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| ALBERT H. WUNSCH, III,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>MARK PARK, TIM KOUTROUBAS, INFO@ENGLEWOODCLIFFS.COM<br><br>Defendants/Non-Appellants<br><br>CTE REPUBLICANS FOR ENGLEWOOD CLIFFS, ZHI LIANG, RIVKA BIECAGZ, and PENNY ROUSOULI,<br><br>Defendants/Appellants. | SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION<br><br>DOCKET NO.: A-003239-23<br><br>CIVIL ACTION<br><br>On Appeal from:<br>Trial Docket No. BER-L-5605-23<br><br>SAT BELOW:<br>HON. Mary F. Thurber, J.S.C. |

# BRIEF IN SUPPORT OF APPEAL BY DEFENDANTS CTE REPUBLICANS FOR ENGLEWOOD CLIFFS, ZHI LIANG, RIVKA BIECAGZ, AND PENNY ROUSOULI

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# TABLE OF CONTENTS

Page

# TABLE OF CONTENTS

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page(s)

## Cases

# TABLE OF AUTHORITIES

# TABLE OF AUTHORITIES

# TABLE OF AUTHORITIES

## Table of Judgments, Orders and Rulings Being Appealed



## Appendix Table of Contents

## PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of Defendants-Appellants CTE Republicans for Englewood Cliffs, Zhi Liang, Rivka Biecagz, and Penny Rousouli ("Defendants"), in support of their appeal from the Order and Decision entered by the Honorable Mary F. Thurber, J.S.C., in the Superior Court of New Jersey, Bergen County Law Division, on May 31, 2024 (the "Decision"). The instant appeal challenges the trial court's denial of Defendants' Motion to Dismiss the Verified Complaint (the "Complaint) filed by Plaintiff-Respondent Albert H. Wunsch, III ("Plaintiff"), and the resulting denial of Defendants' application for the recovery of costs and fees associated with their defense.

The underlying dispute at the heart of the Complaint arises from heated political discourse surrounding a local public government election campaign in Englewood Cliffs, New Jersey. The Complaint claims entitlement to a finding that Defendants published political advertisements that included defamatory statements specifically, and personally, concerning Plaintiff. Defendants respectfully submit that the outcome of the underlying motion to dismiss would have been entirely different had Plaintiff's proofs, or lack thereof, been scrutinized under the appropriate standard.

For the reasons set forth herein, it is respectfully submitted that the Decision should be vacated and overturned, as a matter of law, for Plaintiff's

failure to *establish* a prima facie case for each and every essential element of his claim for defamation in accordance with the evidentiary requirements set forth by the Uniform Public Expression Protect Act.

As enacted by the Legislature, the "act shall be broadly construed and applied to protect the exercise of the right of freedom of speech … guaranteed by the United States Constitution or the New Jersey Constitution." N.J.S.A. 2A:53A-59. Here, Defendants respectfully submit that, on its face, the Complaint amounts to nothing more than Plaintiff's unabashed deployment of the judiciary in an effort to stifle the constitutionally guaranteed right to freedom of speech, under the guise of a cause of action sounding in defamation. In other words, the Decision should be overturned because it lends to the precise result the law strives to prevent - the silencing of the typical banter freely exchanged in ordinary political discourse. Further, upon the dismissal of Plaintiff's Complaint, the act requires that Plaintiff reimburse Defendants for their reasonable costs and fees associated with their defense in this action.

At each stage of litigation, a fundamental role of the trial court is to ensure that only legally viable claims proceed. In this case, contrary to statutory law and well-settled common law, embodying cornerstone principles of the fundamental right to free speech, the Trial Court committed reversible error in permitting the Complaint to proceed past the pleadings stages with respect to

Plaintiff's claim for "Defamation-Libel Per Se" (Count I) as against the appealing Defendants.

For the foregoing reasons, as more fully detailed below, Defendants respectfully request this panel: 1) vacate the trial court's May 31, 2024, Order and Decision; 2) dismiss Plaintiff's Verified Complaint for Plaintiff's failure to establish a prima facie case as to each and every essential element of his claim, pursuant to the Uniform Public Expression Protection Act; and 3) remand this action to the trial court for the limited purpose of determining the amount of legal fees and costs to be awarded to Defendants in connection with the defense against the Complaint.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

This action arises from Plaintiff's unsubstantiated allegations that certain political advertisements made in the course of a local public election campaign in the Borough of Englewood Cliffs contained defamatory statements directed at him and published by Defendants. (Da8). At the time this dispute arose, Defendants were candidates running for election for various local government positions, seeking to defeat certain Democratic rivals controlling the political landscape in Englewood Cliffs. (Da8). In recent years, several polarizing political issues dominated the political discourse in Englewood Cliffs, including issues involving the re-development and rezoning of certain areas within the

Borough and the settlement of claims with a developer. (Da67-Da68). Plaintiff in his capacity as special counsel to the Borough was intimately involved in these issues. (Da244).

As part of ordinary election campaigning, two mailings that are the subject of this appeal were circulated to various residents within the Borough. (Da238). The mailings promoted the candidacy of several of the named Defendants and addressed the aforementioned issues surrounding the re-development/re-zoning of certain housing areas in the Borough without any indication that any of the Defendants' endorsed and/or published same. (Da253).

On October 17, 2023, Plaintiff filed a Verified Complaint in support of his application for an Order to Show Cause in connection with the distribution of the aforementioned mailings. (Da7). The Complaint alleged that Defendants published the knowingly false defamatory statements and that the statements were specifically directed at Plaintiff. (Da9). Plaintiff's application requested: an Order of Declaratory Judgment that the October 7, 2023 and October 8, 2023, publications regarding Plaintiff constitute defamation; and an Order for Injunctive Relief for: a public statement of retraction, apology, and admission; in addition to an award of compensatory and punitive damages, and attorneys' fees and costs. (Da13-Da14). On November 15, 2023, the Trial Court

erroneously entered an Order granting Plaintiff's application without affording Defendants an opportunity to present their meritorious defenses. (Da42).

Five (5) days later, on November 20, 2023, Defendants filed their own application for an Order to Show Cause, requesting the Trial Court's entry of an Order: 1) staying its prior Order entered on November 15, 2023; and 2) dismissing Plaintiff's Verified Complaint with prejudice pursuant to the UPEPA. (Da46). On that same day, the Court entered an Order, *sua sponte*, staying its November 15, 2023 Order that granted Plaintiff's Order to Show Cause. (Da45).

Thereafter, on November 21, 2023, the Trial Court entered an Order converting the pending applications to motions and setting a schedule for briefing and oral argument. (Da125). Plaintiff subsequently submitted written opposition, and Defendants filed papers replying thereto, in further support of their motion to dismiss. Following protracted oral argument on December 18, 2023 (Da242)[1], continuing on January 26, 2024 (Da242)[2], the Trial Court entered the May 31, 2024, Order and Decision, which is the subject of the present appeal. (Da231 – Da261).

[1] 1T: Certified Transcript of Order to Show Cause (Vol. 1), December 18, 2023.

[2] 2T: Certified Transcript of Order to Show Cause (Vol. 2), January 26, 2024.

Now, for the reasons described herein, Defendants respectfully submit the Trial Court committed reversible error in wrongfully denying Defendants' motion to dismiss and permitting Plaintiff's Complaint to proceed. To that end, Defendants respectfully request entry of an Order overturning the Trial Court's May 31, 2024 decision and remanding this case back to the lower court with a directive for the Trial Court to set a date for submission of proofs in support of award of reasonable attorney's fees, costs, and litigation expenses incurred by Defendants in connection with this litigation.

## LEGAL ARGUMENT

Speech "on matters of public concern [is] at the heart of the First Amendment's protection" and "occupies the 'highest rung of the hierarchy of First Amendment values.'" Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (first quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); and then quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). "Such speech 'requires maximum protection.'" Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 156 (2000) (quoting Sisler v. Gannett Co., 104 N.J. 256, 266 (1986). These core principles provide the framework upon which Defendants moved to dismiss Plaintiff's claim for defamation in the context of political discourse in Englewood Cliffs, New Jersey.

## POINT I

## THE TRIAL COURT ERRED IN DECIDING DEFENDANTS' MOTION TO DISMISS UNDER R. 4:6-2 INSTEAD OF THE UNIFORM PUBLIC EXPRESSION PROTECTION ACT AND MISAPPLIED THE STANDARD FOR DISMISSAL OF THE COMPLAINT UNDER THE ACT. (DA231-DA261)

### A. It Is Undisputed That The UPEPA Applies In This Case. (Da260)

On September 7, 2023, Governor Murphy signed into law the NJ Uniform Public Expression Protection Act (P.L.2023, c.155) (hereinafter referred to as "UPEPA"). (Da99). Pursuant to Section 14 of the UPEPA, the act took effect thirty (30) days after enactment (i.e., October 7, 2023) and shall apply to a civil action filed after the effective date. (Da104).

Specifically, the UPEPA "applies to a cause of action asserted in a civil action against a person based on the person's … (3) exercise of the right of freedom of speech … on a matter of public concern." N.J.S.A. 2A:43A-51(b). "The [UPEPA]is designed to prevent an abusive type of litigation called a 'SLAPP', or 'strategic lawsuit against public participation'. A SLAPP may be filed as a defamation … but its real purpose is to silence and intimidate the defendant from engaging in constitutionally protected activities, such as free

speech."[3] Such are the very circumstances upon which Plaintiff's Complaint was filed and this appeal is made.

Plaintiff commenced the underlying action in the trial court on October 17, 2023 (after the effective date of UPEPA). Plaintiff's action was brought by order to show cause, seeking damages against Defendants for defamation arising out of certain political advertisements that were circulated in connection with the 2023 elections in the Borough of Englewood Cliffs. There is no question that UPEPA applies to protect political speech and the Trial Court acknowledged the statute's applicability to the Complaint.

In no uncertain terms, the trial court ruled "[f]or the purposes of this motion, the court accepts that the civil action asserted against defendants may be seen as based on their exercise of the right of freedom of speech. N.J.S.A. 2A:53A-51(b)(3)." (Da260). Plaintiff has not cross-appealed this ruling, and thus, there is no dispute as to the applicability of UPEPA to the Complaint or this appeal. Moreover, on June 3, 2024, this Court ruled in a related appeal by co-defendant, Mark Park, that UPEPA applies to this controversy and that he had a right of automatic appeal from the Trial Court's final order on the parties'

[3] See UNIFORM LAW COMISSION, Description, https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1

order to show cause applications. (Da270). This appeal by Defendants is from that final order. It is, thus, the law of the case that UPEPA applies to the issues on appeal.

**B. The Trial Court Applied The Incorrect Legal Standard To Defendants' Motion To Dismiss Under UPEPA. (Da260)**

Since the UPEPA applies to this case, the statue further provides that "the court shall dismiss with prejudice a cause of action, or part of a cause of action, if:

> (3) either:
>
> (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint; or
>
> (b) the moving party establishes that:
>
> (i) the responding party failed to state a cause of action upon which relief can be granted; or
>
> (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action."

N.J.S.A. 2A:53A-55(a). If any one of those three conditions is satisfied, Defendants are entitled to have the Complaint against them dismissed with prejudice.

However, despite the specifically articulated criteria in UPEPA for dismissal of the Complaint, the Trial Court incorrectly determined that "To

avoid dismissal of the complaint at this stage, plaintiff must have sufficiently alleged the elements of his causes of action in his pleading. R. 4:6-2(e)." (Da249-Da250). While the Trial Court also stated that "To succeed on/avoid dismissal …, plaintiff will have to establish the elements" of its cause of action for defamation-libel per se (Da250), the Trial Court ultimately predicated its denial of Defendants' Motion to Dismiss on R. 4:6-2, concluding that "plaintiff has pleaded all elements of the causes of action and the issue of whether plaintiff will be able to prove them is not yet before the court." (Da259). Defendants are at a loss to explain why the Trial Court relied on the R. 4:6-2 standard, when Defendants never argued for dismissal of the Complaint under R. 4:6-2 and consistently argued that the right to dismissal lied under the UPEPA. (Da248).

"A motion to dismiss a complaint under Rule 4:6-2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005). "The Plaintiff's obligation on a motion to dismiss [under R. 4:6-2(e)] is 'not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action.'" Sickles v. Cabot Corp., 379 N.J. Super. 100 (App. Div. 2005) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). From a plain reading of the UPEPA, it is abundantly clear that the right to a dismissal for a plaintiff's failure to state

a cause of action is the equivalent of subsection (3)(b)(i) above. As such, there would be no need for the trial court's reliance upon R. 4:6-2(e) even if Defendants had moved on those grounds.

Nevertheless, Defendants did not seek dismissal of Plaintiff's Complaint for failure to state a cause of action under R. 4:6-2 or N.J.S.A. 2A:53A-55(a)(3)(b)(i). Rather, Defendants moved to dismiss the Complaint under N.J.S.A. 2A:53A-55(a)(3)(a) on the basis that Plaintiff failed to "establish a prima facie case as to each essential element of … [his] cause of action [for defamation] in the complaint." Under this basis for dismissal, Plaintiff was required to do more than just point to the allegations in his complaint and state that he articulated the basic elements of his cause of action for defamation. Instead, subsection (a)(3)(a) required Plaintiff to come forward with competent evidence in order to "establish a prima facie case as to each essential element" of his cause of action.

Whereas subsection (a)(3)(b)(i) is effectively the standard to overcome a R. 4:6-2 motion to dismiss, subsection (a)(3)(a) is the equivalent of the burden that a plaintiff must satisfy to overcome a defensive motion for summary judgment. On such motions, the courts of this state have described the plaintiff's burden in words similar to subsection (a)(3)(a).

For example, in El-Sioufi v. St. Peter's Univ. Hosp., the defendants filed a motion for summary judgment seeking to dismiss the plaintiff's complaint under New Jersey's Law Against Discrimination. In holding that the motion court properly granted summary judgment, the Appellate Division ruled that the plaintiff had the burden to "produce[] sufficient evidence to demonstrate the elements of his or her prima facie case." 382 N.J. Super. 145, 166 (App. Div. 2005). While a plaintiff need not provide fulsome evidence, the Appellate Division concluded that at the prima facie stage, a plaintiff nevertheless has the evidentiary burden to come forward with at least "modest" or "slight" evidence in support of the elements of its cause of action. Id. at 168 (Citing, Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005)). Ultimately, the court affirmed the granting of summary judgment "because plaintiff had failed to come forward with any fact that suggested that she was subjected to a hostile work environment …" Id. at 180.

By contrast, in Richie & Pat Bonvie Stables, Inc. v. Irving, the Appellate Division reversed the trial court's grant of summary judgment to the defendant which dismissed the fraud complaint. In doing so, the court held that the plaintiffs "established *prima facie* proof that [the defendant] Irving made a representation material to the transaction that was false, with knowledge that it was false, with the intention to mislead plaintiffs into relying on same. Plaintiffs

also presented *prima facie* evidence that they justifiably relied on that statement, which resulted in injury proximately caused by that reliance." 350 N.J. Super. 579, 589 (App. Div. 2002).

Thus, it is clear that under N.J.S.A. 2A:53A-55(a)(3)(a), Plaintiff could not merely rely on the bare allegations in his Complaint and, instead, had the burden to present actual evidence that supported each element of his cause of action; a burden which Plaintiff utterly failed to satisfy. In that context, had the Trial Court applied the appropriate motion standard for dismissal under UPEPA, it is respectfully submitted that Plaintiff's Complaint should have been dismissed in its entirety for his failure to submit any competent evidence in support of his defamation claim.

## POINT II

## THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS WHERE PLAINTIFF FAILED TO PROVIDE ANY COMPETENT EVIDENCE TO ESTABLISH A PRIMA FACIE CASE AS TO THE ESSENTIAL ELEMENT OF PUBLICATION. (DA252-DA261)

As set forth in Point I, Plaintiff has the legal burden under UPEPA to present competent evidence to establish each element of his cause of action for defamation. One of the essential elements of a cause of action for defamation is that the Defendants published/communicated the alleged defamatory statement to a third party. See DeAngelis v. Hill, 180 N.J. 1, 13 (2004). It is respectfully

submitted that Plaintiff did not sustain his burden of proving this element under UPEPA.

In opposition to Defendants' motion to dismiss, Plaintiff failed to provide any evidence to establish a prima facie case that Defendants Liang, Biecagz, or Rousouli actually published the alleged defamatory materials. The Trial Court aptly recognized in its decision that the only fact presented by Plaintiff in connection with his allegation that Defendants Liang and Biecagz published the allegedly defamatory statements is that their names appear on the subject advertisements as political candidates and, according to Plaintiff, he therefore presumes that they must have endorsed the statements and authorized their publication. (Da253). Similarly, Plaintiff's allegations of publication by Defendant Rousouli are predicated on the lone fact that she was a member of Defendant CTE Republicans For Englewood Cliffs. (Da253). No proofs were provided by Plaintiff in opposition to the motion and publication cannot be presumed by association; it must be proven. See Skeoch v. Ottley, 6 V.I. 241, 248-49, 377 F.2d 804, 808 (3d Cir. 1967) (Despite the plaintiff's arguments that the evidence conclusively demonstrated that the defendants were leaders and active workers in the organization that published the libelous statement, the court held that it still did not follow as a matter of law that defendants were responsible for publication of the alleged libel since affiliation alone does not

serve as a basis for conclusively determining responsibility for publication of libel).

Due to Plaintiff's failure to provide any proofs to establish a prima facie case of publication, the Court stated that "[t]he court cannot determine on this record that plaintiff has established [the "publication"] element at this stage against defendants Liang, Biecagz, or Rousouli." (Da253) (emphasis in original). Having failed to satisfy his legal burden under UPEPA on the element of publication, the Trial Court was required to dismiss the action against Defendants Liang, Biecagz, and Rousouli. However, the Trial Court instead erroneously ruled that "[t]he allegations are sufficient to plead this element of the defamation causes of action, sufficient to avoid dismissal on this basis." (Da253).

Having failed to present any evidence on the element of publication to the Trial Court, beyond mere conjecture, Plaintiff's Complaint against Defendants Liang, Biecagz, and Rousouli should have been dismissed. Defendants respectfully submit the Trial Court's failure to reach that conclusion on its own accord was an error of law that should be reversed.

## POINT III

## THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS WHERE PLAINTIFF FAILED TO PROVIDE ANY COMPETENT EVIDENCE TO ESTABLISH A PRIMA FACIE CASE AS TO THE ESSENTIAL ELEMENT OF ACTUAL MALICE. (DA250-DA261)

To prevail on a libel claim in New Jersey, a plaintiff must prove: (1) that Defendant made a defamatory statement of fact; (2) concerning the Plaintiff; (3) which was false; (4) which was communicated to persons other than the Plaintiff; and (5) fault. Mayflower Transit, LLC v. Prince, 314 F. Supp. 2d 362, 372 (D.N.J. 2004). However, the "threshold question in every defamation action is the fault standard to be applied (LoBiondo, 323 N.J. Super. at 409) since New Jersey courts draw a distinction between defamation cases involving private figures on matters of private concern, i.e., private defamation, with everything else being public defamation.

In the case of private defamation, the plaintiff need only prove that the defendants acted negligently. W.J.A. v. D.A., 210 N.J. 229, 242 (2012). However, for public defamation, the plaintiff must prove that the defendant acted with "actual malice" (LoBiondo, 323 N.J. Super. at 409) and the plaintiff's "burden of proof for each of the elements of defamation is by clear and convincing evidence". Dello Russo v. Nagel, 358 N.J. Super. 254, 263 (App. Div. 2003). The matter sub judice falls within the realm of public defamation

based on the nature of the speech involved and Plaintiff's classification as either a public official or limited purpose public figure. Thus, Plaintiff was required under the UPEPA to have provided competent evidence to establish a prima facie case of actual malice to avoid dismissal. Having provided none, the Complaint against Defendants should have been dismissed.

### A. The Trial Court Erred In Denying Defendants' Motion to Dismiss On The Basis That Plaintiff's Status As A Limited Purpose Public Figure Could Not Be Determined As A Matter Of Law. (Da258-Da261)

The United States Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) described two classes of "public figures". At a minimum, Plaintiff in this case falls into the class commonly referred to as "limited purpose public figures." Id. at 345. As the Supreme Court explained, a limited purpose public figure is "an individual [who] voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." Id. at 351; see Wilson v. Grant, 297 N.J. Super. 128, 138 (App. Div. 1996) (Holding that when a plaintiff voluntarily injects himself into a public controversy, such as a hotly contested local political issue, his activities will make him a limited public figure).

The actual malice standard applies not only to those having the *actual* status of a public office or other public figure, but also applies to those persons "whose actions or interests have so involved them in a matter of public interest

that for purposes of speech respecting that matter, they must be regarded as public figures" and are referred to as "limited public figures". LoBiondo v. Schwartz, 323 N.J. Super. 391, 409 (App. Div. 1999). As explained by the New Jersey Supreme Court in Sisler v. Gannett Co.:

> [W]hen a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory speech that focuses upon that public interest will not be actionable unless it has been published with actual malice.

104 N.J. 256, 279 (1986).

To determine whether a person should be classified as a limited purpose public figure, the court is required to evaluate "(1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of Plaintiff's involvement in that controversy." Marcone v. Penthouse Int'l, 754 F.2d 1072, 1082 (3d Cir.), cert. denied, 474 U.S. 864 (1985). A public dispute or a matter of public interest is one which affects either the general public or at least some segment of it, as is the case in the appeal before this Court, and not just the immediate participants. Vassalo v. Bell, 221 N.J. Super. 347, 367 (App. Div. 1987).

By way of example, the courts of our state have determined that an individual is a limited purpose public figure under far more attenuated

circumstances than those at bar. See Vassallo v. Bell, supra, 221 N.J. Super. 347 (App. Div. 1987) (Holding that a building inspector was at least a limited public figure in connection with statements made by the Mayor during a recall election that the inspector was terminated due to sexual harassment allegations of female municipal employees and improper solicitation of campaign contributions, where the firing of the inspector had become *a campaign issue*) (emphasis added); LoBiondo v. Schwartz, supra, 323 N.J. Super. 391 (App. Div. 1999) (Holding that land use applicants were limited public figures with respect to statements concerning their activities in the construction and use of a beach club which was the subject of public interest in the community); Rocci, 165 N.J. at 156 (While not expressly using the term "limited public figure", a school teacher was held to be subject to the actual malice standard with regard to statements about her behavior around students on a school trip to Spain, given the "strong public interest in the behavior of teachers, especially concerning their conduct with and around their students").

Here, Plaintiff served as "special counsel" to the Borough of Englewood Cliffs. (Da244). The mailings that Plaintiff alleges to have contained defamatory statements about him were political advertisements that referred to him in the context of his interactions with the incumbent mayor of the Borough and his legal representation of the Borough on a local re-development/rezoning dispute

and other matters of local concern to the residents of the Borough. (Da244-Da246). As noted by the Trial Court, Plaintiff even admitted that the subjects of the political advertisements were matters of public interest, stating, "Plaintiff argues that the matters of public interest concerning the fair housing litigation and settlement, for which he was "special counsel, …" (Da257). Through his admitted involvement as legal counsel on hotly contested issues in the Borough, Plaintiff knowingly and voluntarily thrusted himself into the local political fray at the "attendant risk of publicity" and public criticism (see Wilson, 297 N.J. Super. at 138-39 (quoting Ollman v. Evans, 750 F.2d 970, 993 (D.C.Cir. 1984) (Bork, J., concurring)). As such, the Trial Court should have found that Plaintiff was a limited purpose public figure, if not an actual public officer or figure, by virtue of his role as Borough counsel, as a matter of law.

However, the Trial Court incorrectly ruled "that a more fully developed factual record will be needed before a determination can be made as to whether plaintiff should be bound by the actual malice burden of proof." (Da258). The only facts Plaintiff presented to the Trial Court in opposition to his status as a limited purpose public figure amount to nothing more than, in effect, sham certifications. In the context of a motion for summary judgment, for example, the New Jersey Supreme Court has held that "conclusory and self-serving assertions" in certifications, such as Plaintiff's here, without explanatory or

supporting facts will not defeat a meritorious motion. Puder v. Buechel, 183 N.J. 428, 440 (2005) (citing Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2003); Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (see also James Talcott, Inc. v. Shulman, 82 N.J. Super. 428, 443 (App. Div. 1964) (noting that "[m]ere sworn conclusions of ultimate facts, without material basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand a motion for summary judgment")).

In this matter, Plaintiff's conclusory certifications entirely miss the mark insofar as they go to great lengths to nakedly assert that he is merely a private citizen, that does not engage in politics, is not running and has never run for political office, does not have political signs on his property, and therefore is not a public figure under any circumstance. (Da18). As a matter of law, though, Plaintiff is a limited purpose public figure in connection with the politically charged statements at issue in this case, whether or not the aforementioned assertions in his certifications are true.

In declining to rule that Plaintiff was a limited purpose public figure, the Trial Court improperly focused on his involvement in the 2023 local elections and political campaigning, stating that his legal representation of the Borough "involve[d] work he did several years ago;" (2) he was not involved in the 2023

local elections and political campaigns; (3) "he had not injected himself [into the election], and he should not be vulnerable to attacks like these when he has nothing to do with the election." (Da258). Even if true, Plaintiff's involvement in the 2023 election is irrelevant. Also irrelevant is the court's conclusion that the issues involved work Plaintiff did years ago because "once a person becomes a [limited] public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy." Berkery v. Kinney, 397 N.J. Super. 222, 228, 936 A.2d 1010, 1014 (App. Div. 2007) (Plaintiff argued "that he is not a public figure because he now lives a private lifestyle").

The only relevant issue is whether the allegedly defamatory statements pertained to Plaintiff's involvement in issues surrounding matters that were of public concern to the Borough. Once the Trial Court found that Plaintiff admitted that the fair housing litigation and settlement, on which he represented the Borough as special counsel, were matters of public interest (Da257), nothing further was required and the Trial Court should have determined that he was a limited purpose public figure as a matter of law, requiring him to prove that the alleged defamatory statements were made with actual malice and that Plaintiff's burden of proof as to each and every element of his cause of action for defamation must be established with by and convincing evidence.

### B. The Trial Court Erred In Not Dismissing The Complaint Because Plaintiff Sufficiently Pleaded That Defendants Made The Alleged Defamatory Statements With Actual Malice. (Da258-Da261)

After the Trial Court incorrectly ruled that discovery is required in order to determine Plaintiff's status as limited purpose public figure, it compounded its error by holding that the Complaint sufficiently pleads the element of actual malice - "for the purposes of the pending motions, the court is satisfied that plaintiff's pleadings are sufficient to support his claims under the actual malice standard." (Da258). As previously stated, properly pleading a cause of action for defamation is not the standard to avoid dismissal under UPEPA, but rather it requires presentation of evidence sufficient to establish a prima facie case.

"To satisfy the actual-malice standard, a plaintiff must show by *clear and convincing* evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 165 (1999). To be actionable, "the recklessness in publishing material of obviously doubtful veracity must approach the level of publishing a 'knowing, calculated falsehood.'" Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 466 (1982) (citation omitted). The Trial Court acknowledged the proof requirement for actual malice by citing the Model Jury Charge for actual malice. (Da258).

However, instead of analyzing whether Plaintiff presented any proofs to establish that each Defendant published knowingly false statements about him, the Trial Court turned this burden of proof on its head and improperly shifted the burden to Defendants, holding that "Defendants have not in any way suggested they believe, or have any information to support the belief, that Wunsch was involved in a scheme or conspiracy to divert Borough funds, which is the clear message sent in the statements they are alleged to have published." (Da259).

Again, this was Defendants' motion and thus, it was Plaintiff's burden to prove his prima facie case of Defendants' knowledge. But, like the element of publication, here too Plaintiff failed to provide the Court with any proof that any of the Defendants published the statements with the knowledge that they were false or with reckless disregard as to whether or not they were true.

It is respectfully submitted that the Trial Court's errant decision, based upon the incorrect standard on a Motion to Dismiss under the UPEPA, muddied the waters in what should have been a straightforward analysis. The truth of the matter remains that Plaintiff failed to submit any competent evidence to satisfy his legal burden as to the essential element of actual malice, and therefore, the Trial Court should have dismissed his Complaint below as a matter of law.

## POINT IV

## THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS MADE DEFAMATORY STATEMENTS AS A MATTER OF LAW. (DA253-DA261)

As previously stated herein, for Plaintiff's Complaint to survive, he was required make a sufficient evidentiary showing to the trial court that the publication contained a defamatory statement of fact concerning the Plaintiff that was false. Mayflower Transit, LLC v. Prince, 314 F.Supp.2d 362, 372 (D.N.J. 2004). Of the six (6) statements identified in the Complaint, the Trial Court only found four (4) of them to be defamatory. Since Plaintiff has not filed a cross-appeal with respect to the other two (2) statements, they are no longer at issue in the case. However, as to the four (4) statements addressed by the Trial Court, the court erred in finding them to be defamatory as a matter of law.

### A. The Purported Defamatory Statements Were Not Actionable Statements Of Fact Concerning Plaintiff. (Da253-Da261)

As a matter of law, whether a particular statement is defamatory depends upon the content, verifiability, and context thereof. Ward v. Zelikovsky, 136 N.J. 516, 529 (1994). A statement is deemed to be one of fact if it is verifiable and capable of objective proof. If it is not capable of objective proof, it is a non-fact or non-actionable opinion. Id. at 530-31. As such, "loose, figurative or hyperbolic language" will be less likely to imply specific facts, and thus more likely to be deemed rhetorical hyperbole or a vigorous epithet and thus non-

actionable. Id. at 532. Even if a statement is potentially injurious to a plaintiff's reputation, name calling, epithets, and abusive language, no matter how vulgar or offensive, and no matter how obnoxious, insulting or tasteless, are not actionable and are "regarded as part of life for which the law of defamation affords no remedy." Id. at 529-30.

Even if a statement is verifiable and capable of a defamatory meaning, it may still be found to be non-defamatory depending on the context of the statement. As pertinent to the case at bar, it has been held that "accusations during a heated political campaign are likely to carry less credibility for the average person than they would in a less emotional context." G.D. v. Kenny, 205 N.J. 275, 291-92 (2011) (Viewing the alleged statements in their proper context – statements made in the heat of a contentious political campaign – the court ruled that the defendant's statements were not defamatory, recognizing that "political discourse, even in its meanest form, is at the very core of free-speech protections"); Dressler v. Mayer, 22 N.J. Super. 129, 136 (App. Div. 1952) (Holding that in "light of the circumstances surrounding the publication, i.e., the political campaign and accusations generally made by a rival faction, we feel constrained to hold that the phrase complained of was not libelous … [and that the] trial court properly held that the words complained of were not libelous per se").

With the backdrop of these core principles addressed by our courts under similar factual circumstances, Defendants respectfully submit that Plaintiff failed to establish his claim for defamation and that the Trial Court erred in holding that four (4) of the statements are defamatory. For example, in Greenbelt Co-op Pub. Ass'n v. Bresler, the Court held that the use of the word "blackmail" in an article describing the plaintiff's negotiation tactics was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable" and that "[no] reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the plaintiff] with the commission of a criminal offense." 398 U.S. 6, 14 (1978). The New Jersey Supreme Court in Kotlikoff v. The Community News, 89 N.J. 62 (1981) reached a similar conclusion where it rejected claims that the publication of a letter to the editor accusing the mayor of a "huge coverup" and "conspiracy" in his handling of an issue of public interest, ruling that the terms "conspiracy" and "coverup" were employed here in a "loose, figurative sense" and as "rhetorical hyperbole," much the same as the work "blackmail" in Greenbelt (and the statements at issue in this appeal). See id., supra, 89 N.J. at 72.

Evidenced by the aforementioned progeny of well-settled caselaw, New Jersey Courts have a long history of protecting speech and standing for the

principle that, even if a particular statement refers to criminal conduct, it is not per se libelous but must be closely examined by the Court in context to determine whether the reader would be left with the impression that Plaintiff was actually being accused of a crime. LoBiondo, 323 N.J. Super. at 410. As the Supreme Court explained in Lynch v. New Jersey Educ. Ass'n, "[p]olitical discourse depends on the expression of opinion. In an election for public office, that discourse often entails a subjective appraisal of the qualifications of a candidate. Emotion, partisanship, or self-interest, although they may impair the appraisal's value, do not justify its suppression." 161 N.J. 152, 168 (1999). To this end, in the case of Langert v. The Lakewood View, the Appellate Division found that certain politically charged language such as "kickback scheme," "payback," and "defrauding," was non-actionable as defamation. Id., A-2815-12T1, 2014 WL 147320, at *6 (N.J. Super. Ct. App. Div. Jan. 16, 2014)[4]. Instead, the appellate court found that while the subject article was possibly fraught with innuendo about such illicit conduct, the publication did not falsely state the plaintiff was part of the fraud or committed a criminal offense and therefore, when it is read in its entirety and in context, the defendant did not liable the plaintiff. Id.

[4] Pursuant to R. 1:36-3, a true and accurate copy of this unpublished opinion is provided in Defendants' Appendix. The undersigned is not aware of any contrary unpublished opinions as of the filing date of this brief.

Here, Plaintiff's Complaint cites two (2) political advertisements containing six (6) statements in total that are the sole source of his cause of action for defamation. (Da9-Da11). The first of which is an email sent in connection with co-Defendant Mark Park's political mayoral campaign, and the second was a postal mailing purportedly sent by Defendant CTE Republicans for Englewood Cliffs. (Da9-Da11). In the Trial Court's Decision at page 24, the court determined that the following four (4) statements from said mailings were defamatory:

1. That Kris Kim is scheming to pay off Democrat professionals, with [Plaintiff's] photo prominently displayed.

2. That [Plaintiff] "gets paid to run the Democrat Party. IS THIS ILLEGAL BEHAVIOR?"

3. That Kim gave "millions to Wunsch & Co in the name of settlement." and

4. IS KRIS KIM HELPING BERGEN COUNTY DEMOCRATS FILL THEIR COFFERS BY ARRANGING TO BUILD THROUGH WUNSCH?

(Da256). As will be demonstrated below, each of the above statements should have been determined by the Trial Court to be non-defamatory as a matter of law.

**1. Kris Kim is scheming to pay off Democrat professionals, with [Plaintiff's] photo prominently displayed. (Da256)**

The only explanation provided by the Trial Court as to why it found this statement to be defamatory is that the court believed that it "impl[ied] underlying facts that plaintiff states are false …." (Da257). The court's ruling was wrong on several counts.

First, the court took this statement out of context. The complete statement contained in the political email flier was "Town-wide flooding is due to Kris Kim scheming to pay off Democrat professionals instead of fixing the problem." (Da244). It is clear from the complete statement that the subject of the statement was the incumbent mayor, Kris Kim, and that the context of the statement pertained to his use Borough funds for purposes other than fixing town-wide flooding issues.

Second, Plaintiff is not directly named in this statement and there is no direct reference that he is part of the "scheming." The Trial Court appears to have come to the opposite conclusion simply on account of Plaintiff's photo being "prominently displayed" in the email. Where the Court in the Greenbelt case dispensed with a defamation claim where the plaintiff was explicitly accused of blackmail, this statement (even in association with Plaintiff's picture) does not come close to establishing actionable defamation. At most, the statement is merely non-actionable innuendo, as it was in the Langert case.

### 2. Plaintiff "gets paid to run the Democrat Party. IS THIS ILLEGAL BEHAVIOR?" (Da256)

There is absolutely nothing defamatory about this "statement." In fact, all it does is pose a rhetorical question to the electorate. There is no suggestion, explicit or implicit, despite what the court found, that any payments Plaintiff received were to run the Democrat Party or were associated with the alleged Kris Kim scheme. Moreover, the statement is not one that can be proven to be true or false, as the underlying question of whether Plaintiff is the "leader" of any political party, either in-front-of or behind the scenes, is one of abstract opinion as to Plaintiff's influence in the local political scene. See Ward, supra, 136 N.J. at 532.

### 3. Kim gave "millions to Wunsch & Co in the name of settlement." (Da256)

Like the first allegedly defamatory statement, the court failed to provide any explanation as to why it found this statement defamatory, other than it purportedly implied underlying facts that Plaintiff states are false. Also, like the first statement discussed, the court excised this statement from its surrounding context. The complete statement (which is actually a rhetorical question) in the email is "WHY DOESN'T KIM USE OUR TAX DOLLARS TO FIX OUR FLOODING ISSUES INSTEAD OF GIVING MILLIONS TO WUNSCH & CO IN NAME OF SETTLEMENT?". (Da245). Again, the context of the statement

involves Mayor Kim's handling of flooding issues within the Borough as well as the use of Borough funds for a settlement of the housing lawsuit that Plaintiff had represented the Borough on instead of using those funds to fix the flooding issues.

Further, the statement does not express or imply that Plaintiff acted unprofessionally, improperly, or without authority. Contrary to the court's implicit conclusion, the statement/question does not directly state or even suggest that Plaintiff was a participant in any sort of unscrupulous conduct surrounding the settlement to which the statement refers.

**4. IS KRIS KIM HELPING BERGEN COUNTY DEMOCRATS FILL THEIR COFFERS BY ARRANGING TO BUILD THROUGH WUNSCH? (Da256)**

The Trial Court concluded that this rhetorical question, when viewed in the context of the entire flyer, suggests a defamatory message that Plaintiff is part of a scheme to divert Borough monies to Democrat cronies. (Da257). The court's overextended subjective inference is legally insufficient. As the Appellate Division held in Langert, innuendo will not suffice to render a statement libelous. Instead, the language must reasonably be understood as attributing specific criminal acts to the plaintiff based on undisclosed factual allegations. There is nothing in the above rhetorical question that attributes any

specific criminal act to Plaintiff and, therefore, the court should not have found that this statement was defamatory as a matter of law.

### B. Plaintiff Failed To Provide Competent Evidence That The Alleged Defamatory Statements Were False And The Trial Court Erred In Shifting The Burden Of Proof To Defendants To Establish That The Statements Are True. (Da257-Da261)

As stated previously, one of the essential elements of a cause of action for defamation is that the alleged libelous statement is false. The reason being that truth is not only a common-law defense to defamation, but also "absolutely protected under the First Amendment." Ward v. Zelikovsky, 136 N.J. 516, 530 (1994). In fact, "[t]ruth may be asserted as a defense even when a statement is not perfectly accurate." G.D. v. Kenny, 205 N.J. 275, 293 (2011). Plaintiff bears the burden of proving that the defamatory statements were not substantially accurate and therefore false. G.D. v. Kenny, 205 N.J. 275, 304 (2011). To this end, the law of defamation itself "overlooks minor inaccuracies and concentrates upon substantial truth" as the determining factor in the analysis. Read v. Profeta, 397 F.Supp. 3d 597, 651 (D.N.J. 2019). Moreover, even if a statement is false, in the context of statements against public figures or limited purpose public figures, such false statements are not actionable unless published with *actual malice*. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). (Senna v. Florimont, 196 N.J. 469, 498 (2008).

Here, Plaintiff failed to satisfy its legal burden by coming forward with tangible proofs that the above defamatory statements were false other than his self-serving statement that they were false, which the Trial Court accepted as an unrefuted, dispositive proven fact because "defendants have offered no truth defense." (Da257). This holding constitutes gross error by the Trial Court. Plaintiff is the one that had the burden of proof to establish the falsity of the statements by competent evidence in response to a motion to dismiss under UPEPA as well as at an ultimate trial on the merits, which he failed to do. Moreover, Defendants' motion was filed at the pre-answer stage and thus, there was no obligation on them to either allege or prove the statements to be true.

Even if the trial court accepted Plaintiff's sham certification wholesale, his assertions alone are not dispositive of the issue and Defendants are entitled, as they have, to present countervailing facts. Also, even if the statements are proven to be untrue, Defendants cannot be liable for defamation absent actual malice, and in that regard, Plaintiff utterly failed to satisfy his burden of providing any evidence to establish a prima facie case of actual malice by Defendants.

Accordingly, it was an error of law for the Trial Court to have dispositively held the above statements as defamatory as a matter of law, and since Plaintiff failed to present even a modicum of competent evidence in

support each of the essential elements of his claim for defamation as against each of the named Defendants, it is respectfully submitted that Plaintiff's Complaint should have been dismissed with prejudice under the UPEPA, and Defendants should have been awarded reasonable costs and fees pursuant to the express terms and provisions of the UPEPA as further illustrated below.

## POINT V

## THE TRIAL COURT ERRED IN FAILING TO DISMISS PLAINTIFF'S CLAIM FOR LIBEL PER SE. (DA259)

In addition to moving to dismiss Plaintiff's defamation claim, Defendants also were entitled to have had Plaintiff's libel per se claim dismissed. In denying the dismissal of this claim, the Trial Court stated:

> The [defendants'] argument is based on plaintiff's failure to have proved damages. The court has already determined that discovery is necessary before the court can consider fully and fairly plaintiff's application for injunctive relief. Therefore, the only issue here is whether plaintiff has pleaded a claim for libel per se sufficient to withstand a motion to dismiss under Rule 4:6-2(e). This is not a summary judgment motion, nor is it the time to address whether this trial court should rule that libel per se is no longer viable in New Jersey, when the appellate courts have not dispensed with it.

(Da259).

The court's decision is flawed for several reasons. The UPEPA applies equally to claims for "libel per se" just as it applies to any other defamation claim, and as such, the standard that Plaintiff was obligated to satisfy was not

merely to allege damages, but rather providing evidence to establish a prima facie case that he sustained actual damages. A plaintiff in a defamation action, including one based on libel per se, is required "to present evidence of an actual injury by way of damage to reputation or emotional distress or loss of wages or change in position." Rocci v. MacDonald-Cartier, 323 N.J. Super. 18, 24-25 (App. Div. 1999) (Affirming dismissal of the plaintiff's libel per se claim, where she failed to present any evidence that she had been damaged by the alleged defamatory statements), aff'd as modified sub nom. Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149 (2000).

Secondly, Plaintiff failed to present any competent evidence to support the element of damages. All that had been presented in connection with the motion are several conclusory statements in Plaintiff's certification that his "integrity, reputation and ability to foster growth of [his] firm has been challenged" because various clients and/or persons within the community have purportedly approached him to ask if the statements were true. (Da21-Da22). These gratuitous self-serving statements are legally insufficient to establish a prima facie case.

As stated by the NJ Supreme Court in Sisler v. Gannett Co., Inc., 104 N.J. 256 (1986), in order to establish reputational damages, the plaintiff must:

> offer some concrete proof that his reputation has been injured. One form of proof is that an existing relationship has been seriously disrupted, reflecting the idea that a reputation may be valued in terms of relationships with others. Testimony of third parties as to a diminished reputation will also suffice to prove "actual injury." Awards based on a plaintiff's testimony alone or on "inferred" damages are unacceptable.

Id. at 291 (citations omitted). Since Plaintiff failed to provide any evidence of injury to his reputation beyond his sole certification testimony, and since he failed to provide any evidence of actual damages to his law practice, he failed to establish a prima facie case of damages to avoid dismissal of his Complaint under UPEPA.

Third, the court erred in holding that Plaintiff was entitled to discovery on the element of damages. The damages that would be claimed by Plaintiff are personal to him and within his knowledge and custody. There is no discovery that Plaintiff would require from Defendants that would enable him to prove whether he was damaged by the subject statements. Since the damages proofs are within his sole and exclusive control and knowledge, it was error for the court to deny dismissal on the basis of discovery. While, as the court stated, this is not a summary judgment motion, nonetheless, Plaintiff's burden to defeat Defendants' motion to dismiss under UPEPA required him to advance the same degree of responsive proofs.

Finally, even assuming, arguendo, that the subject statements could be deemed libelous per se, based on Plaintiff's status as a limited purpose public figure (if not an actual public figure or public official), he still is obligated to prove that the statements were published with actual malice. See Lawrence v. Bauer Pub. & Printing Ltd., 89 N.J. 451, 469 (1982) (Entering a judgment of dismissal in favor of the defendants, the Court held that while the published articles were defamatory as a matter of law, since the plaintiffs were limited purpose public figures, the defendants "are protected by a qualified First Amendment privilege unless there is clear and convincing evidence that they acted with actual malice toward plaintiffs" and as to that issue, there was insufficient evidence to present a jury question on the issue).

Because, as previously stated, Plaintiff failed to present any evidence of actual malice to satisfy his legal burden under UPEPA, his claim for libel per se must also be dismissed with prejudice.

## POINT VI

## THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS, THEREBY NEVER REACHING DEFENDANT'S ENTITLEMENT TO AN AWARD FOR COSTS AND FEES, AND REASONABLE LITIAGATION EXPENSES BASED UPON PLAINTIFF'S FAILURE TO ESTABLISH EACH AND EVERY ESSENTIAL ELEMENT OF DEFAMATION. (DA231)

The UPEPA is clear. Upon dismissal of Plaintiff's Complaint, for the reasons fully described in Defendants' moving papers submitted to the trial court below, and these papers submitted on appeal, Defendants are entitled to recover from Plaintiff costs, fees, and expenses in connection with this action. In pertinent part, the UPEPA provides that a party which is served with a complaint for defamation may file an order to show cause to dismiss the cause of action or part of the cause of action. N.J.S.A. 2A:53A-51. It further provides that:

> On a motion under section 3 of P.L.2023, c.155 (C.2A:53A-51), the court ***shall*** award costs, reasonable attorney's fees, and reasonable litigation expenses related to the order to show cause:
>
> (1) to the moving party if the moving party prevails on the order to show cause…

N.J.S.A. 2A:53A-58(1).

Thus, to the extent that this Court reverses the Trial Court and rules that the Trial Court should have dismissed all or any part of the claims asserted by

Plaintiff in the Complaint, it is respectfully submitted that such order and decision of this Court include with the remand a direction to the Trial Court to set a date for submission of proofs in support of an award of costs, fees and expenses to Defendants in accordance with the UPEPA.

## CONCLUSION

For the foregoing reasons, Defendants respectfully submit their entitlement to the entry of an Order: 1) reversing the trial court's May 31, 2024, Order; 2) dismissing Plaintiff's Verified Complaint as against Defendants Liang, Rousouli, Biecagz, and CTE Republicans for Englewood Cliffs with prejudice; and directing the trial court to set a date for submission of proofs in support of award of reasonable attorney's fees, costs, and litigation expenses incurred by Defendants in connection with this litigation.

PECKAR & ABRAMSON, P.C.
*Attorneys for Defendants-Appellants CTE Republicans for Englewood Cliffs, Zhi Liang, Rivka Biecagz and Penny Rousouli*

By: */s/ Michael S. Zicherman*
Michael S. Zicherman, Esq.

Dated: September 26, 2024

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November 7, 2024

Joseph H. Orlando, Esq.
Clerk of the Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0006

Re: ALBERT H. WUNSCH, III, Plaintiff, v. CTE REPUBLICANS FOR ENGLEWOOD CLIFFS, MARK PARK, ZHI LIANG, RIVKA BIECAGZ, PENNY ROUSOULI, AND JOHN AND JANES DOES 1-10, Defendants.
On Appeal From Orders Denying Defendants' Orders to Show Cause
Appellate Docket No.: A-003239-23
Docket No. Below: BER-L-5605-23
Sat Below: Hon. Mary F. Thurber, J.S.C.

Dear Mr. Orlando,

Kindly accept this Letter Appellate Brief of Defendant-Respondent Mark Park. For the reasons that follow, Defendant-Respondent Mark Park seeks a summary reversal of the Orders dated May 31, 2024 denying defendants' Orders to Show Cause to dismiss this defamation lawsuit pursuant to the Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49, et seq. (UPEPA) and a remand to award defendants reasonable attorney's fees.

# TABLE OF CONTENTS

## PRELIMINARY STATEMENT

The Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49, et seq ("the Act") is meant to stop lawsuits like this one that attempt to stifle freedom of expression on matters of public concern. The Act provides defendants with formidable tools to combat abusive Strategic Lawsuit Against Public Participation (SLAPP) defamation actions like the instant one including allowing defendants to move by way of an "order to show cause . . . to dismiss the cause of action or part of the cause of action" N.J.S.A. 2A:53A-51 and requires a Court to "rule on an order to show cause . . . as soon as practicable after a hearing." N.J.S.A. 2A:53A-56.

For the following reasons, the motion judge erred in applying the Act and Mayor Park respectfully requests an order summarily reversing the Order dated May 31, 2024 and entry of an Order dismissing Wunsch's defamation lawsuit with prejudice and remanding for the limited purpose of determining the amount of legal fees and costs to be awarded to defendants in connection with the defense against the Complaint pursuant to the Act.

## PROCEDURAL HISTORY

Albert H. Wunsch, III filed this lawsuit on October 17, 2023 against Mayor Park, CTE Republicans for Englewood Cliffs, Zhi Liang, Rivka Biecagz and Penny Rousouli who at the time the lawsuit was filed were involved in a municipal

election campaign in the Borough of Englewood Cliffs. (Da7-Da16). Subsequently, Mark Park, Zhi Liang and Rivka Biecagz were duly elected on November 7, 2023 and are now members of the Englewood Cliffs Borough Council. (Da1-Da37).

On October 26, 2023, the court below entered the Order to Show Cause filed by Wunsch. (Da38-Da41).

On November 15, 2023, the Court entered an Order granting Wunsch Application for Injunctive Relief. (Da42-Da44). On November 20, 2023, the Court stayed its Order dated November 15, 2023 (Da45).

On November 20, 2023, defendants-appellants filed an application for an Order to Show Cause to Dismiss Wunsch's defamation Complaint. (Da46-Da50). On November 21, 2024, the Court entered an Order converting defendants' Orders to Show Cause to motions sua sponte. (Da125-Da126).

On May 31, 2024, the Court entered three (3) Orders denying defendants' Orders to Show Cause. (Da231-Da261).

An Amended Notice of Appeal was filed in this matter was filed on July 15, 2024. (Da266-Da269).

## STATEMENT OF FACTS

Wunsch claims in his Verified Complaint that certain political advertisements made in the course of a local public election in the Borough of

Englewood Cliffs contained defamatory statements directed at him. (Plaintiff's Verified Complaint "Complaint" ¶¶ 11, 12, Da7-Da16).

The first of these publications is an email sent in connection with co-Defendant Mark Park's political mayoral campaign, and the second was a postal mailing sent by Defendant CTE. In total, Wunsch alleges that six statements contained in the political advertisements were defamatory in nature. (Complaint, Da7-Da16).

First, Wunsch alleges that the following statement is defamatory as against him: "**Town Wide Flooding Is Due To Kris Kim Scheming To Pay Off Democrat Professionals Instead Of Fixing The Problem**" (Complaint, ¶ 12(a), Da9).

Second, Wunsch alleges that it is defamatory to publish that he was "**Paid $800k+ Taxpayer Money To Sell Us Out**". (Complaint, ¶ 12(b), Da9-Da10).

Third, Wunsch alleges the statement, "**Why Doesn't Kim Use Our Tax Dollars To Fix Our Flooding Issues Instead Of Giving Millions To Wunsch & Co. In The Name Of Settlement**" defames him. (Complaint, ¶ 12(c), Da10) (emphasis added).

Fourth, Wunsch alleges he was defamed by the statement, **"Bergen County Democrats will fill their coffers by arranging to build in EC through Wunsch?"** (Complaint, ¶ 12(d), Da10) (emphasis added).

Fifth, Wunsch claims the statement– **"End further corruption in our town"** – defames him. (Complaint, ¶ 12(e), Da10). The full statement is as follows:

> VOTE REPUBLICANS FOR A BALANCED COUNCIL
> MARK PARK FOR MAYOR
> LIANG AND BIEGACZ FOR COUNCIL
> END FURTHER CORRUPTION IN OUR TOWN
>
> [(Da25).]

Sixth, Wunsch claims he was defamed by posing the question, **"Wunsch gets paid to run the Democrat Party. IS THIS ILLEGAL BEHAVIOR?"** (Verified Complaint, ¶ 12(f), Da10).

Wunsch has held many official positions in the Borough of Englewood Cliffs including 1) Municipal Prosecutor, 2) Public Defender; 3) Borough Attorney; and 4) Special Counsel. He was terminated by a vote of the Borough Council as Special Council on October 11, 2023, 6 days before this lawsuit was filed. (Certification of Wunsch dated October 17, 2023, paragraph 5, Da18).

## LEGAL ARGUMENT

### Point I

### The Trial Court Erred By Not Dismissing Wunsch's Complaint Pursuant To The Uniform Public Expression Protection Act.

New Jersey's recently enacted Uniform Public Expression Act, N.J.S.A. 2A:53A-49 et seq.[1], also known as the Anti-SLAPP law ("the Act"). The Act provides at N.J.S.A. 2A:53A-50 (2)(b) that it applies to a cause of action asserted in a civil action against a person based on the person's:

> (2) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative or other governmental proceeding; or
>
> (3) exercise of the right of free speech . . . guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern.
>
> [N.J.S.A. 2A:53A-50 (2)(b).]

In ruling on the Order to Show Cause the Court may consider the pleadings, the order to show cause application and supporting certifications, briefs any reply or response to the order to show cause, and any evidence that could be considered in ruling on a motion for summary judgment. (N.J.S.A. 2A:53A-54).

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[1] The Act is largely adopted from the Uniform Public Expression Protection Act (approved by the Uniform Law Commission in 2020) ("UPEPA"). Maine is the latest state to enact the Uniform Public Expression Protection Act (UPEPA) – following New Jersey, Oregon (substantially similar), Utah, Hawaii, Kentucky, and Washington. UPEPA aims to provide a clear framework for the efficient review and dismissal of Strategic Lawsuits Against Public Participation. (SLAPPs). "Anti-SLAPP laws such as the UPEPA . . . operate to allow a person who has been sued for the exercise of their free speech rights to seek an early dismissal of the litigation. The goal is to prevent such a person from having to suffer through the costs, expenses, and mental stress of an abusive lawsuit that in the end will be dismissed as a matter of law anyway." https://www.forbes.com/sites/jayadkisson/2024/05/01/maine-adopts-the-uniform-public-expression-protection-act/.

The Act provides that the Court "shall dismiss with prejudice a cause of action, or part of a cause of action if . . . the Act applies . . . and (3) either (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint [or] (b) The moving party establishes that: (i) The responding party failed to state a cause of action upon which relief can be granted; or (ii) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action. N.J.S.A. 2A:53-55(a). Importantly, the Act provides that it "shall be broadly construed and applied to protect the exercise of the right of freedom of speech . . . guaranteed by the United States Constitution or the New Jersey Constitution." N.J.S.A. 2A:53A-59. The Act was effective as of October 7, 2023, 10 days before Wunsch filed this defamation action.

**A. The Act Applies to Wunsch's Defamation Action.**

The Act applies generally to the exercise of the right of free speech . . . guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern. N.J.S.A. 2A:53A-60 (3). The New Jersey Supreme Court has established the principle that a person challenging speech on matters of public concern must plead actual malice in matters of public concern in what it has termed the "fair comment" privilege. Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 141-42 (1986).

In Senna v. Florimont, 196 N.J. 469, 496-497 (2008), the Court gave guidance to Courts considering whether challenged speech involved matters of public concern. Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," Connick v. Myers, 461 U.S. 138, 146 (1983) or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," San Diego v. Roe, 543 U.S. 77, 83–84 (2004). See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Time, Inc. v. Hill, 385 U.S. 374 (1967). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Rankin v. McPherson, 483 U.S. 378 (1987); Snyder v. Phelps, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011) (speech by a fringe group protesting near a military funeral).

Political expression is protected by the First Amendment of the United States Constitution and by Article I, Paragraphs 6 and 18 of the New Jersey Constitution. See Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 486 (2012) (recognizing that political speech "is protected by the State Constitution, which affirmatively guarantees the right of free speech to all citizens"); G.D. v. Kenny, 205 N.J. 275, 303 (2011) (explaining that "[t]he right to speak freely on matters of public concern and the right to criticize a candidate for

public office implicate core values protected by our [F]ederal and [S]tate [C]onstitutions"). Indeed, political speech "is entitled to the highest level of protection in our society." Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 85 (2014). Accordingly, under both the Federal and New Jersey Constitutions political speech and expression are accorded broad protection. Buckley v. Valeo, 424 U.S. 1, 14 (1976); Mazdabrook, 210 N.J. at 499.

"New Jersey accepted the invitation [under Gertz v. Robert Welch, 418 U.S. 323 (1974)] to provide greater protection to speech involving matters of public concern than mandated by the United States Supreme Court's First Amendment jurisprudence," and, as explained above. Senna, 196 N.J. at 484-85. Senna requires a showing of actual malice where a defamation plaintiff—whether he is a public figure or private figure—sues over a statement on a matter of public concern. Id. at 496-97 ("the actual-malice standard will apply when the alleged defamatory statement concerns a public figure or public official or involves a matter of public concern.").

The State of Washington adopted the Act and a Washington appellate court held that the question of whether speech is a matter of public concern is a question of law, including speech "relating to any matter of political, social, or other concern to the community." Jha v. Khan, 24 Wash. App. 2d 377, 389, 520 P.3d 470, 477-78 (2022), review denied, 530 P.3d 182 (Wash. 2023) (citations omitted).

Indeed, the trial court ruled that "[f]or the purposes of this motion, the court accepts that the civil action asserted against defendants may be seen as based on their exercise of the right of freedom of speech. N.J.S.A. 2A:53A-51(b)(3)." (Da260).

Further, Wunsch is a public official. The First Amendment requires that public officials and other public figures plead and prove actual malice, *i.e.*, that the statements at issue were made with knowledge of falsity or with reckless disregard for the truth, as an element of any defamation claim. See New York Times v. Sullivan, 376 U.S. at 254, 279-80 (1964); Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 US 130 (1967).

Accordingly, there is no question that the speech Wunsch challenges is campaign speech on matters of public concern. Thus, the Act applies and requires Wunsch to establish a prima facie case as to each essential element of his defamation action.

**B. Dismissal of Wunch's Complaint is Required Under the Act Because Wunsch has not Established a Prima Facie Case as to Each Essential Element of his Defamation Action.**

Defendants moved to dismiss the Complaint under N.J.S.A. 2A:53A-55(a)(3)(a) because Wunsch failed to "establish a prima facie case as to each essential element of . . . [his] cause of action [for defamation] in the complaint."

The motion judge erred by evaluating the Orders to Show Cause to dismiss the Complaint pursuant to R. 4:6-2 and not N.J.S.A. 2A:53A-55(a)(3)(b)(i).

Wunsch challenges as defamatory two campaign mailings that were circulated to various residents within the borough. (Wunsch's Verified Complaint, Da7-Da16). The first of these publications is an email sent in connection with co-Defendant Mark Park's political mayoral campaign, and the second was a postal mailing sent by Defendant CTE. In total, Wunsch alleges that six statements contained in the political advertisements were defamatory in nature. (Complaint, Da7-Da16).

1. Wunsch alleges that the following statement is defamatory as against him: "**Town Wide Flooding Is Due To Kris Kim Scheming To Pay Off Democrat Professionals Instead Of Fixing The Problem**" (Complaint, ¶ 12(a), Da9).
2. Wunsch alleges that it is defamatory to publish that he was "**Paid $800k+ Taxpayer Money To Sell Us Out**". (Complaint, ¶ 12(b), Da9-Da10).
3. Wunsch alleges the statement, "**Why Doesn't Kim Use Our Tax Dollars To Fix Our Flooding Issues Instead Of Giving Millions To Wunsch & Co. In The Name Of Settlement**" defames him. (Complaint, ¶ 12(c), Da10).
4. Wunsch alleges he was defamed by the statement, **"Bergen County Democrats will fill their coffers by arranging to build in EC through Wunsch?"** (Complaint, ¶ 12(d), Da10).
5. Wunsch claims the statement – **"End further corruption in our town"** – defames him. (Complaint, ¶ 12(e), Da10). The full statement is as follows:

   **VOTE REPUBLICANS FOR A BALANCED COUNCIL**
   **MARK PARK FOR MAYOR**
   **LIANG AND BIEGACZ FOR COUNCIL**

**END FURTHER CORRUPTION IN OUR TOWN**

[(Da25).]

6. Wunsch claims he was defamed by posing the question, **"Wunsch gets paid to run the Democrat Party. IS THIS ILLEGAL BEHAVIOR?"**

[(Verified Complaint, ¶ 12(f), Da10).]

As a matter of law, the speech Wunsch challenges is campaign speech on matters of public concern – matters of political, social, or other concern to the community – and he is a public official occupying the highest rung of protection.

### C. Wunsch Has Not and Cannot Establish a Prima Facie Case of Defamation against Defendant Mark Park.

#### 1. Importance Of Protecting Uninhibited And Robust Debate.

The Supreme Court has recently reaffirmed that "New Jersey's Constitution 'guarantees a broad affirmative right to free speech" that is 'broader than practically all others in the nation.'" Viktoriya Usachenok v. State of New Jersey, Department of the Treasury, A-40-22 (086861) (May 6, 2024). In Neuwirth v. State, 476 N.J. Super. 377 (App. Div. 2023), a defamation case decided before the Uniform Public Expression Protection Act was effective, the Appellate Division stated that, "[s]peech on 'matters of public concern [is] at the heart of the First Amendment's protection' and 'occupies the "highest rung of the hierarchy of First Amendment values."'" Neuwirth, 476 N.J. Super. at 391 (citations omitted).

The Appellate Division in Neuwirth stated, "[P]leadings reciting mere conclusions without facts . . . do not justify a lawsuit [which is] especially true in

defamation cases, in which courts must balance "an individual's right to protect his reputation . . . and our citizens' right to free expression and robust debate in our democratic society." Id. at 390. The Appellate Division in Neuwirth observed "our Supreme Court has held, in a defamation case, "[i]t is not enough for plaintiffs to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can 'bolster a defamation cause of action through discovery, but not [ ] file a conclusory complaint to find out if one exists.'"

Reaffirming New Jersey's broad affirmative right to free speech, the Appellate Division stated: "Thus, false statements about public officials, public figures, and matters of public concern are not actionable unless they were made with actual malice." Ibid. (citations omitted). With regard to pleading actual malice, the Court stated, "To satisfy the actual-malice standard, a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth," commenting that "[t]hat is a high standard." Ibid. The standard is "a subjective standard that does not involve consideration of whether a reasonable person would have, or should have, known the statement was false but rather whether 'the defendant in fact entertained serious doubts as to the truth of his publication.'" Ibid.

In Ward v. Zelikovsky, 136 N.J. 516, 529-35 (1994), the New Jersey Supreme Court held that the First Amendment "does not embrace the trite wallflower politeness of the cliche that 'if you can't say anything good about a person you should say nothing at all.'" Rodney A. Smolla, Law of Defamation, § 6.09[2], at 6-37 (1986). Indeed, "name calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable." Id. at § 6.12[9], at 654. "No matter how obnoxious, insulting or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy." Id. at § 4.03, at 4-11.

When it comes to defamation, New Jersey courts give "greater protection to speech involving . . . the public interest because of the important role that uninhibited and robust debate plays in our democratic society." Senna v. Florimont, 196 N.J. 469, 474 (2008).

"[I]t is well established in New Jersey that a plaintiff's "burden of proof for each of the elements of defamation is by clear and convincing evidence." Hornberger v. Am. Broad. Cos., Inc., 251 N.J. Super. 577, 598 (App. Div. 2002); See also Model Civil Jury Charge 3.11A (PUBLIC DEFAMATION) (Approved 03/2010; Revised 11/2022) ("[Plaintiff] must prove five elements by clear and convincing evidence").

**a. Wunsch presented no evidence to establish actual malice and knowledge that the statements Wunsch claims defamed him were false or made with reckless disregard of truth or falsity.**

In New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964), the Supreme Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is with the knowledge that it was false or with reckless disregard of whether it was false or not." The boundaries of the designation "public official" were left open for further definition. Id. at 283 n. 23.

In Vassallo v. Bell, 221 N.J. Super. 347 (App. Div. 1987), the Appellate Division held that to be considered a "public official," a person must hold a position "which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the charges in controversy." Id. at 361-363 (citations omitted). This is "not limited to elected officials but extends to appointed officials as well" (citation omitted) and "is not limited to the upper echelons of government." This includes any position "which might touch on an official's fitness for office including personal attributes such as "dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the individual's private character." The Court in Vassalo canvased cases and observed that a building inspector has been held to be

a public official since the position "was of 'such apparent importance' that the general public, and particularly the citizens of [the municipality], would have an `independent interest' in the officeholder's qualifications and performance." Id. at 362 (quoting Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966)). The Court in Vassallo also found that the plaintiff, a municipal building inspector, was a public figure defined as "individuals 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" Id. at 365 (quoting Curtis Publishing Co. v. Butts; Associated Press v. Walker, 388 U.S. 130, 164 (1967). "Public-figure status is a matter for determination by the Court." Id. at 370.

In Senna, 196 N.J. at 496-97, the New Jersey Supreme Court summarized the rules regarding "whether to apply the actual-malice standard for liability purposes in defamation cases" and holding that the actual-malice standard "will apply when the alleged defamatory statement concerns a public figure or a public official or involves a matter of public concern." The Supreme Court held that "[d]iscourse on political subjects and critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard." Ibid.

The New Jersey Supreme Court has made clear that the actual malice standard also applies when the allegedly defamatory statement(s) involve a matter

of public concern. See Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 142 (1986); Sisler v. Gannett Co., Inc., 104 N.J. 256 (1986).

New Jersey's Constitution affords even broader speech protections than does the Federal Constitution Sisler, 104 N.J. at 271-72 (citations omitted) (noting Article I, Section 6 is "more sweeping in scope than the language of the First Amendment [and] has supported broader free speech rights than its federal counterpart.").

As Borough Attorney, Wunsch is a public official. On March 20, 2019, pursuant to Resolution 19-106, Defendant Wunsch was appointed as "Special Litigation Counsel" by the Mayor and Borough Council. Resolution 19-106. Also, Wunsch is a public figure because he is involved in matters of public importance.

Finally, the campaign speech attacked by Wunsch as defamatory are matters of public concern because the speech is "on political subjects" and as the New Jersey Supreme Court has stated, "critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard." Senna, 196 N.J. at 496-97.

Wunsch has not demonstrated malice.

**b. The statements Wunsch alleges to be defamatory are matters of opinion.**

In Ward, 136 N.J. at 529-35, the Supreme Court highlighted the importance of the opinion/fact and non-fact/fact distinctions and that the inquiry "centers on

the concept of verifiability." Requiring that a statement be verifiable ensures that defendants are not punished for exercising their First Amendment right to express their thoughts. Unless a statement explicitly or impliedly rests on false facts that damage the reputation of another, the alleged defamatory statement will not be actionable. We require verifiability because "[i]nsofar as a statement lacks a plausible method of verification," the trier of fact who is charged with assessing a statement's truth "will have considerable difficulty returning a verdict based upon anything but speculation." Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985).

Wunsch has not established that the statements he claims defamed him are verifiable statements of fact, a required element of a claim of defamation and the Verified Complaint must be dismissed with prejudice pursuant to the Uniform Public Expression Protection Act. The Statements Wunsch attacks are protected campaign speech on matters of public concern against Wunsch, a public official, and Wunsch cannot establish actual malice.

**c. Wunsch has not provided proof of damages.**

As an element of establishing Wunsch's claim of defamation, he must demonstrate "actual harm to reputation through the production of concrete proof. Awards based on a plaintiff's testimony alone or on inferred damages are

unacceptable." Ward, 136 N.J. at 540 (citations and internal quotation marks omitted).

Wunsch has not supplied any documentation or other evidence that he lost any business or otherwise suffered a general diminution in earnings that was the natural and direct result of the allegedly defamatory statements or that he sustained actual harm to his reputation. A "plaintiff's testimony alone" or on "inferred damages" are prohibited in the State of New Jersey. Ward, 136 N.J. at 540 (citations and internal quotation marks omitted). The conclusory statements that Wunsch makes in the Verified Complaint are unsupported and insufficient to establish he sustained damages as required under the Act.

## CONCLUSION

For the foregoing reasons, Defendant-Respondent Mark Park respectfully requests that the Court summarily reverse the Orders denying the Orders to Show Cause to Dismiss the Complaint and remand to award reasonable attorney's fees and costs pursuant to the Act.

Respectfully submitted,
s/ *Donald F. Burke*
Donald F. Burke, Esq.

cc: Albert H. Wunsch, III, Esq.
Michael S. Zicherman, Esq.

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**
**DOCKET NO. A-3239-23**

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**ALBERT H. WUNSCH, III,**

**Plaintiff-Respondent,**

**vs.**

**MARK PARK, TIM KOUTROUBAS, INFOR@ENGLEWOODCLIFFS.COM,**

**Defendants**

**CTE REPUBLICANS FOR ENGLEWOOD CLIFFS, ZHI LIANG, RIVKA BIECAGZ, and PENNY ROUSOULI,**

**Defendant-Appellants.**

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**On Appeal from Superior Court, Law Division-Bergen County Docket No. BER-L-5605-23**

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# BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT
**(Pa 1-3)**

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**

# TABLE OF APPENDIX

## PRELIMINARY STATEMENT

This matter involves a defamation claim filed by the Plaintiff-Respondent, Albert H. Wunsch, III ("Plaintiff"), based upon October 2023 election campaign statements made by the Defendants, which alleged that the Plaintiff engaged in corrupt, unethical, and criminal conduct.

In seeking a summary dismissal under the newly enacted Uniform Public Expression Protection Act," N.J.S.A. 2A:53A-49, et al. ("UPEPA") -- which became effective the day after the first defamatory statement in this case -- the Defendants filed an Order to Show Cause, which resulted in an interlocutory Order by the Law Division requiring the parties to conduct expedited discovery on various issues, including the state of mind element of the defamation cause of action.

Rather than engage in limited discovery and litigate the merits, the Defendants chose to file this appeal, contending that the "denial" of their Order to Show Cause entitled them to an appeal to the Appellate Division "as of right."

On appeal, the Defendants contend that the Law Division applied the wrong standard under UPEPA, arguing that the Law Division improperly applied a Rule 4:6-2 motion to dismiss standard rather than a Rule 4:46 summary judgment standard, and in so doing, failed to dismiss the Complaint outright on the basis of insufficient evidence.

Such reasoning ignores the record, which shows that the Law Division employed a hybrid standard, as permitted by UPEPA, utilizing both the standards of Rule 4:6-2 and Rule 4:46. The trial court's recognition that discovery was essential to resolve this matter dovetails precisely into well established summary judgment principles, which compel a denial of a motion when discovery is incomplete. In addition, UPEPA expressly authorizes a court to order discovery if needed.

Limited discovery here is necessary on two issues that cannot be resolved in a summary manner: (1) whether the facts support a finding that the Defendants Liang, Biecagzk, and Rousouli participated in publishing the defamatory statements; and (2) whether the "actual malice" defamation standard applies, and if so, whether the Plaintiff has satisfied that standard. It is firmly established that summary judgment is inappropriate and rarely utilized in resolving the actual malice issue, because it involves a state of mind and generally does not involve direct evidence.

The Defendants also contend that the statements at issue were not defamatory, and merely constituted "loose, figurative or hyperbolic language" or alternatively, represented "name calling, epithets, and abusive language." Such arguments lack merit and are easily rebutted, as the statements (1) accuse the Plaintiff of corrupt conduct and criminal acts, and (2) subject him to contempt and a loss of the good will and confidence in which he is held by others.

## STATEMENT OF PROCEDURAL HISTORY

On October 17, 2023, the Plaintiff filed a Verified Complaint and request for entry of an Order to Show Cause under Rule 4:52. The Complaint sought declaratory and injunctive relief related to alleged defamatory statements sent to third parties by the Defendants. (Da 1-37).

Despite receiving proper notice[1], the Defendants failed to oppose[2] the Plaintiff's Order to Show Cause, which was heard by the Honorable Mary F. Thurber, J.S.C. of the Law Division of Bergen County on November 15, 2023. (Da 139-160). After the hearing, the Law Division entered an Order the same day granting the relief sought by the Plaintiff and set a January 25, 2024 hearing date on

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1 As noted by the Law Division: "I'm satisfied that the defendants collectively had notice, requested an adjournment, which was not granted, and elected not to appear." (Da 152). The Defendants falsely state that the Law Division failed to provide them an opportunity to present their defenses. (Db 4-5).

2 As noted by the Law Division:

> Defendants requested an adjournment, which was not granted. No opposition was filed and no defendant appeared. No attorney has entered an appearance on behalf of any defendant, although one attorney wrote to the Court that he had been consulted but not retained. The Court called defendant Zhi Liang from the hearing (he is the only defendant to have provided the Court a document with his phone number). He understood the Court would be proceeding to hear the Order to Show Cause application and elected not to stay connected to the hearing via telephone.

(Da 97).

the balance of plaintiff's claims. (Da 95-97). The November 15, 2023 Order included a finding that the Defendants' publications on October 7, 8, and 15 and November 3, 5, and 6 of 2023 rose to the level of defamation against the Plaintiff and his personal and business reputation, and also constituted libel per se. The Law Division ordered the Defendants to:

- retract their statements
- publish an apology
- provide a certified statement identifying the person(s) who supplied the information defendants published, and
- not to issue any further publications regarding plaintiff

(Da 95-96).

On November 20, 2023, the Defendants filed an Order to Show Cause seeking to stay the November 15, 2023 Order and for dismissal of the Complaint pursuant to the Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49 ("UPEPA"). (Da 46-124). On November 21, 2023, the Law Division stayed the November 15 Order and converted the Defendants' Order to show cause into a motion to dismiss to be heard at a later date. (Da 125-126).

Oral argument on the merits took place on December 18, 2023 and January 26, 2024. The court reserved decision on the multiple applications. Beginning on January 31, 2024, the parties submitted letters concerning a different matter pending before another judge in Bergen County, *800 Sylvan Avenue v. Borough of Englewood Cliffs* (Docket No.: BER-L-5309-21).

On March 24, 2024, citing UPEPA, the Defendants filed another Order to Show Cause, which demanded an expedited ruling on the converted motions to dismiss. That application also sought declaratory relief stating that Judge Farrington's February 8, 2024 Order in the other litigation was erroneous, and that there was no conflict of interest with respect to the Defendants' vote with respect to the Plaintiff's invoices.

The Defendants' second Order to Show Cause did not seek interim temporary restraints. However, such relief was subsequently requested by the Defendants. In this respect, Judge Thurber writes:

> On April 3, 2024, after the Court received and reviewed the papers filed in support of that application, the court entered the requested Order to Show Cause, setting a briefing schedule and a return date of April 23, 2024. On April 8, 2024, Mr. Burke [defense counsel] filed additional papers, listed in eCourts as "General Correspondence," containing seven different packets of uploaded materials, more than 125 pages, which the judge has not yet received. This includes a document captioned "Supplemental Application For An Order For Immediate, Interim Injunctive Relief Pursuant to Rule 4:52" and requests argument and briefing as set forth in the Court's Order to Show Cause entered on April 3, 2024.

(Pa 3)[3].

On April 11, 2024, Judge Thurber denied the Defendants' application for temporary injunctive relief, stating the following in paragraph 1 of her Order:

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[3] This Order was omitted from the Defendants' Appendix.

> The application for temporary restraints pending the return date is Denied. All issues shall be addressed on the return date.

(Pa 2). Judge Thurber also denied the Defendants' request to immediately overrule Judge Farrington in the other litigation:

> To the extent defendant is seeking a preemptive order in this case to direct how an order of another judge might be implemented, that is irregular and not a basis for entry of emergent relief. The court will consider the additional papers filed and has adjusted the briefing schedule accordingly.

(Pa 3; emphasis added).

At this point, Judge Thurber had not issued any ruling on the merits for either (1) the Defendants' converted motions to dismiss, or (2) the issue of whether the Defendants' statements were defamatory.

On the return date oral argument on May 7, 2024, Judge Thurber did not entertain any argument relating to the motions to dismiss or defamation. Instead, the hearing focused upon the Defendants' application seeking Judge Thurber to overrule Judge Farrington's conflict of interest finding contained in the February 8, 2024 Order.

Thus, there have been three oral arguments in this matter:

- the November 15, 2023 hearing pertaining to the Plaintiff's Order to Show Cause and Verified Complaint;

- the January 26, 2024 hearing focusing on the Defendant's motion seeking dismissal of the Complaint; and

- the May 7, 2024 hearing involving the Defendants' application to overrule Judge Farrington's ruling in the separate matter

On May 31, 2024, Judge Thurber entered an interlocutory Order with the following rulings:

1. The Court's Order dated November 15, 2023, is VACATED.
2. Defendants' applications to dismiss the complaint are DENIED.
3. Defendants' applications for counsel fees and costs are DENIED.
4. Defendants shall file their answers to plaintiff's complaint within twenty days of this Order.

(Da 231-232). This Order was accompanied by a written decision. (Da 233-261).

The Law Division has yet to issue a final decision or order on the merits of the Plaintiff's Complaint. Discovery has yet to commence. This was noted by Judge Thurber in the May 15, 2024 Order appealed by the Defendants:

> The court has issued at least five Orders in this matter, none of which was a final order.

(Da 235).

## STATEMENT OF FACTS

The Plaintiff has lived most of his life in the Borough of Englewood Cliffs, and is a member of the Englewood Cliffs Democratic Party. He has never run for office, has never placed a political sign on his property, and has never been an officer or Committee member of the Democratic Party. (Da 18).

The Plaintiff has held the following positions in Englewood Cliffs: (1) Municipal Prosecutor; (2) Public Defender; (3) Borough Attorney; and (4) Special Counsel. (Da 18).

Although the Plaintiff supported the Democrats in the 2023 election, he did not actively campaign or publicly endorse any of the candidates. He was not a campaign manager or treasurer for any candidate, and made no financial donations to any candidate. (Da 18).

As a New Jersey attorney, the Plaintiff has owned and operated a law practice in Englewood Cliffs for more than thirty years. The majority of his business takes place within this Borough, where every resident was emailed and mailed a copy of the various defamatory publications at issue. (Da 19).

The statements claimed as defamatory, three in total, were all made in campaign literature published and distributed during the 2023 election season. (Da 25, 27-28, 37).

**October 7, 2023 Email**

On October 7, 2023, an email was sent via Constant Contact, a service the Borough uses to gather email address of all residents. (Da 25). Those who lived in the Borough, and then moved, remain on this emailing list. Thus, this publication was made to a population much larger than the current residents of Englewood. The emailed flyer includes the following statement:

> Town-wide flooding is due to Kris Kim [Democratic mayoral candidate] scheming to pay off Democrat professionals instead of fixing the problem.

Immediately below this is the statement:

> Builders Are Waiting For Democrats Kris Kim To Become Mayor.

Immediately below this is a photograph of the Plaintiff, followed by the following statements:

> Al Wunsch, Borough Attorney
>
> EC Democrats Leader and Defacto Mayor
>
> Paid $800k + TAXPAYER MONEY TO SELL US OUT
>
> Wunsch gets paid to run the Democrat Party. IS THIS ILLEGAL BEHAVIOR?
>
> Kris Kim, aka Wunsch's "Yes" Man
>
> AS MAYOR, KIM WILL CONTROL THE PLANNING BOARD AND BLINDLY APPROVE BUILDERS APPLICATIONS

> Why Doesn't Kim Use Our Tax Dollars To Fix Our Flooding Issues Instead Of Giving Millions To Wunsch & Co In Name Of Settlement?

(Da 25). Further down on the same page, below a "VOTE REPUBLICANS" message, is the following:

> END FURTHER CORRUPTION IN OUR TOWN

(Da 25).

**October 8, 2023 Mailing**

On October 8, 2023, a printed flyer was sent by U.S. mail to all residents of the Borough of Englewood Cliffs. (Da 27). It states "BUILDERS ARE WAITING FOR DEMOCRAT KRIS KIM TO BECOME MAYOR," followed by side-by-side, same-size photographs of the Plaintiff and Kim. Below Wunsch's photo the flyer repeats these statements from the emailed flyer:

> Borough Attorney, EC Democrats Leader and Defacto Mayor
>
> PAID $800K+ TAXPAYER MONEY TO SELL US OUT

Below both photos it states:

> KRIS KIM WUNSCH'S "YES" MAN
>
> Is Kris Kim Helping Bergen County Democrats Fill Their Coffers By Arranging to Build Through Wunsch?

(Da 27).

The published statements cited above are false. At all relevant times, the Plaintiff was not the "Borough Attorney." He was Special Counsel" with regard to the affordable housing litigation. (Da 19). Contrary to the second publication, the Plaintiff was not the "yes man" for Kris Kim, and is not the leader of the Englewood Cliffs democrats. The Plaintiff is neither an elected official, nor was he a candidate for election in any capacity. And he is not corrupt as alleged. (Da 19).

The flyer claims that the Plaintiff is one of the "Democrat Professionals" allegedly involved in a "scheme." This is an absurd accusation that is not only false but also alleges serious conduct incompatible with the Plaintiff's business, trade, and office. (Da 20).

The accusation that the Plaintiff has been paid to "sell us out" is false and offensive. There is no basis for such a blatant lie, which calls into question the Plaintiff's integrity without any justification. Such falsehoods affect the Plaintiff's law practice and cause others to view him in a lesser light, and cause others to avoid him both personally and professionally. (Pa 20).

The accusation that Kris Kim is giving "Wunsch & Co. millions" is false. The Plaintiff is unaware of who "Wunsch & Co." are and certainly has not been given

"millions." The Defendants have access to the Borough's books and know exactly how much the Plaintiff has been paid, and for what services payment was rendered. (Da 20). Any and all invoices were approved by the governing body.

While phrased as a question, the statement that "Bergen county democrats will fill their coffers by arranging to build in EC through Wunsch?" represents a direct accusation of misconduct and criminal behavior that has no basis in fact, and serves to tarnish the Plaintiff's reputation. (Da 21).

The published phrase "End further corruption in our town" insinuates that the Plaintiff is the source of the alleged "corruption." This statement is false, and acts to harm the reputation of the Plaintiff both personally and in his business. (Da 21).

The record at this early date strongly suggests that the publishers of the statements at issue published these materials with knowledge that the statements were false. The damage to the Plaintiff's reputation and business that will flow from these publications is inevitable, and has already commenced. On October 11, 2023, four days after the first defamatory publication, the Plaintiff was terminated from his position as Special Counsel for the affordable housing litigation. (Da 21).

The Plaintiff was approached by councilman, David DiGregorio, a Democrat, who asked the Plaintiff if he "on the take" or if he was "taking bribes." This is the same Democratic councilman who voted for the Plaintiff's termination. (Da 21-22).

After the publications at issue, the Plaintiff was contacted by four longstanding clients concerned about the accusations leveled at the Plaintiff via the defamatory statements. All four clients are residents of Englewood Cliffs and, in two of the four instances, have been clients for thirty years. Another has been a client for approximately twenty years. One client stated that his company was not happy to read these accusations and asked the Plaintiff if they were true. Another client seriously asked the Plaintiff: "Are you in the Mafia?" A third client inquired as to whether the Plaintiff was "on the take?" (Da 22).

When walking on the local track field, the Plaintiff has been stopped by residents who "recognized" his photograph from the publicized statements. (Da 21).

The Defendants are not political neophytes. Mark Park had served as Councilmen and is currently the Mayor. Tim Koutroubas served on the council and was Council president. He is currently running for office again. Zhi Liang and Rivka Biecagz also served as councilpersons and are currently on the council. Penny Rousouli has also been involved politically as the Chair of the Committee to Elect Republicans and her home is the Republicans' Headquarters.

Each and every one of the Defendants were readily aware that the Plaintiff had no authority to issue building permits. Wunsch was never the Planning Board Attorney. He never handed any building applications in the town and had no control

over the building department. The Defendants were well aware of this, yet still published the subject political flyers stating their defamatory accusations.

## STATEMENT OF THE STANDARD OF REVIEW

The Defendants neglect to inform the Court of the standard of review that applies to this matter.

Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review:

> * * * we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.

*In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson,* 194 N.J. 276, 284 (2008), quoting *Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am.*, 65 N.J. 474, 484 (1974).

## LEGAL ARGUMENT

### POINT I

### THE LAW DIVISION'S DECISION PROPERLY UTILIZED ITS AUTHORITY UNDER THE UNIFORM PUBLIC EXPRESSION PROTECTION ACT BY REQUIRING LIMITED DISCOVERY PRIOR TO RESOLVING THIS CASE ON THE MERITS.

The Defendants seek to subvert the summary judgment procedure embedded in the Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49, et al. ("UPEPA") by relying upon the "prima facie" standard, but in so doing, ignore the bedrock principle that such motions require denial in the absence of critically needed discovery on factual issues, namely, (1) the subjective state of mind issue contained within the actual malice standard, and (2) the need to clarify the relationship of various Defendants to the publications at issue.

As a result, the trial court properly noted the critical need for limited discovery. Emphasis is drawn to the fact that no discovery was conducted in this case. Entering judgment here in such a situation here made no sense, and runs headlong into well established summary judgment principles

Reversal of the Law Division's decision is thus unwarranted.

### A. While the Uniform Public Expression Protection Act Applies to This Case, Such Legislation Is Primarily Directly at Individuals Opposing New Development.

UPEPA, which took effect on October 7, 2023, was enacted to combat meritless "strategic lawsuits against public participation" ("SLAPP"), which are typically those brought against individuals or organizations who oppose new development. In this respect, one legal commentator notes: "Suits commenced by developers in anticipation of public opposition to their projects became frequent enough to acquire an acronym: SLAPP Suits, which stands for Strategic Litigation Against Public Participation." SLAPP suits, 36 New Jersey Practice, Land Use Law § 23.33 (3d ed.). Another authority states:

> It is a more typical story than you might expect. A local political gadfly, blogger or even a small publisher investigates or rails against a building project that is perceived to involve local corruption. Or perhaps a non-profit inveighs against building on wetlands. The project's developer or a business owner, fed up with the public criticism that they believe affects their reputation and economic interests, sues for defamation and tortious interference.

Bruce S. Rosen, *Is It Time for New Jersey to SLAPP Back?*, New Jersey Lawyer, October 2020, p. 54 (2020).

The Plaintiff's suit is not a "strategic lawsuit against public participation," but rather, a serious-minded, factually grounded defamation lawsuit filed against local politicians who made false statements with the knowledge that such statements were

false, and who in the process, cause significant harm to an innocent person's reputation and business.

In any event, the Plaintiff agrees with the Law Division that UPEPA technically applies to the instant case. He also agrees with Judge Thurber's decision that discovery is needed to bring this matter to a proper conclusion on the merits.

UPEPA permits eligible defendants to file an Order to Show Cause that requires the an alleged a plaintiff to demonstrate that the factual and legal basis for the lawsuit is legitimate, and requires the court to consider the issues in an expeditious manner. N.J.S.A. 2A:53A-51.

The Plaintiff observes that by choosing to appeal an interlocutory procedural order rather than engage in discovery and the merits, the Defendants have ironically caused further delay of this litigation by filing what is essentially a premature notice of appeal.

### B. UPEPA Does Not Create a New Method for Dismissal of Lawsuits, But Merely Permits Courts to Employ the Standards For Dismissal Under Rules 4:6-2 and 4:46-2.

The Defendants' brief suggests the UPEPA legislation constitutes a new and independent procedure for dismissal of complaints, and that UPEPA somehow prohibits utilization of the summary judgment principle of permitting discovery

when necessary. If this is the thrust of the Defendant's position on appeal, it requires correction.

UPEPA merely incorporates preexisting and well established rule-based methods under for dismissal, namely the dismissal on the pleadings remedy under Rule 4:6-2 and the dismissal via summary judgment under Rule 4:46. A trial court is thus authorized to employ either or both of these procedures when deciding cases under UPEPA, as illustrated in the following language:

> a. In ruling on an order to show cause under section 3 of P.L.2023, c. 155 (C.2A:53A-51), the court shall dismiss with prejudice a cause of action, or part of a cause of action, if:
>
> ---
>
> (3) either:
>
> (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint; or
>
> (b) the moving party establishes that:
>
> (i) the responding party failed to state a cause of action upon which relief can be granted; or
>
> (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J.S.A. 2A:53A-55(a).

Here, subsection (a)(3) and (b)(ii) employ the summary judgment standard under Rule 4:46-2, and subsection (a)(3)(i) utilizes the motion to dismiss standard under Rule 4:6-2(e).

In ruling on an order to show cause under UPEPA, a court may consider the pleadings, the order to show cause application and supporting certifications, briefs, any reply or response to the order to show cause, and any evidence that could be considered in ruling on a motion for summary judgment. N.J.S.A. 2A:53A-54

The Defendants ignore the critical fact that UPEPA further incorporates the summary judgment principle of denying a motion and requiring the parties to engage in discovery on dispute issues of fact. In this respect, N.J.S.A. 2A:53A-52 provides that

> * * * the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under subsection a. of section 7 of P.L.2023, c. 155 (C.2A:53A-55) and the information is not reasonably available unless discovery is allowed.

This is precisely what the Law Division did in the instant case. As explained below, given the (1) state of mind inquiry on the actual malice issue, and (2) the need to clarify the relationship of various Defendants to the publications at issue, the trial court properly noted the critical need for limited discovery. Emphasis is drawn to the fact that no discovery was conducted in this case. Entering judgment here in

such a situation here made no sense, and runs headlong into well established summary judgment principles.

Thus, the record shows that the Law Division employed a hybrid standard, as permitted by UPEPA, utilizing both the standards of Rule 4:6-2 and Rule 4:46. Its recognition that discovery was essential to resolve this matter dovetails precisely into well established summary judgment principles, which compel a denial of a motion when discovery is incomplete.

### C. Dismissal of the Complaint as to the Defendants Liang, Biecazg, and Rousouli Was Not Warranted On the Basis That They Were Not Involved in the Publication of the Statements.

The elements of a defamation claim in New Jersey are (1) "the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585 (2009), quoting *DeAngelis v. Hill*, 180 N.J. 1, 13 (2004). Truth is an absolute defense to a defamation claim. *G.D. v. Kenny*, 205 N.J. 275, 293 (2011).

As to the issue of publication, it is undisputed that statements were published to a third party by the Defendants. These statements were published to the entire Borough, as well as former residents, via regular mail and through the Constant

Contact email list. The emails came from all of the Defendants, with the sender listed as "info@englewoodcliffs.com," which is owned by the Defendant, Tim Koutroubas. The publications were paid for by the Defendant CTE, of which the Defendant, Penny Rousouli is the chairperson. The publications were issued in support of the candidacy of the Defendants Park, Liang, and Biegacz, who attached their names to the flyers, implying their endorsement of the published content.

The Defendants Liang, Biecazg, and Rousouli argue on appeal that nothing in the record ties them to the statements at issue, and that the Complaint should have been summarily dismissed below without the need for discovery. In rejecting this argument, the Law Division reasoned as follows:

> Defendants Liang, Biecazg, and Rousouli argue there is nothing in the record that could attribute any of the statements to them. The first was campaign literature of defendant Park in support of his mayoral campaign. The second was sent by defendant CTE, and the only connection demonstrated for Liang and Biecazg is that their names are listed as candidates for Borough Council. Defendant Rousouli's name appears nowhere on either document. Plaintiff responds that Rousouli is the chairperson of CTE, who paid for the flyer; that the CTE flyer was in support of the candidacies of defendants Park, Liang, and Biecgacz; and that Liang and Biecgacz "attached their names to the flyers, implying their endorsement of same." The court cannot determine on this record that plaintiff has established this element at this stage against defendants Liang, Biecazg, or Rousouli. The allegations are sufficient to plead this element of the defamation causes of action, sufficient to avoid dismissal on this basis.

(Da 252-253).

This sound reasoning should not be disturbed on appeal. The fact that the Law Division may have employed Rule 4:6-2 reasoning in place of the "prima facie" reasoning of Rule 4:46 is neither here nor there. The conducting of further discovery will shed light on any factual disputes on this issue. Such proceedings would be entirely consistent with the discovery principles embedded in UPEPA, as noted above.

The Defendants reliance upon dicta in *Skeoch v. Ottley,* 377 F.2d 804, 808 (3rd Cir. 1967) misses the mark, as that case held that responsibility for publication is a factual question which is normally for the jury to resolve. 377 F.2d at 808. Indeed, the appeal in *Scheoch* involved a jury verdict, and not a motion to dismiss or summary judgment. The facts and principle in *Skeoch* thus supports the Law Division's decision ordering limited discovery in the instant case. See, *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985), *vacated in part on reh'g,* 763 F.2d 1472 (D.C. Cir. 1985) ("Responsibility for publication is a factual question which is normally for the jury to resolve").

### D. The Law Division Properly Held That Limited Discovery Is Necessary to Determine Whether the Actual Malice Standard Applies, and If So, Whether the Plaintiff Has Satisfied That Standard.

The Defendants devote eight pages to a non-issue, namely, whether the Law Division should have categorized the Plaintiff as a "limited purpose public figure." (Db 16-22). For purposes of appeal, this issue is irrelevant, because even assuming *arguendo* that the actual malice standard applies, such a standard entirely supports the trial court's (1) denial of the Defendants' motion for dismissal, and (2) order directing the parties to engage in limited discovery.

As noted by the New Jersey Supreme Court, "the actual-malice standard is subjective." *Costello v. Ocean Cnty. Observer*, 136 N.J. 594, 615 (1994). The inquiry on summary judgment thus involves an inquiry into the defendant's state of mind when making the statement. Ibid. Malice is shown if the factfinder determines that the defendant in fact entertained serious doubts about the truth of the statement or that defendant had a subjective awareness of the story's probable falsity. Ibid. In this context, the Supreme Court in *Costello* noted the difficulties of ruling in favor of a defendant at the summary judgment stage:

> Rarely will direct evidence exist to meet that burden. Instead, a plaintiff might show actual malice by demonstrating that the defendant had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

> Because the issue of a defendant's state of mind "does not readily lend itself to summary disposition," courts are wary of disposing of cases involving actual malice through summary judgment.

136 N.J. at 615; Accord, *Hopkins v. City of Gloucester*, 358 N.J. Super. 271, 282 (App. Div. 2003); *Gilmore v. City of Paterson*, 694 F. Supp. 3d 561, 566 (D.N.J. 2023). In discussing summary judgment motions, a leading authority states:

> **State of mind or intent.** The motion should ordinarily not be granted where an action or defense requires determination of a state of mind or intent, such as claims of waiver, bad faith, fraud or duress. See, e.g. Auto Lenders v. Gentilini Ford, 181 N.J. 245, 271-272 (2004); Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001); Shebar v. Sanyo Business Systems Corp., 111 N.J. 276, 291 (1988).

Pressler & Verniero, *Current N.J. Court Rules,* Comment 2.3.4 on R. 4:46-2 (Gann 2024).

The Defendants ignore these salient principles, which support the Law Division's decision. The Defendants also ignore the core principle that "a party is entitled to conduct full discovery to find support for a claim before a motion for summary judgment will be entertained, especially when critical facts are within the knowledge of other parties to the action." *Standridge v. Ramey,* 323 *N.J.Super.* 538, 547, 733 A.2d 1197 (App.Div. 1999). Every litigant who has a bona fide cause of

action should be afforded the opportunity for "full exposure" of his or her case. *Velantzas v. Colgate–Palmolive Co., Inc.,* 109 *N.J.* 189, 193 (1988).

In these types of cases, the Supreme Court in *Velantzas* stated that the standard remains that of *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 193 (1963):

> Since this is in an early stage and still not fully developed, we ought to review a judgment terminating it now from the standpoint of whether there is any basis upon which plaintiff should be entitled to proceed further.

And, as noted by the Appellate Division in *D'Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 11 (App.Div. 1992):

> It is inappropriate to grant summary judgment where the suit is in an early stage and the evidence has not been fully developed.

In the instant case, discovery has yet to begin, and is obviously incomplete. Consequently, the Defendants' position on appeal lacks merit.

## POINT II

## THE LAW DIVISION CORRECLY HELD THAT THE STATEMENTS AT ISSUE WERE DEFAMATORY AS A MATTER OF LAW.

In Point IV, the Defendants assert that the statements at issue were not defamatory, and merely constituted "loose, figurative or hyperbolic language" or alternatively, merely represented "name calling, epithets, and abusive language." (Db 25). They also rely upon a perception that "accusations during a heated political campaign are likely to carry less credibility for the average person." (Db 26).

Such arguments lack merit and are easily rebutted.

"A defamatory statement is one that is false and is injurious to the reputation of another or exposes another person to hatred, contempt or ridicule" or subjects another person to a loss of the good will and confidence in which he or she is held by others." *Hyman v. Rosenbaum Yeshiva of N. Jersey*, 258 N.J. 208, 236–37 (2024), quoting *Decker v. Princeton Packet, Inc.*, 116 N.J. 418, 425-26 (1989).

To determine if a statement has a defamatory meaning, a court must consider three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement. *Leang,* 198 N.J. at 585. A court looks "to the fair and natural meaning [to be given to the statement] by reasonable persons of ordinary intelligence." *Romaine v. Kallinger,* 109 N.J. 282, 290 (1988).

A statement falsely attributing criminality to an individual is defamatory as a matter of law. Id. at 291.

Here, the statements at issue do not represent non-actionable name calling, hyperbole or loose language. Instead they paint the Plaintiff as a criminal involved in a scheme to defraud the general public. These Defendants are also accusing the Plaintiff of having the authority to grant permits to builders via payoffs. However, they know full well that Plaintiff had no authority to issue, grant, or approve building permits. At the end of the day, constitutional law and common law principles are both grounded in the same common-sense inquiry: how would the average reader understand the statement? *See Kotlikoff v. The Community News*, 89 N.J. 62, 71 (1982) ("The ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions. Accusations of criminal activity, even in the form of opinion, are not constitutionally protected"). As the Supreme Court has summarized, the test is whether the statement would "'have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson v. New Yorker Magazine Inc.*, 501 U.S. 496, 517 (1991). As long as *one* plausible understanding of how that average reader would understand the statement is that it asserted a defamatory fact, the case moves forward. The Defendants do not get a

"get out of jail free card" for surrounding otherwise factual defamatory statements with vulgarity and self-indulging histrionics.

In New York, courts have found that statements such as, "it pays to do business with the mayor"; that "plaintiff is profiting in his law practice at the Village's expense"; and that "his administration is corrupt" were statements of fact capable of being defamatory. *Silsdorf v Levine*, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822 (N.Y.1983), *cert. denied* 464 U.S. 831 (1983).

These are precisely the category of statements at issue here. The Defendants' publications can only be construed in a manner that seeks to attack Plaintiff's character and reputation in an effort to bolster Defendants' campaign efforts, a campaign that the Plaintiff was not a candidate or party to. By targeting the Plaintiff and attacking his name and reputation with false and accusatory language, the Defendants crossed the line permitted in the admittedly volatile arena of political campaigning. As to this election, Plaintiff was simply a spectator, not a candidate.

In this respect, the Law Division correctly reasoned as follows, emphasizing the fact that the Defendants accused the Plaintiff of criminal conduct:

> That Kris Kim is scheming to pay off Democrat professionals, with Wunsch's photo prominently displayed.
>
> That Wunsch "gets paid to run the Democrat Party. IS THIS ILLEGAL BEHAVIOR?" when coupled with the allegation that Kim is scheming to pay Wunsch, and positioned directly beneath the statement that Wunsch was paid

$800K+.

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That Wunsch "was paid $800k+" is not a false statement, but the message is that he got paid that as part of a scheme to pay off professionals, for which defendants have not proffered a truth defense.

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IS KRIS KIM HELPING BERGEN COUNTY DEMOCRATS FILL THEIR COFFERS BY ARRANGING TO BUILD THROUGH WUNSCH?

Although phrased as a question, when taken in the context of the entire flyer, the same defamatory message is there—that Wuncsh is part of a scheme to divert Borough monies to Democrat cronies. The elements of this are the prominent side-by-side display of Wunsch's photograph with the Democrat mayoral candidate, Kris Kim, statements that builders are waiting for Kim to become Mayor while saying Wunsch is the EC Democrats Leader and Defacto mayor and was paid $800K+.

These are statements as described in Ward—they imply underlying facts that plaintiff states are false and as to which defendants have offered no truth defense. Defendants' argument that an accusation of being part of a payoff scheme does not connote criminal conduct falls flat. "To establish the defamatory nature of the articles it was not necessary for plaintiffs to prove that defendants had accused them of the commission of a crime . . . . The statement that plaintiffs 'may be' charged with criminal conduct diminishes their standing in the community and is little different from an assertion that plaintiffs have actually been charged with certain crimes." Lawrence v. Bauer, 89 N.J. at 459–60.

Defendants do not assert truth as a defense — they do not allege there is actually a scheme of corruption and payoffs in which Wunsch is the ringleader or, at a minimum, a key player.

(Da 256-257).

This sound reasoning should be affirmed on appeal.

## POINT III

## THE LAW DIVISION ACTED PROPERLY IN ORDERING DISCOVERY ON THE PLAINTIFF'S LIBEL CLAIM AND DENYING THE DEFENDANTS' REQUEST FOR COUNSEL FEES.

In Point IV, the Defendants complain that the Law Division erred in not dismissing the Plaintiff's libel claim. As to this issue, the Law Division relied upon the fact that discovery is necessary for a proper resolution on this issue. (Da 259).

This reasoning is sound, for the reasons set forth in Point I above.

In Point V, the Defendant appeal the denial of their request for counsel fees under UPEPA, claiming that it should have prevailed in its attempts to dismiss the Complaint. (Db 27-28).

For the reasons set forth in Points I and II, the Law Division's decision does not warrant reversal on appeal. Thus, the Defendants' argument as to counsel fees is thus untenable and without support.

## CONCLUSION

For the foregoing reasons, the Plaintiff-Respondent, Albert H. Wunsch, III, respectfully requests the Appellate Division to affirm the Order and Decision entered by the Law Division of Bergen County on May 31, 2024.

Respectfully Submitted,

*// Albert H. Wunsch, III //*
ALBERT H. WUNSCH, III, ESQ.

Date: November 6, 2024

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|---|---|
| ALBERT H. WUNSCH, III,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>MARK PARK, TIM KOUTROUBAS, INFO@ENGLEWOODCLIFFS.COM<br><br>Defendants/Non-Appellants<br><br>CTE REPUBLICANS FOR ENGLEWOOD CLIFFS, ZHI LIANG, RIVKA BIECAGZ, and PENNY ROUSOULI,<br><br>Defendants/Appellants. | SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION<br><br>DOCKET NO.: A-003239-23<br><br>CIVIL ACTION<br><br>On Appeal from:<br>Trial Docket No. BER-L-5605-23<br><br>SAT BELOW:<br>HON. Mary F. Thurber, J.S.C. |

# REPLY BRIEF IN FURTHER SUPPORT OF APPEAL BY DEFENDANTS CTE REPUBLICANS FOR ENGLEWOOD CLIFFS, ZHI LIANG, RIVKA BIECAGZ, AND PENNY ROUSOULI

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

# TABLE OF AUTHORITIES

**Page(s)**



## Statutes



## Rules



## Table of Judgments, Orders and Rulings Being Appealed

## STANDARD OF REVIEW

Defendants believed the standard of review was axiomatic and did not require a full recitation to the panel. It is readily apparent that Defendants gave Plaintiff far too much credit because it is fundamental law in New Jersey that appellate courts review decisions of the trial court on motions to dismiss and summary judgment motions *de novo*, and that there is no deference given to the legal conclusions of the trial court in this matter. See AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co., 256 N.J. 294, 310 (2024); Sackman Ent., Inc. v. Mayor & Council of Belmar, 478 N.J. Super. 68, 75 (App. Div. 2024).

## POINT I

### PLAINTIFF'S OPPOSITION MISAPPREHENDS THE STANDARD FOR DECIDING A MOTION TO DISMISS UNDER THE UPEPA. (PB16)

Plaintiff argues that his case should not be dismissed because he is entitled to discovery on the element of publication and whether the actual malice standard applies, and if it applies, then also discovery as to whether there was actual malice by Defendants. (Pb18). Defendants disagree, but the Complaint must be dismissed in either event because if it is determined that the UPEPA applies to this case, which Plaintiff concedes (Pb17) (despite his incorrect red herring assertion that the UPEPA is limited to development cases), then the action "shall" be dismissed with prejudice if "(a) the responding party [Plaintiff] fails to establish a prima facie case as to ***each essential element*** of any cause of

action in the complaint" (N.J.S.A. § 2A:53A-55(a)(3)) (emphasis supplied), which are the exact circumstances under which this appeal is made.

Courts in other jurisdictions that have enacted the UPEPA have similarly concluded that a plaintiff is required to come forward with actual evidence. See Davenport Extreme Pools & Spas, Inc. v. Mulflur, 698 S.W.3d 140, 159, 2024 WL 2982718 (Ky. Ct. App. June 14, 2024) (Motion to dismiss under the UPEPA was properly granted as to alleged defamatory statement that plaintiff was a "thug" because Plaintiff made "no showing of actual damages."); see also Jha v. Khan, 24 Wash. App. 2d 377, 397-98, 520 P.3d 470 (Wash. Ct. App. 2022), review denied, 530 P.3d 182 (Wash. 2023). Notably, the UPEPA requires that, "[i]n applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." N.J.S.A. § 2A:53A-59.

Thus, this Court must construe the requirements of the UPEPA in this case consistent with the obligation that Plaintiff come forward with competent evidence in support of each and every element of his claims. Plaintiff having failed to do so; Defendants respectfully submit that this appeal must be granted in its entirety.

## POINT II

## PLAINTIFF FAILED TO MEET HIS BURDEN TO ESTABLISH EACH ESSENTIAL ELEMENT OF HIS CAUSES OF ACTION.

### A. Plaintiff Failed to Establish That The Subject Statements Constitute Actionable Defamation. (Pb27)

According to New Jersey common law, the statements underlying Plaintiff's Complaint amount to nothing more than hyperbolic rhetoric arising from Plaintiff's involvement in a hot-button political issues at the heart of local politics in the borough of Englewood Cliffs. As such, they fall well short of actionable defamation even if Plaintiff were not required to prove Defendants acted with *actual malice*. Whether the meaning of a statement is susceptible to a defamatory meaning is a question of law for the court (Kotlikoff v. Community News, 89 N.J. 62, 67 (1982)), and the reviewing court must analyze the statement in the context in which the statement was made, as well as other statements surrounding the alleged defamatory statement. See Jha v. Khan, 24 Wash.App.2d 377, 520 P.3d 470, 478 (Wash. Ct. App. 2022). This is particularly true where the statements were made as part of a political discourse.

In the political context, the New Jersey Supreme Court has stated that name calling, epithets, rhetorical hyperbole and abusive language are not actionable because they do not have a defamatory content since no harm to reputation can be shown, nor are such statements defamatory when viewed in

the context of a political race. Ward v. Zelikovsky, 136 N.J. 516, 529-30 (1994). Moreover, "[e]ven apparent statements of fact may assume the character of opinions, and thus be privileged, when made in 'public debate, heated labor dispute, or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole.'" Jha v. Khan, 520 P.3d 470, 481 (Wash. Ct. App. 2022), review denied, 530 P.3d 182 (Wash. 2023). While Plaintiff repeatedly asserts he was not a political candidate and maintained no political signs on his property, for purposes of a defamation claim it makes no difference where the statements were still part of a political discourse.

For example, in Jha v. Khan,[1] the plaintiff was a private citizen, and property developer, who brought a defamation action against the defendant political candidate for certain statements made by her during her political campaign. Id. at 475. As part of defendant's campaign against the incumbent council member, she published an article stating that her political rival "has a history of taking money from developers and putting their interests above the

[1]While Jha is an out-of state case, it was decided under the Washington State UPEPA, and since UPEPA requires that it must be broadly construed and uniformly applied between states that have adopted the uniform statute, the holdings in Jha should be deemed as precedential as to any case issued out of the New Jersey courts.

public interest." Id. The article further stated that plaintiff's development proposal threatened "to create a dangerous precedent where developers can disregard public transparency." Id.

The defendant moved to dismiss under UPEPA, which was denied. On appeal, the court reversed and dismissed the complaint, finding that defendant's statements were a matter of public concern in that "the article posits that [the rival] councilmember Myers votes in the interest of unsavory business interests and political financiers rather than his constituents and it urges Redmond residents to vote for [defendant] Khan as the better alternative." Id. at 478. The court further held that the "official activities of an elected representative are without question a matter of public concern" and that "a political candidate 'has a protected right to speak in furtherance of [her] candidacy.'" Id. This analogous fact pattern is precisely what is before this Court on this appeal.

Similarly, in the persuasive opinion of Rogers v. Mroz, 252 Ariz. 335, 502 P.3d 986 (2022), Wendy Rogers and Steve Smith were rival candidates in a primary election for United States representative. Id. at 502 P.3d at 989. As part of her campaign, Rogers ran a radio advertisement describing her opponent as "a slimy character whose modeling agency specializes in underage girls and advertises on websites linked to sex trafficking." Id. The Supreme Court of Arizona noted that, while there could be many implications if the statement were

viewed in isolation, the advertisement as a whole implied to listeners: Smith was "slimy." Id. In granting the motion to dismiss the defamation complaint by the modeling agency, the court recognized that if the claim were allowed to proceed, it would open the floodgates to anyone referenced in a political campaign, which would intolerably chill the right to free speech. Id. at 995.

Political speech, like that at issue in this action, is unlike other forms of speech and is given significant deference, especially in modern politics, where people expect extreme mudslinging by political rivals. As held by the Jha court:

> … the right to free speech is especially important during political campaigns and a certain amount of inflammatory rhetoric is to be expected. Seaquist, 8 Wash. App. 2d at 566-67, 438 P.3d 606 (stating that "the First Amendment applies to the fullest extent during a political campaign" and "audiences here ... would fully expect political campaign materials to be saturated with mischaracterizations, rhetoric, and exaggeration"); Rogers, 502 P.3d at 995 (" '[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.' " (second alteration in original) (internal quotation marks omitted) (quoting Boos v. Barry, 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988))). 520 P.3d at 481.

Just as with the statements in Jha and Rogers, when viewed in the context of a heated political campaign, the statements at the heart of this appeal were merely part of a broader political advertisement against incumbent political opponents and are fully protected by the First Amendment and NJ Constitution. Plaintiff's unavailing opposition is underscored by the observation that his entire legal

argument on this issue rises and falls with Silsdorf v. Levine, 59 N.Y.2d 8 (N.Y. 1983), cert. denied 464 U.S. 831, 104 S. Ct. 109 (1983). (Pb29). In Silsdorf, the New York Court of Appeals addressed the lower court's dismissal of the plaintiff's complaint for lack of legal sufficiency, akin to a motion to dismiss for failure to state a claim under New Jersey's R. 4:6-2. As such, the Silsdorf Court only substantively ruled that the plaintiff's allegations were legally sufficient to state a cause of action for defamation and that the complaint should not have been dismissed at the pleadings stage without any finding as to whether the statements were defamatory. Silsdorf, 59 N.Y.2d at 10.

Finally, Plaintiff argues that Defendants did not establish the truth of the subject statements, which impermissibly shifts the burden of proof owned entirely by Plaintiff. In this case, Plaintiff's Complaint (and Amended Complaint) must be dismissed because Plaintiff failed to meet his burden of coming forward with *actual* evidence that the subject statements were factually false.

### B. Plaintiff Failed to Properly Plead and Establish the Requisite Element of Actual Malice and the Trial Court Erred By Granting Plaintiff Limited Discovery. (Pb27)

It should be axiomatic that the actual malice and proof by clear and convincing evidence standard applies here, where the alleged defamatory statements were part of political advertisements and concerned local issues of

significant public importance in the Borough. Even before the UPEPA was enacted, the courts of our state have made it abundantly clear that "[s]peech on 'matters of public concern [is] at the heart of the First Amendment's protection' and 'occupies the "highest rung of the hierarchy of First Amendment values."'" Neuwirth v. State, 476 N.J. Super. 377, 391 (App. Div. 2023) (internal citations omitted).

Moreover, Plaintiff's Verified Complaint arises from his conduct and behavior in his role as "Special Counsel" to the borough of Englewood Cliffs. (Pb11). The behavior of attorneys is indisputably a matter of public concern in New Jersey, particularly when those attorneys, as is the case here, represent public bodies. See Cohen v. Radio-Elecs. Officers Union, Dist. 3, NMEBA, 146 N.J. 140, 155 (1996); see also Schwartz v. Worrall Publications, Inc., 258 N.J. Super. 493, 499 (App. Div. 1992) (Holding that "we have no hesitation concluding that Schwartz is a public figure," where the alleged defamatory statements arise out of his legal representation of a public entity). Thus, discovery is not required to determine if the actual malice standard applies.

Where actual malice applies, this Court very recently ruled on what is required to plead and establish actual malice. In Herman v. Muhammad, the plaintiff was a teacher who "brushed back" a second-grade student's loose-fitting hijab that plaintiff mistook for a hood. A-0784-23, 2024 WL 4489630, at

*1 (N.J. Super. Ct. App. Div. Oct. 15, 2024)[2]. Plaintiff apologized to the student for her mistake and the class proceeded without incident. Id. The following day, defendant, Ibtihaj Muhammad, an Olympic medal fencer, who wears a hijab, posted on social media, stating that the hijab was forcibly removed despite the student's efforts to resist and referring to the situation as an act of "racism and bigotry." Id. On a motion to dismiss, the court plainly held that the actual malice standard applied because plaintiff is a teacher in a public school. Id. at 5.

Additionally, the court stated that the plaintiff's amended complaint did not sufficiently allege a prima facie case of defamation because the plaintiff merely "makes conclusory claims—with no factual support—that defendants knew the statements were false, were made with reckless disregard as to their truth, or they had reason to doubt their truth [and her] … allegations fail to address defendants' subjective intent in making their statements." Id.

In the case at bar, the closest that Plaintiff comes to even pleading actual malice is stating that "Defendants acted intentionally in knowing the information they published was false and damaging." (Da13, ¶ 26). Likewise, in Plaintiff's Amended Complaint, he reasserted this same conclusory allegation and also added the equally conclusory allegation that "At all times relevant to

[2]Pursuant to R. 1:36-3, Defendants are not aware of any contrary unpublished opinions as of the filing date of this brief.

this Complaint, all Defendants were well aware that the information they disseminated to the general public was completely false." (Da195). These are the same conclusory claims that the court rejected in both Neuwirth and in Herman – that they merely restated the applicable legal standard were not assertions of fact– and warranted the dismissal of the complaint for failure to state a cause of action upon which relief can be granted pursuant to the UPEPA at N.J.SA. § 2A:53A-55(a)(3)(b)(i).

However, not only does Plaintiff fail to adequately plead actual malice, but he also failed to furnish any evidence to the trial court to "establish" a prima facie case of actual malice under the UPEPA. N.J.SA. § 2A:53A-55(a)(3)(a). Plaintiff provided not even a scintilla of evidence that any of the defendants entertained serious doubts as to the truth of the alleged statements.

There are no facts that Plaintiff has or even can allege, not to mention provide evidence of, to support the element of actual malice. In Plaintiff's opposition to the motion to dismiss, Plaintiff argued that he satisfied the actual malice standard. (Pb27). The only "facts" alleged in his brief, and are unsupported by any evidence in the record, are equally conclusory in that "the Defendants are all politically connected residents and/or current and former council members" and therefore, they fully understood that the statements are nothing short of fabrication" and that they also have OPRA access to Borough

records and failed to ascertain the truth behind the statements. (Pb28-29). Such statements, even if true, still fail to establish actual malice, particularly since a failure to investigate is not a basis for establishing actual malice. See Herman, 2024 WL 4489630, at *5 ("Mere failure to investigate all sources [of information to be published] does not prove actual malice."). Indeed, the only evidence in the record from Plaintiff is a copy of the proposed letter of apology that he was sent on behalf of the defendants, wherein they expressed that they had believed the statements were true. (Da230).

With the overwhelming legal authority in favor of Defendants' appeal, Plaintiff's desperate attempt to fend off dismissal by virtue of his request for limited discovery is not supported by the law. No amount of discovery will change whether or not Plaintiff is a limited purpose public figure; it is a legal issue. In fact, the Neuwirth panel addressed the specific issue of discovery in these types of cases. The court in Neuwirth observed that "our Supreme Court has held, in a defamation case, '[i]t is not enough for plaintiffs to assert … that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can 'bolster a defamation cause of action through discovery, but not [] file a conclusory complaint to find out if one exists.'" Neuwirth v. State, 476 N.J. Super. at 391. (internal citations omitted).

Plaintiff having failed to plead or establish the element of *actual malice*, which applies to Plaintiff's claim as a limited purpose public figure involved in issues of public concern, and the trial court having erred in denying Defendants' motion to dismiss to afford Plaintiff limited discovery, it is respectfully submitted that Defendants' appeal should be granted dismissing Plaintiff's Verified Complaint (as well as his Amended Complaint) against Defendants.

### C. Plaintiff Failed to Meet His Burden of Establishing Defendants "Published" The Alleged Statements, and the Trial Court Erred by Granting Plaintiff Time For Discovery. (Pb21)

Plaintiff's brief erroneously asserts, "it is undisputed that statements were published to a third party by the Defendants[,]" (Pb21) a blatant misrepresentation to this panel. He then adds another false statement in claiming Defendants Park, Liang, and Biegacz [sic] "attached" their names to the flyers (Pb22), which is not supported by a shred of evidence in the record or otherwise. Plaintiff's claims have been undermined by bare, sweeping, conclusory allegations from the inception of this dispute. However, Plaintiff presenting the aforementioned accusations as "undisputed" truths demonstrates Plaintiff's desperation to preserve his Complaint in the face of overwhelming legal authority warranting its dismissal – even if that requires Plaintiff to misrepresent facts to the Court as he does here.

As set forth in Defendants' opening brief (Db13), there is no question that Plaintiff has the legal burden under the UPEPA to present competent evidence to establish that Defendants published/communicated the alleged defamatory statements to a third party. The trial court conceded as much in its decision below, providing in pertinent part:

> The court cannot determine on this record that plaintiff has established this element at this stage against defendants Liang, Biecazg [sic], or Rousouli. The allegations are sufficient to *plead* this element of the defamation causes of action, *sufficient to avoid dismissal on that basis*.

(Da252-253). The import of the passage above is two-fold: first, the trial court agrees with the defense that Plaintiff failed to meet his evidentiary burden under the UPEPA to establish this essential element of his claim; second, had the trial court applied the appropriate standard governing a motion to dismiss under the UPEPA (Point I, *infra*), Plaintiff's Complaint should have been dismissed by the trial court and the instant appeal would not have been necessary. Plaintiff's argument that "[t]he fact that the Law Division may have employed Rule 4:6-2 reasoning in place of the "prima facie" reasoning of Rule 4:46 is neither here nor there[,]" is not only nonsensical, but also the crux of the appeal before this panel.

Instead, Plaintiff holds out the need for discovery in hopes that his unsupportable claims will survive dismissal. As set forth above, a plaintiff can

bolster a defamation cause of action through discovery but cannot use it to find out if one exists. If Defendants' publication of the statements was truly "undisputed," as Plaintiff claims, he would not need the discovery he so desperately clings to as a final resort to avoid dismissal of his speech-stifling Complaint. Plaintiff cannot have it both ways. He cannot misrepresent to the Court that he has satisfied his evidentiary burden under the UPEPA via alleged "undisputed" facts, while simultaneously claiming that he should be entitled to discovery to unearth the evidence that he has thus far failed to present. Having no basis in fact or law for Plaintiff's opposition, it is respectfully submitted that Defendants' appeal should be granted in its entirety.

### D. Plaintiff Failed to Meet His Burden of Establishing He Sustained Any Damages and the Trial Court Erred by Granting Plaintiff Time For Discovery. (Pb31)

Defendants fully addressed Plaintiff's evidentiary failures related to his damage claims, as well as the trial court's failure to dismiss his libel per se claim to allow limited discovery on this element of his claim. (Db35). Nevertheless, Plaintiff's opposition fails to assert any arguments against this point and thus, tacitly concedes that he failed to provide evidence to establish a prima facie case of *actual* damages. N.J.S.A. § 2A:53A-55(a)(3).

Plaintiff failed to present an iota of competent evidence that he suffered any legal harm in connection with the claims in the Verified Complaint beyond

his own self-serving statements, alleging scant instances of hearsay encounters with unidentified members of the public. Such gratuitous statements are insufficient to establish a prima facie case to defeat a motion for summary judgment (see Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted)) and do not suffice to meet Plaintiff's burden under the UPEPA. Instead, to avoid dismissal, Plaintiff was required to adduce concrete proof that he or she was harmed, either by way of pecuniary losses or injury to his reputation by way of affidavits from third parties attesting to their lowered opinion of him as a result of the political ads. see McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 319–21 (App. Div. 2000).

Furthermore, since pecuniary or reputational damages are within Plaintiffs' personal knowledge and sole ability to acquire, there is no discovery from Defendants that he would need in order to present evidence to the court to sustain his legal burden. Having failed to do so, his complaint, as well as his amended complaint, must be dismissed with prejudice.

## CONCLUSION

For the foregoing reasons, Defendants respectfully submit that Plaintiff's opposition must be categorically rejected in favor of Defendants' entitlement to the entry of an Order granting this appeal in its entirety.

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