttering this on the

very few trustworthy statements he made during his deposition. His attempts to cure his testimony after his attorney's objections are apparent and telling. His natural utterances are the most reliable and credible, but that too is for the jury to decide. Defendant McCallum's credibility is a cause for concern that only a jury can evaluate and opine on.

His constant contractions during his deposition testimony, lack of knowledge of a position he held for eight years and his evasiveness further create genuine issues of material facts in dispute. The claims of breach of contract and implied covenant of good faith and fair dealing require an analysis of one's intent. Here, a contract existed between Mr. Allen and the City of Newark as evidenced by the Employee Manual,Executive Order, and the Collective Bargaining Agreement. Defendant McCallum has an established history lacking in credibility and only a jury can determine if the proffered reason for Mr. Allen's termination was or was

not pretext. The City of Newark employs 3,800 employees as set forth in the testimony of Kecia Daniels and they could not find another position or office location for Mr. Allen?

Defendant McCallum hated Mr. Allen and wanted to hurt and punish Mr. Allen and sought his vindication by taking money out of Mr. Allen's pocket, food off his children's plate, and blackballing him in the community by making negative remarks about Mr. Allen's past persona. Defendant McCallum not only terminated Plaintiff in bad faith, he orchestrated Mr. Allen's termination beating the clock on Mr. Allen's ability to be certified as a candidate by admittedly conspiring with the City Clerk, to terminate him the day Mr. Allen returned to work and before Mr. Allen could be certified as a candidate for West Ward Councilman.

Joseph McCallum admittedly and unequivocally did state in his deposition all that would lead a reasonable fact finder to that which was in bad faith.

The Trial Court failed to appreciate that bad faith is a question of fact for the jury. Bad faith requires a state of mind determination and the Court is cautioned against granting Summary Judgment on claims where bad faith is an underlying tenant. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001). The Court's Opinion is devoid of any analysis undertaken relative to the potential bad faith or state of mind of Joseph McCallum and predicated most of her opinion on the limited procedural aspect of whether the Plaintiff was certified as a candidate prior to his termination.

Only a jury can determine whether and to what extent McCallum was dishonest and acted in bad faith as it relates to Mr. Allen's termination. The Court granting the Defendants Summary Judgment was simply inappropriate where credibility is a genuine issue of material fact in dispute. In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013).

Mr. Allen is not an At-Will employee or he would not be a Union Member afforded the rights and benefits including retro-active pay. However, Defendants argued and the Court accepted that Mr. Allen was an At-Will employee. Whether Mr. Allen was an at-will employee or a member of a collective bargaining unit entitled to all the rights, including progressive discipline conferred therein, is certainly a genuine issue of material fact, which the Court failed to appreciate. Therefore, the Court's error must be reversed and the question sent to a jury. One thing is certain, Mr. Allen was admittedly terminated in violation of Mayor Booker's Executive Order MEO-08-2008.

Mr. Allen had no prior discipline, his Union was not notified of his termination, his termination was never appropriately ratified by City Council the City Legislators as prescribed by statute and Mr. Allen was never rightfully reinstated to his job. These are procedural facts may not be issues in dispute. However,

what is in dispute, what are the "genuine issues" of material facts in dispute is the motive and intent underpinning the decisions that were made relative to Mr. Allen's employment and whether and to what extent they were made in bad faith. These are "genuine issues" of material facts in dispute that only a jury can decide and to which the Court finding as a matter of law was error.

POINT IV. THE COURT ERRED IN DISMISSING ARTICLE 1 OF THE NEW JERSEY CONSTITUTION FALSE LIGHT ALLEGATION IN WHICH JOSEPH MCCALLUM, JR. PLACED MR. ALLEN IN A FALSE AND NEGATIVE LIGHT BY PUBLISHNG STATEMENTS ABOUT HIM WHICH WERE PRIVATE AND PART OF HIS PAST PERSONA, WHICH ARE QUESTIONS ONLY A JURY CAN DECIDE.(T1 P63 L6-13)

Defendant testified disparagingly about Mr. Allen and Mr. Allen testified that Defendant McCallum blackballed him, and released private information publicly by calling him a thug, in a hurtful reference to his past, from which he has long become a

contributing member of society. Defendant McCallum's conduct cast Mr. Allen in a false light not through defamatory comments but through his release of private information to the public. Swan v. Boardwalk Regency Corp., 407 NJ Super. 108, 119 (App. Div. 2009). Not all false light allegations are defamation. Where there is truth in the statements it does not fall under the one (1) year statute as defamation but is a two (2) year statute of limitations which Mr. Allen's timely filing has met.

Defendant McCallum's conduct was a tort against Mr. Allen; therefore, it is subject to the two-year statute of limitations under N.J.S.A.2A:14-2. McCallum knew Mr. Allen's past involvement in the criminal justice system, one of the very reasons he brought him into his fold. McCallum used Mr. Allen for his street credit and then turned on him by spreading disparaging remarks and calling him a thug and referring to the man Mr. Allen had long left behind. This stigma made it

difficult for Mr. Allen to be considered a trusted or otherwise viable candidate for West Ward Councilman and further diminished the community's perception of Mr. Allen which he had worked so hard to restore.

Notwithstanding this issue being presented to the Court during oral argument it failed to appreciate the fact sensitive nature and undertook no analysis of the allegation but rather decided, in error, that as a matter of law, no false light could have occurred due to the statute of limitation. T1 p. 63L6-9. Mr. Allen met the two-year statute of limitations based on the false light claim or private and truthful information being disseminated and therefore the court erred in dismissing this Count.

CONCLUSION

In Conclusion, based on the foregoing argument and the law, "genuine issues" of material facts in dispute exist for which the Court erred in deciding as a matter of law to grant Defendant/Respondent's Motion for

Summary Judgment. The Counts set forth in Mr. Allen's Complaint require this case be heard by a jury. The Appellate Court is urged in the interest of justice, and Plaintiff/Appellant Marcellus Allen prays, the matter is reversed and remanded for trial.

Respectfully submitted,

/s/ Tracey S. Cosby

Tracey S. Cosby

Dated: July 16, 2024

MARCELLUS T. ALLEN, Appellant, v. CITY OF NEWARK, JOSEPH A. MCCALLUM, Jr., (Individually and in his Official Capacity); JOHN DOES 1-10 (fictitious names identities unknown), ABC CORPS. 1-10 (fictitious names identities unknown), Respondents.	SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION Docket No.: A-002366-23 CIVIL ACTION ON APPEAL FROM: Law Div. Docket No. ESX-L-000273-20 Sat Below: Hon. Bridget A. Stetcher, J.S.C.

RESPONDENTS CITY OF NEWARK AND JOSEPH A. MCCALLUM, JR.'S ANSWERING BRIEF AND APPENDIX (Da1-Da2)

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PRELIMINARY STATEMENT

Plaintiff/Appellant Marcellus Allen (hereinafter referred to herein as "Plaintiff") appeals from an Order in which summary judgment was granted to all defendants in this matter, City of Newark ("Newark") and Joseph A. McCallum, Jr. ("Councilman McCallum") (collectively "Defendants"). Plaintiff's claims against Defendants are centered around his assertion that the termination of his employment was in violation of Executive Order MEO-O-08-001, which was issued on September 23, 2008, by Mayor Cory Booker on behalf of the City of Newark (the "Executive Order").

As the trial court judge aptly found, there is simply no merit to Plaintiff's claims against Defendants, because the Executive Order plainly states that to be protected from termination, the employee running for office must be **certified** as a candidate for municipal elective office in the City of Newark. Here, Plaintiff was terminated on January 12, 2018, and was not certified as a candidate until about a month-and-a-half later, on February 22, 2018. Thus, because Plaintiff was not certified to run for office, the trial court properly found that there was no violation of the Executive Order in the first instance and dismissal of the First and Second Counts of Plaintiff's Complaint was proper.

Second, Plaintiff's termination was based on his poor performance and lack of professionalism, as he himself testified that he looked at nude images and pornography during office hours,

argued with other aides, and campaigned against his own employer, Councilman McCallum, and spoke negatively about Councilman McCallum to constituents when he was canvasing the West Ward for signatures for his petitions. Furthermore, since Plaintiff was an at-will employee and failed to identify any document or statement that could constitute a contract or implied contract to support his breach of contract and breach of the implied covenant of good faith claims, the trial court properly dismissed the Second Count of Plaintiff's Complaint. To that point, the trial court also found unavailing and properly rejected Plaintiff's argument that he was a union member protected under a certain unidentified Collective Bargaining Agreement, as Plaintiff failed to raise any such claim in his Complaint.

Finally, the trial court properly dismissed Plaintiff's claim for false light invasion of privacy, because the one-year statute of limitations imposed by N.J.S.A. 2A:14-3 had run. Specifically, Plaintiff confirmed this claim arose solely from his termination by the Councilman on January 12, 2018, but his Complaint was not filed until two years later. Plaintiff's claim for false light invasion of privacy, which is based on the allegation that his termination portrayed him as a poor employee, is barred by the statute of limitations based on his own testimony and the date of the filing of the complaint. Here too, the trial court properly rejected Plaintiff's argument that his false light invasion of

privacy claim is somehow entitled to a two-year statute of limitations.

Respectfully, because the record evidence and applicable law demonstrate that Plaintiff's claims against Defendants are baseless, the trial court's decision granting summary judgment on all of Plaintiff's claims should be resoundingly affirmed.

PROCEDURAL HISTORY

Plaintiff filed his Complaint on January 12, 2020 ("Complaint") in the Superior Court of New Jersey, Law Division – Essex County, asserting claims against Defendants for wrongful termination, breach of contract and breach of the implied covenants of good faith and fair dealing, violation of the New Jersey Constitution, and False Light Invasion of Privacy. (Pa3.) Following early motion practice, the trial court dismissed the wrongful termination claim against Defendants, and the following three counts of the Complaint remained:

- Second Count – Breach of Contract and Breach of the Implied Covenant of Good Faith and Dealing,
- Third Count – Violation of Article I, Paragraphs 1 and 6 of the New Jersey Constitution, and
- Fourth Count – False Light Invasion of Privacy.

(Pa16; Da1.)

On June 24, 2022, Defendants moved for summary judgment regarding the remaining three claims against it: breach of contract and breach of the implied covenant of good faith and fair dealing, violation of the New Jersey Constitution, and False Light Invasion of Privacy against Defendants, (Pa29), and on February 29, 2024, the trial court heard oral argument and entered an Order granting Defendants' Motion for Summary Judgment, (Pa1).

On April 8, 2024, Plaintiff filed a Notice of Appeal with this Court, (Pa186), which was subsequently amended on April 16, 2024, (Pa194).

COUNTERSTATEMENT OF FACTS

Plaintiff mischaracterizes the facts in an effort to convince this Court that a genuine factual dispute existed on the record below that was sufficient to allow his claim to survive summary judgment. To set the record straight, Defendants summarize the material facts, addressing a variety of Plaintiff's distorted recitation of "facts" and mischaracterization of the record below.

1. Plaintiff formerly served as an Aide Level One to Defendant Councilman McCallum for the West Ward of the City of Newark. (Pa45, Pa46.) Defendant Councilman McCallum was an elected official who served as a council member for the West Ward of the City of Newark from 2015 to 2022 and was Plaintiff's supervisor. (Pa61.) Defendant Newark is a public entity and Plaintiff's former employer. (Pa4.) Defendant Newark is also the entity at which

Defendant Councilman McCallum served as a council Member for the West Ward of Newark. (*Id.*)

2. During the time relevant to Plaintiff's allegations, Councilman McCallum had four aides working for him. (Pa62-Pa63.) Those aides were Brian McCallum (the Councilman's brother), Louis Shockley, Carolyn Walker-Jordan, and Plaintiff. (*Id.*) Brian McCallum and Louis Shockley served as level two aides, and Plaintiff and Carolyn Walker- Jordan served as level one aides. (Pa63.)

3. When Plaintiff served as a level one aide for Councilman McCallum, his duties consisted of speaking with constituents, fielding telephone calls, handling walk-in requests, doing clerical computer work, and representing Councilman McCallum at various functions such as public hearings and city council meetings. (Pa63, Pa4-Pa5.) In the City of Newark, aides serve at the pleasure of the councilperson. (Pa66.)

4. Plaintiff had problems with the other aides in the office, specifically, with Brian McCallum, Councilman McCallum's brother. (Pa 52.) Plaintiff testified that he despised Brian McCallum and would push back against Brain McCallum when he gave Plaintiff work assignments. (*Id.*) Further, Plaintiff routinely acted unprofessionally in the office. Plaintiff admitted that he looked at nude images and different types of pornography in the office. (Pa 53.) The final straw for Councilman McCallum was in

early January 2018, when Plaintiff took an unauthorized vacation and lied about his whereabouts. (Pa 66-67.) When Councilman McCallum questioned Plaintiff about his whereabouts, Plaintiff said he was heading down south, but Councilman McCallum later saw Plaintiff at a swearing-in ceremony at a freeholders meeting. (Pa68.) Plaintiff alleges his vacation was approved by Rufus Johnson, the former chief of staff, however, Plaintiff testified that he did not have any documents showing his vacation was, in fact, ever approved. (Pa51.)

5. Based on the bad attitudes, hostile interpersonal interactions, weak customer service skills, and poor work performance exhibited by Plaintiff, Brian McCallum, and Louis Shockley, Councilman McCallum had no choice but to terminate each of them. (Pa66.) Louis Shockley was terminated on December 21, 2017. (Pa64.) Plaintiff was terminated on January 12, 2018. (Pa47, Pa70.) The Councilman's brother, Brian McCallum, was terminated around the same day as Plaintiff. (Pa64.)

6. The day before Plaintiff was terminated, Councilman McCallum heard that Plaintiff had taken out petitions to run for council member for the West Ward of Newark. (Pa67.) Plaintiff testified that he decided to run against his boss, Councilman McCallum, because he thought Councilman McCallum did not care about the city. (Pa49.) Councilman McCallum was not upset Plaintiff decided to run against him. (Pa68.) Councilman McCallum was,

however, concerned that Plaintiff had access to confidential office data on voters and spoke to his constituents daily. (*Id.*) As it turned out, Councilman McCallum's concerns were well founded, as Plaintiff admitted that while he was seeking signatures for his petitions, Plaintiff spoke negatively about Councilman McCallum to prospective voters. (Pa50.)

7. In the City of Newark, a candidate running for the office of council member for the West Ward must submit a sufficient number of qualified petitions – that is signatures of registered voters from the proper geographic area – to be certified for placement on the ballot for election. (Pa72.) The total number of qualified petitions required to be certified to run for the office of council member for the West Ward is 307. (*Id.*) If a person submits the required number of qualified petitions, as determined by the City Clerk, then the person becomes "certified" to be a candidate on the ballot. (*Pa72,* Pa50, Pa55.) A person who does not submit the required number of qualified petitions is not a certified candidate and cannot be placed on the ballot. (*Id.*)

8. On January 30, 2018, weeks after his termination, Plaintiff received a letter from the City Clerk informing him that he had not submitted a sufficient number of qualified signatures. (Pa72.) Plaintiff had only filed 206 of required 307 qualified signatures. (*Id.*) On February 22, 2018, more than a month after his termination by Councilman McCallum, Plaintiff, after obtaining

additional signatures, received another letter from the City Clerk informing him that he had now submitted a sufficient number of signatures to be certified for placement of the ballot. (Pa74.) Thus, Plaintiff was not a certified candidate until February 22, 2018, almost a month-and-a-half after his employment was terminated. (*Id.*, Pa70.)

9. Years earlier, on September 23, 2008, Mayor Booker on behalf of the City of Newark, issued an Executive Order No.: MEO-O-08-0001. (Pa76.) Executive Order No.: MEO-O-08-0001 provides:

> Any municipal employee or appointee who is **certified** as a candidate for municipal elective office in the City of Newark or for county elective office in the County of Essex shall be entitled to maintain their position with the City of Newark.

(emphasis added).

Plaintiff was terminated on January 12, 2018, almost a month-and-a-half prior to being certified to run. (Pa70, Pa74.)

STANDARD OF REVIEW

In reviewing whether summary judgment was properly granted, the appellate court applies the same standard as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Rule 4:46-2(c); see also

Perrelli v. Pastorelle, 206 N.J. 193, 199 (2011) (quoting language from the Rule). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id. "[A] court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life, 142 N.J. 520, 529 (1995) (emphasis in original); Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). "[W]here the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Brill, 142 N.J. at 529; see also Inv'rs Bank v. Torres, 457 N.J. Super. 53, 64 (App. Div. 2018).

Summary judgment is proper even where there is a denial of an essential fact if the remainder of the record demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399-400 (App. Div. 1972). "The existence of merely some factual dispute will not defeat a properly supported motion." Alfano v. Schaud, 429 N.J. Super. 469, 475 (App. Div. 2013).

Particularly relevant here is the admonition previously given by this Court: "'[w]hen opposing parties tell two different

stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'" Id. (quoting Scott v. Harris, 550 U.S. 372, 380 (2007).

LEGAL ARGUMENT

I. The Trial Court Properly Dismissed the First and Second Counts of Plaintiff's Complaint Because Plaintiff's Employment Was Terminated Due to His Poor Performance and Unprofessionalism and Plaintiff's Employment Was Not Protected by the Executive Order or Any Other Contract or Agreement with the City of Newark (T62:11-63:5)

A. Plaintiff's Employment Was Terminated Due to His Poor Performance and Unprofessionalism

The record evidence is undisputed that Plaintiff was terminated because of his poor performance and unprofessionalism. Plaintiff himself admitted that he looked at nude images and pornography during office hours. (Pa 53.) He also had problems with the other aides, especially with Brian McCallum, and would get into loud arguments when Brian McCallum assigned him work. (Pa 52.) Accordingly, the trial court was correct in its finding that this evidence, "when viewed in a light most favorable to Plaintiff, supports that Plaintiff was terminated for reasons relating to his poor performance and unprofessionalism." (T62:15-18.) To be clear, Plaintiff was not the only aide whose employment was terminated by Councilman McCallum due to ongoing issues with performance and unprofessionalism; Councilman McCallum fired two other aides,

Louis Shockley, and his own brother, Brian McCallum around the same time as Plaintiff. (Pa64, Pa66.) Plaintiff and Brian McCallum were terminated on or about the same day. (Pa64, Pa70.)

B. Plaintiff Is Not Subject to the Protections of the Executive Order Because He Was Not Certified as a Candidate Prior to Being Terminated

An executive order is essentially a piece of legislation governing the relationships of the parties to whom it applies. Talmadge Vill. LLC v. Wilson, 468 N.J. Super. 514, 517 (App. Div. 2021). All legislative enactments in New Jersey are first read to mean what they say; that is, when interpreting a piece of legislation, the Court's "first obligation" is to consider the enactment's "plain meaning." State v. Marchiani, 336 N.J. Super. 541, 546 (App. Div. 2001). Here, the Executive Order plainly states that to be protected from termination the employee running for office must be "**certified**" as a candidate for municipal elective office in the City of Newark. (Pa76.) To become certified as a candidate to run for council member for the West Ward of Newark, a candidate must submit 307 qualified signatures, and only after the signatures are checked to confirm that the signees are voters in the West Ward of Newark, does the clerk certify the individual as running for office. (Pa72, Pa55.) Prior to that, the individual is solely a person interested in running for office and nothing more.

As the trial court correctly found, "Plaintiff is not part of the class of citizens that the executive order intended to protect, as it plainly states that the employee running for office must be certified as a candidate for municipal office in the City of Newark." (T62:22-63:1.) Plaintiff was terminated on January 12, 2018, and was not certified as a candidate until February 22, 2018, almost a month-and-a-half later. (Pa47, Pa70, Pa74.) Therefore, the trial court properly ruled that because "Plaintiff admit[ted] he was not yet certified as a candidate prior to being fired [, he] is not subject to the protections of the executive order." (T62:19-21.)

Plaintiff's baseless arguments, including that the Executive Order was implemented to ensure that "all employees terminated due to their running for elective office shall receive their jobs back," (Pb28), regardless of <u>when</u> they were certified, creates an obviously untenable and absurd situation. Such a warped interpretation of the Executive Order would allow for the restoration of a former employee's job months, or even years, following their termination, if they eventually become certified as a candidate for municipal elective office in the City of Newark. Respectfully, this Court must, therefore, reject Plaintiff's arguments and affirm the trial court's ruling in this regard.

C. Plaintiff Failed to Identify Any Document or Statement That Could Constitute a Contract, Implied Contract, or Agreement to Give Rise to a Claim for Breach of Contract and Implied Covenant of Good Faith and Fair Dealing

In another futile attempt to further his claim that he was wrongfully terminated, Plaintiff repeatedly makes the baseless argument throughout his briefing that he was a member of a collective bargaining unit and that he was allegedly denied protections that should have been afforded to him as a union member. (Passim.) These claims must fail because Plaintiff never pled such a claim in his Complaint and only raised this argument for the first time in his opposition to Defendant's motion for summary judgment. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142, 145 (1973); see also Abbott v. Burke, 119 N.J. 287, 390 (1990). Plaintiff's bald assertions that he "was a member of the Collective Bargaining Agreement," and "was not afforded the notice or protection of the Union", (Pb21), are unsupported by the record as Plaintiff never pled any such allegation in his Complaint.

Additionally, whatever Plaintiff's argument is with respect to the Collective Bargaining Agreement, the trial court also properly found that even if there was an agreement that afforded Plaintiff any protection, his claim would nonetheless fail "because plaintiff failed to employ and exhaust the CBA's grievance procedure and is, thus, barred from maintaining a cause of action on these grounds. (T63:14-18) (citing Snitow v. Rutgers Univ., 103 N.J. 116, 124 (1986)). To this, Plaintiff offers no meaningful assertion of error.

II. The Trial Court Properly Dismissed the Third Count of Plaintiff's Complaint Because Plaintiff's Employment Was Neither Terminated Because He Ran for Political Office Nor Does He Have a Constitutional Right to Run For Office Against His Own Boss (T62:11-63:5)

Point III of Plaintiff's briefing to this Court is hard to follow, but Defendants surmise that Plaintiff's argument is as follows: that Plaintiff's employment was terminated because he ran for political office against Councilman McCallum, and this firing violated Plaintiff's rights under Article I, Paragraphs 1 and 6 of the New Jersey Constitution to express his political views and speak freely. The governing law, however, does not support Plaintiff's claim, and indeed, the trial court was correct in dismissing this claim as well.

This Court has comprehensively explained that certain employer interests "limit a public employee's First Amendment right of speech." These factors are: "(1) the need to maintain

discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to limit conduct which impedes the public employee's proper and competent performance of his duties, and (4) the need to encourage close and personal relationships between employees and their superiors." Hall v. Mayor & Dir. of Pub. Safety in Pennsauken Twp., 176 N.J. Super. 229, 232 (App. Div. 1980) (citing Winston v. South Plainfield Bd. of Ed., 64 N.J. 582, 588 (1974); Williams v. Civil Service Comm'n, 66 N.J. 152, 158 (1974); Endress v. Brookdale Community College, 144 N.J. Super. 109, 137 (App. Div. 1976); Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149, 166 (App. Div. 1974), cert. den. 65 N.J. 573 (1974), cert. den. 419 U.S. 1057 (1974)).

Similarly, the Supreme Court of the United States has made clear that "political viewpoint" is a "permissible employment criteria for positions involving . . . confidential employees." Rutan v. Republican Party of Illinois, 497 U.S. 62, 71 n. 5 (1990); see also Branti v. Finkel, 445 U.S. 507, 517–18 (1980). The federal jurisprudence matters here because the Appellate Division has held that New Jersey courts "rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution, art. I, ¶ 6." Karins v. City of Atl. City, 152 N.J. 532, 547 (1998) (citing Horizon Health Ctr. v. Felicissimo, 263 N.J. Super. 200, 214 (App. Div. 1993), modified and aff'd, 135

N.J. 126; Robert F. Williams, The New Jersey State Constitution 34 (1990)).

Thus, Plaintiff does not have any constitutional free speech right to remain employed while running against his own employer. Indeed, courts have routinely upheld terminations of employees with access to confidential information who openly supported campaigns against their current or subsequently elected employer. Curinga v. City of Clairton, 357 F.3d 305, 311 (3d Cir. 2004) (affirming grant of summary judgment against city manager fired after campaigning against members of city council); Williams v. City of River Rouge, 909 F.2d 151, 155-56 (6th Cir. 1990) (affirming grant of summary judgment against city attorney fired after campaigning against newly elected mayor). Clearly, running against one's boss for public office is even more fraught.

In Wilbur v. Mahan, Judge Posner, writing for the Seventh Circuit, explained that it is a "declaration of war" when an employee who occupies a confidential job "announces that he is going to run against his boss for the boss's office because the boss is not administering the office properly." 3 F.3d 214, 218 (7th Cir. 1993). That is, it "makes the candidate a political enemy of his boss." Id. Similarly, the Appellate Division, in affirming a grant of summary judgment against public employees who claimed retaliation, stated that "[a] plaintiff who alleges retaliation for political affiliation must show . . . he was employed at a

public agency in a position that does not require political affiliation." Lapolla v. Cty. of Union, 449 N.J. Super. 288, 298 (App. Div. 2017). Thus, if a government job necessarily requires the employee to be "on the same page" politically as one's supervisor, one can be terminated if one decides to campaign against the employer.

More generally in Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563 (1968), the Supreme Court established "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Id. at 568. Thus, while a public employer may not have a blanket rule limiting an employee's speech on matters of public concern, a public employer may examine the impact of an employee's speech to determine whether that speech is or may be so disruptive as to prevent the employee from functioning in the work environment. Id. at 568-69. The Third Circuit has explained that the "Pickering balancing test requires the courts to 'balance ... the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Munroe v. Central Bucks School Dist., 805 F.3d 454, 466 (3d Cir. 2015) (quoting Pickering, 391 U.S. at 568). The Appellate Division has used the

Pickering balancing test to evaluate free speech claims brought under the New Jersey Constitution. Pietrunti, 128 N.J. Super. at 168.

Here, the trial court properly dismissed Plaintiff's claims because, as discussed above, based on Plaintiff's inappropriate and unprofessional behavior, Councilman McCallum had no choice but to terminate Plaintiff for the sake of the smooth and efficient running of his office. (Pa52-53, Pa66-67.) Additionally, there is no doubt that Plaintiff running against his former boss would cause tension within Councilman McCallum's office. Plaintiff testified that he did not believe Councilman McCallum cared for the City of Newark and he did not believe the Councilman was running his office properly. (Pa49-50.) Plaintiff even admitted that he would speak negatively about Councilman McCallum to constituents when he was canvasing the West Ward for signatures for his petitions. (Pa50.) Councilman McCallum was also concerned that Plaintiff had access his personal and confidential information and what he could do with that information. (Pa68.) These factors not only jeopardized Councilman McCallum's ability to effectively serve his constituents, but when Plaintiff decided to run against Councilman McCallum and told constituents that the Councilman was not a good representative of the West Ward, Plaintiff declared himself "a political enemy of his boss" and his termination was thus permitted as a matter of law. Wilbur, 3 F.3d at 218. Plaintiff attempts, in

vain, to circumvent the law by arguing that Plaintiff's position "required no political affiliation," and therefore his running against Councilman McCallum was of no consequence (Pb32), when in reality, the only political loyalty Plaintiff owed was to his own boss—Councilman McCallum, who he actively sought to oust. Lapolla, 449 N.J. Super. at 298. Thus, the trial court properly dismissed Count Three of Plaintiff's Complaint as a matter of law.

III. The Trial Court Properly Dismissed the Fourth Count of Plaintiff's Complaint for False Light Invasion of Privacy Because the Statute of Limitations Had Run (T63:6-13)

False light protects a person's interest "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." Romaine v. Kallinger, 109 N.J. 282, 294 (1988) (quoting Restatement (Second) of Torts § 652E, comment b; see Comment, "False Light: Invasion of Privacy?", 15 Tulsa L.J. 115, 117 (1979)). "The publicized material in a false-light claim must constitute a major misrepresentation of [plaintiff's] character, history, activities or beliefs." Id. at 295 (quotations omitted). "Thus, there can be no recovery for false-light invasion of privacy unless it is shown that the publicity at issue was of a character highly offensive to a reasonable person." Id. (quotations omitted).

Importantly, "[c]laims for invasion of privacy based on placing plaintiff in a false light are subject to the **one-year statute of limitations** imposed by N.J.S.A. 2A:14-3." Smith v.

Datla, 451 N.J. Super. 82, 94 (App. Div. 2017) (emphasis added) (citing Swan v. Boardwalk Regency Corp., 407 N.J. Super. 108, 123 (App. Div. 2009)). Such false claims assert that a defendant has falsely made a plaintiff look bad to others. In contrast, false light claims based on "intrusion" into a person's "seclusion" are subject to a two-year statute of limitations. Id. at 93-94 (citations omitted). Such an "intrusion" false light claim is asserted, for example, when one has been surreptitiously recorded in a private space. See e.g., Friedman v. Martinez, 242 N.J. 449, 470 (2020). No such allegation is present here. Finally, false light claims based on stealing someone's name or likeness are subject to a six-year statute of limitations. Smith, 451 N.J. Super. at 94. Claims of this sort are grounded on the use of one's name "without his consent, either to advertise the defendant's product or to enhance the sale of an article." Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 77 (Ch. Div. 1967)(lawsuit brough by famous golfers, including Arnold Palmer, against game maker who used golfers' names without consent). Here, of course, Plaintiff does not allege that his name or likeness have been stolen.

In this appeal, however, Plaintiff argues that a two-year statute of limitations should apply because "Defendant McCallum's conduct cast [Plaintiff] in a false light not through defamatory comments but through his release of private information to the

public", (Pb41), specifically, that Councilman McCallum allegedly revealed Plaintiff's "past involvement in the criminal justice system" and called him a "thug." (Pb40-Pb41.) Plaintiff failed to cite to any statute or caselaw to support such a proposition—that this alleged defamatory statement rises to the level of an intrusion claim warranting a two-year statute of limitation. In fact, Plaintiff's citation to this Court's ruling in Swan, 407 N.J. Super. at 119, actually undercuts Plaintiff's argument, as this Court specifically cautioned that allowing a one-year statute of limitations for defamation claims and a two-year statute of limitations for false light privacy claims "would condone a transparent evasion of the one-year statute of limitations in New Jersey," which is exactly what Plaintiff is attempting to accomplish here.

Here, Plaintiff has confirmed that his claim that he was placed in a false light arises solely from his termination by the Councilman on January 12, 2018. (Pa10, Pa70.) The Complaint, however, was not filed until two years later. (Pa3.) Thus, his claim of false light invasion of privacy through making Plaintiff appear to be a bad employee by terminating him is, on his own testimony and the date of the filing of the complaint, barred by the statute of limitations. The trial court, therefore, properly dismissed Plaintiff's False Light claim because it was out of time and because Plaintiff "failed to establish evidence of defendants'

unauthorized release of private and truthful information about Plaintiff." (T63:10-13) (citing Smith v. Datla, 451 N.J. Super. 82, 94 (App. Div. 2017)).

Accordingly, the trial court's grant of summary judgment in Defendants' favor was appropriate as the weight of all the evidence is so grossly one-sided that Defendants must prevail as a matter of law. See Brill, 142 N.J. at 540; see also Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 532 (App. Div. 2019) (affirming grant of summary judgment dismissing Plaintiff's claims because the record was "one-sided").

CONCLUSION

For the foregoing reasons, Defendants City of Newark and Joseph A. McCallum respectfully request that the Court affirm the trial court's Order granting Summary Judgment in their favor.

Dated: August 19, 2024

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