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MICHAEL GILLIAM

Plaintiff

vs.

TOWNSHIP OF FRANKLIN,
COMMUNITY FIRE CO., #1, AKA
STATION 25 VOLUNTEER FIRE CO.,
EAST FRANKLIN FIRE DEPARTMENT
STATION 27, FRANKLIN TOWNSHIP
FIRE DISTRICT # 3, DOUGLAS
KRUSHINKSI, DANIEL KRUSHINSKI,
CHRISTOPHER FISCHER, RICHARD
RIES, AND HERMAN CALVO

Defendants

SUPERIOR COURT OF NEW JERSEY
SOMERSET COUNTY
LAW DIVISION

DOCKET NO. L-559-11

CIVIL ACTION

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Quinn M. McCusker
Jay A. Gebauer
On the Brief

PRELIMINARY STATEMENT

The plaintiff, Michael Gilliam, an elected official, filed this Complaint against the defendants seeking recovery for defamation, false light and intentional infliction of emotional distress (IIED).

Beginning in 2003, Mr. Gilliam was elected as a Commissioner of the Franklin Township Board of Fire Commissioners for Fire District #3. During the time period relevant to this case (2010), the plaintiff was elected to be the Chairman of the Board of Fire Commissioners. Prior to being elected to the Board of Fire Commissioners, the plaintiff served as a firefighter in Community Volunteer Fire Company (Station 25), which is under the jurisdiction of Fire District #3.

The plaintiff named District #3, Station 25, East Franklin Fire Department (Station 27) and the Township of Franklin as defendants. The individual defendants include members of the fire houses in District #3: Chief Richard Ries and Herman Calvo from Station 25 and Chief Daniel Krushinski and Christopher Fischer from Station 27. The plaintiff also named Douglas Krushinski, a fellow Fire Commissioner, as a defendant.

Mr. Gilliam contends that the defendants falsely claimed he engaged in illegal or immoral liaisons with minors. The plaintiff's allegations stem from an April 19, 2010 letter signed by the defendants, Ries, Calvo, (Daniel) Krushinski and Fischer. Defendant, Douglas Krushinski did not sign the letter. This letter included a copy of the plaintiff's MySpace profile from 2006. This profile contained a photo of the plaintiff (who was in his 20s at the time), but indicated that he was a 14-year-old boy. The profile contained the tagline "intimacy is that of legitimacy."

The April 19 letter was addressed to the attorney for District #3 and distributed to the Executive Committee of Fire District #3, which they discussed during the executive committee portion of their April 21, 2010 meeting. The letter indicates that they found the plaintiff's actions, specifically that of describing himself as 14 years old, to be unfitting behavior for an elected official. They requested that Mr. Gilliam immediately resign as Commissioner of Fire District # 3.

Thereafter, some of the individual defendants addressed the MySpace issue during a Franklin Township Board of Fire Commissioners' meeting on May 19, 2010 and during a May 25, 2010 Franklin Township Council Meeting. The April 19 letter was not read into the record or distributed during these meetings. Finally, the MySpace issue was addressed on websites for Stations 25 and Station 27. The April 19 letter was not reproduced on the websites.

The defendants now move for summary judgment. The public entity defendants must be dismissed as they are immune under the Tort Claims Act. Specifically, public entities cannot be held vicariously liable for their employees' actions if those actions constitute actual malice or willful misconduct. Every count of the plaintiff's Complaint alleges the defendants acted with malice.

The individual defendants must be dismissed as well. None of the defendants' conduct was defamatory. Even assuming, for argument's sake, some of the alleged conduct could be found to be defamatory, the plaintiff's Complaint must still be dismissed.

First, as an elected official, the plaintiff must satisfy a substantial burden to defeat this motion. Specifically, the plaintiff must show the defendants acted with "actual malice." At this point, relevant discovery is complete and nothing in the record supports the plaintiff's

allegations that the defendants acted with actual malice. The defendants were troubled by the fact that, as an elected official, the plaintiff lied about his age and claimed to be 14 years old on a profile referencing intimacy. Their conclusions and opinions were based upon objective facts and, therefore, cannot rise to the level of actual malice. Absent a showing of actual malice, summary judgment is the preferred method of disposing of this type of defamation claim.

Second, even if the defendants' actions were defamatory (which the defendants expressly deny), summary judgment is still appropriate. Specifically, since the April 19 letter was distributed only to members of the Executive Committee and discussed in detail during the executive session for the purpose of addressing potential issues with the plaintiff's MySpace page, the defendants are entitled to qualified privilege.

As outlined above and in more detail below, summary judgment is appropriate and the plaintiff's Complaint must be dismissed with prejudice.

STATEMENT OF MATERIAL FACTS

1. This claim arises out of a series of events occurring in 2010 which plaintiff alleges involved defamatory conduct by the individual defendants.

2. For the purpose of deciding this motion, discovery is complete.

PLAINTIFF'S ALLEGATIONS

3. On June 2, 2010, the plaintiff filed a Notice of Claim pursuant to the Tort Claims Act upon Station 27.

4. Thereafter, on July 22, 2010, the plaintiff filed the Tort Claims Notice on Franklin Township Fire District #3.

5. A true and exact copy of the plaintiff's Notice of Tort Claims on Behalf of Michael Gilliam (without attachments) is attached hereto as "Exhibit A."

6. At the time the Notice was filed, the plaintiff indicated he was a Commissioner of Fire District #3 of the Township of Franklin. (Exhibit A, #4).

7. The Notice indicates that, in his capacity as the Fire Commissioner, he recommended that certain fire departments and/or fire houses receiving public funding be subjected to financial oversight and audit. (Exhibit A, #4).

8. The Notice indicates that in April and May of 2010, township employees retaliated against the plaintiff and:

[C]reated, distributed, and published written and verbal false statements accusing and portraying Mr. Gilliam as a person that engages in 'illegal or immoral liaisons' with minors. These...employees...have intentionally and maliciously made false statements regarding Mr. Gilliam portraying him as someone who engages in unlawful sexual acts with minors.

These false statements regarding Mr. Gilliam were made part of and pursuant to a malicious and purposeful campaign to force Mr. Gilliam to resign from his position of Commissioner in retaliation for his requests for oversight and financial audits of the fire department and/or fire houses of Franklin Township. [The individual defendants], with malice, expressly and explicitly threatened Mr. Gilliam with the exposure and publication of false and defamatory statements about him if he did not resign from his position as Commissioner.

...

[The individual defendants] made and published the false and defamatory statements regarding Mr. Gilliam...

[The individual defendants] also made false and defamatory statements Mr. Gilliam was not in compliance with the residency requirements for holding office in Franklin Township.

(Exhibit A, #4).

9. The plaintiff alleges the following individuals are responsible for the defamatory statements: Daniel Krushinski - Chief of East Franklin Fire Department; Douglas Krushinski - Commissioner, Franklin Township Fire District; Christopher Fischer - President, East Franklin Fire Department; Richard Ries - Chief, Community Fire Department; and Herman Calvo - Board Chairman, Community Fire Department. (Exhibit A, #4).

10. On March 30, 2011, the plaintiff filed a Complaint against the above-referenced individuals as well as numerous public entities: The Township of Franklin, Community Fire Co. #1, a/k/a Station 25 Volunteer Fire Company, East Franklin Fire Department Station 27 and Franklin Township Fire District #3.

11. A true and exact copy of the plaintiff's Complaint is attached hereto as "Exhibit B."

12. The Complaint indicates that the plaintiff was elected as a Commissioner of the Fire Board of Franklin Township Fire District #3 in 2003. Prior to this, he served as a volunteer firefighter. (Exhibit B, ¶ 12).

13. In 2009, the plaintiff was elected as the chairman of the Fire Board of Franklin Township Fire District #3. (Exhibit B, ¶ 16).

14. In March of 2010, he recommended that audits be conducted on the two fire departments comprising the Franklin Township Fire District #3, which included Community Fire Department #1 (Station 25) and East Franklin Fire Department (Station 27). (Exhibit B, ¶ 17).

15. According to the plaintiff, these audits were required by statute N.J.S.A. 40:5-2,¹ but had not been run since he was first elected Commissioner in 2003. (Exhibit B, ¶ 18).

16. The plaintiff claims he was concerned with how public money totaling more than \$1.162 million had been spent during that period. (Exhibit B, ¶ 18).

17. According to the Complaint, the plaintiff's request for audits was immediately met with hostility and resistance. (Exhibit B, ¶ 19).

18. Thereafter, the plaintiff alleges the defendants "embarked on a calculated campaign of retaliation and defamation in a concerted effort to force Mr. Gilliam to resign as Chairman." (Exhibit B, ¶ 20).

¹ N.J.S.A. 40:5-2

Any county or municipality may make a voluntary contribution of not more than \$ 70,000 annually to any duly incorporated first aid and emergency or volunteer ambulance or rescue squad association of the county, or of any municipality therein, rendering service generally throughout the county, or any of the municipalities thereof. In addition, if any such associations experience extraordinary need, the county or municipality may contribute an additional amount of not more than \$ 35,000.00 annually; provided, however, that the need for such additional funds is established by the association and is directly related to the performance of said association's duties. Whenever the total annual county or municipal contribution to an association exceeds \$ 70,000, the chief financial officer of the county or municipality shall receive an audit performed by a certified public accountant or a registered municipal accountant of each association's financial records for the current year which shall certify to the governing body of the county or municipality that such records are being maintained in accordance with sound accounting principles.

19. Specifically, the plaintiff alleges the defendants Daniel Krushinski, Christopher Fischer, Richard Ries and Herman Calvo signed a letter dated April 19, 2010 which was sent to the City Attorney for Franklin Township, Mr. Barnes (plaintiff's Complaint incorrectly indicates it was sent to the people of Franklin Township) indicating:

...Enclosed you will find the printout of a disturbing social networking page [owned] by the current Chairman of the Board, [plaintiff]. In this "profile" he attempts to imitate a 14-year-old boy. The purpose of social networking sites such as MySpace is to make contact with new individuals based on the information posted. We are deeply concerned for the welfare of any minors who may choose to contact Michael via this alias, and disturbed at the prospect of accepting guidance and leadership from an individual who brazenly displays deceptive and immoral information...

We believe that [plaintiff] intends to engage in potentially illegal or immoral liaisons with individuals of this age group, assuming he has not already done so. [Plaintiff] is well into his twenties, and we find this prospect to be reprehensible, and completely unfitting behavior for an elected official.

Accordingly, we request that [plaintiff] immediately resigns as a Commissioner... While we wish we could have imagined that he had innocent intentions for the use of his webpage, past acts lead us to believe otherwise. His actions are immoral and possibly criminal, making him unfit to represent the taxpayers of our district...

A true and exact copy of the April 19, 2010 letter is attached hereto as "Exhibit E."

20. Attached to this letter was a print-out of plaintiff's MySpace page for "Mysterywriter20." [sic] (Exhibit B, ¶ 22, Exhibit E).

21. The MySpace page contains a picture of the plaintiff with the quote "Intimacy is that of Legitimacy." (Exhibit E).

22. Thereafter, on April 21, 2010, at a District #3 Fire Commissioner's public meeting, defendant, Daniel Krushinski informed Mr. Gilliam that he and the entire Board has "received a letter" and accused him of "actions unbecoming a Fire Commissioner." (Exhibit B, ¶ 23).

23. According to the Complaint, Defendant Daniel Krushinski went on to "threaten" Mr. Gilliam by stating: "I have contacts with everybody from here to Toledo with newspapers, and before it gets that far, that's why all these people are here, I'm going to ask that you please resign at the end of the meeting." (Exhibit B, ¶ 24).

24. Defendant, Daniel Krushinski then stated that he received information from another individual that did some background searching and it comes from Burlington County," and warned Mr. Gilliam. "I think you know what it is..." (Exhibit B, ¶ 25).

25. Defendant Daniel Krushinski also allegedly "threatened" that if the plaintiff did not resign, Krushinski would publish this "information" in the *Star-Ledger* and the *New York Post* newspapers and that he would further jeopardize Mr. Gilliam's employment with the Federal prison system. (Exhibit B, ¶ 26).

26. Immediately thereafter, Defendant Herman Calvo spoke publicly to Mr. Gilliam stating, "There's papers going around the streets, everything Michael, your pictures are on them Michael, nobody else's. You are a disgrace to District 3. You should resign immediately. It's coming down the road, that's all I can tell you." (Exhibit B, ¶ 27).

27. Thereafter, on May 5, 2010, representatives of Stations 25 and 27 put a statement on their websites indicating the plaintiff was "bullying" the Commissioners and making decisions on his own to the detriment of the taxpayers. (Exhibit B, ¶ 28). Although they "attempted to keep these matters private for Commissioner Gilliam's sake and asked him to

step down”, since he did not step down, they decided to bring these matters to light. (Exhibit B, ¶ 29).

28. After the web site postings, the plaintiff received an anonymous letter at his grandfather’s home addressed to “Mr. Rule Maker,” indicating:

Here are some things to keep you up to speed on what’s going on in fire District #3. We ask you to please step down by Tuesday night’s meeting or we are going to be forced to send this same package to your bosses at the prison in Fort Dix. Just to think the biggest rule maker was the biggest rule BREAKER what a jerk off.

Exhibit B, ¶ 31, Exhibit F

29. The Complaint also alleges that Defendant, Daniel Krushinski publicly defamed the plaintiff at a May 19, 2010 meeting of the Board of Fire Commissioners when he read the April 19, 2010 letter aloud to the audience. (Exhibit B, ¶ 32).

30. The Complaint alleges that the defendants “continued to harass Mr. Gilliam at public meetings and accuse him of various wrong doings and unethical conduct.” (Exhibit B, ¶ 34).

31. Finally, the Complaint alleges the plaintiff resigned on December 31, 2010 “after enduring Defendants’ unrelenting and unlawful campaign of defamation and retaliation for upwards of eight (8) months.” (Exhibit B, ¶ 35).

32. The plaintiff is seeking punitive damages. (Exhibit B, Counts I, II and III).

33. A true and exact copy of the plaintiff’s resignation letter is attached hereto as “Exhibit G.”

34. In his resignation letter, the plaintiff indicated that “It [sic] my hope that the pugnacity that has been shown towards my family and me will cease and that the business will be able to

be continued without any added burden to the Board regarding or in relation to me.” (Exhibit G).

35. As a result of the alleged conduct as outlined above, the plaintiff’s three-count Complaint seeks damages for: Count I – defamation, Count II, false light and Count III - intentional infliction of emotional distress. (Exhibit B).

36. As for Count I – Defamation, the plaintiff alleges the defendants “knowingly and maliciously defamed [the plaintiff] to the citizens of Franklin Township in both libelous and slanderous manners...” (Exhibit B, ¶ 36).

37. Regarding Count II, False Light, the plaintiff also alleges the defendants “knowingly and maliciously portrayed [the plaintiff] in a false light to the citizens of Franklin Township ...” (Exhibit B, ¶ 40).

38. Finally, as for Count III – Intentional Infliction of Emotional Distress, the plaintiff alleges the defendants “intentionally inflicted upon [the plaintiff] emotion [sic] distress when it [sic] knowingly and maliciously defamed him and portrayed him in a false light to the citizens of Franklin Township ...” (Exhibit B, ¶ 43).

39. Defendants filed their Answer on June 20, 2011.

40. A true and exact copy of the Defendants’ Answer is attached hereto as “Exhibit C.”

41. The defendants specifically pled all defenses and immunities available as found in the Tort Claims Act. (Exhibit C, Affirmative Defenses, ¶ 27).

SPECIFICALLY-ALLEGED DEFAMATORY CONDUCT

42. In his Complaint and discovery responses,² the plaintiff accuses the defendants of five specific defamatory actions. They include:

- I. The April 19, 2010 letter;
- II. Statements made by Daniel Krushinski and Herman Calvo during an April 21, 2010, District #3 Fire Commissioner's public meeting;
- III. Statements made by Daniel Krushinski during a May 19, 2010 meeting of the Board of Fire Commissioners;
- IV. Statements published on Station 25's and Station 27's websites; and
- V. An anonymous letter.

(Exhibit B, Exhibit D, p. 9 No. 9).

43. While not specifically indicated by the plaintiff in his Complaint, the allegedly defamatory issues were also discussed during a May 25, 2010 Franklin Township Council Meeting.

I. The April 19, 2010 Letter

44. The April 19, 2010 letter was summarized above at ¶19-21.

II. Statements Made by Daniel Krushinski and Herman Calvo During an April 21, 2010, District #3 Fire Commissioner's Public Meeting

45. Regarding the April 21, 2010 Fire District meeting, there are two separate portions to this meeting: a public hearing and an "Executive Session."

46. A true and exact copy of the minutes from the public meeting is attached hereto as "Exhibit H".

² A true and exact copy of the plaintiff's answers to interrogatories is attached hereto as "Exhibit D."

47. A true and exact copy of the meeting minutes from the "Executive Session" is attached hereto as "Exhibit I."

48. A copy of the audio from the April 21, 2010 public and "Executive Session" meetings is attached hereto as "Exhibit J." The public portion of the meeting and the first portion of the executive session appears on the attached CD (Exhibit J) as a track 1:54:26 in length. The second portion of the executive session is a track 43:21 long.

49. Regarding the public meeting, the meeting minutes summarize what was said as follows:

Dan Krushinski, Chief of East Franklin Fire Department

...This entire Board received a letter and we feel you are accountable for actions unbecoming of a Fire Commissioner and I have contacts with everybody from here to Toledo with newspapers, and before it gets that far, that's why all these people are here, I'm going to ask that you please resign at the end of the meeting. I don't want an applause I don't want anything, I don't want to make it worse than what it is okay it's bad. I also today got information from another individual that did some background searching and it comes from Burlington County and I think you know what that is, if you want I can go into that under public portion, I don't want to.

I think to save grace with all of us, you've done a fine job, you got these two fire companies together but I think for the benefit of everybody in this room, it's time to move on. And if the Commissioners don't think it's a good idea for you to move on, we do. I think we could give you a round of applause for what you did, but I can't tell you what's going to be in Fridays Star Ledger. I can't tell you what's going to be in the NY Post if you don't resign. Because it's not going to be good, my name has already been in the paper and I don't need it there, you have a job to uphold at the jail and I want you to keep that job. But you're looking me in the eye and we've had these conversations and you know it's not good Michael. I'm giving you a man to man in front of everybody in this room, please step down. That's all I have to say.

Herman Calvo, Assistant Chief at Station 25

Michael I just want to make one point, the issue that got this whole thing going was you making a phone call directing your secretary to call two Chiefs. You did that on your own to tell them you were shutting down District 3 that came from you. The other Commissioners were contacted immediately, they knew nothing about it. You made that decision. I agree with Chief Krushinski he said it all. There's papers going around streets, everything Michael your pictures are on them, nobody else's. You are a disgrace to District 3 you should resign immediately. It's coming down the road, that's all I can tell you. You're the one who said we're shutting the firehouses nobody else, nobody else knew about it except you.

(Exhibit F, p. 8-9).

50. The above appears in the audio recording at 47:42 through 51:06. (Exhibit J).
51. The April 19, 2010 letter was never read during the April 21, 2010 public portion.
52. Of the named defendants, only Daniel Krushinski and Herman Calvo spoke at this meeting.
53. Regarding the meeting minutes from the Executive Session, the only individuals present were the Fire Commissioners for District #3. (Exhibit H).
54. The following is a paraphrased summary of the audio recording of the Executive Session meeting (Exhibit J, 43:21 track):
55. Douglas Krushinski: We all received a package (including a picture of Michael), ***I'm not going to repeat it.*** I think it stinks being on board with plaintiff as chairman of the board. (Exhibit J, 2:59).
56. Unknown: My concern is junior fireman – they're minors. If what that letter states is true, Michael should not be allowed in the building alone with minors. If it got back to parents, we could have problems. (Exhibit J, 3:50).

57. Sherrod Middleton: Are we saying he's a pedophile? I don't see anything in there indicating as such. Last login 6/09/06, so people who brought this up did not have a problem with it then, now have a problem with it. (Exhibit J, 5:00).
58. Douglas Krushinski: I never saw the plaintiff's MySpace page printout until I got the April 19, 2010 letter. (Exhibit J, 5:49).
59. Douglas Krushinski: What if your 14-year old son/daughter was talking to Michael on line and you found out that Michael runs the fire district? (Exhibit J, 6:12).
60. Douglas Krushinski: "I've never said that word (pedophile)." (Exhibit J, 6:30).
61. Sherrod Middleton: It seems to me you are trying to paint Michael as a pedophile. (Exhibit J, 6:40).
62. Douglas Krushinski: No (not trying to say he's a pedophile). (Exhibit J, 6:44).
63. Douglas Krushinski: I'm not accusing him of contacting anyone. I did not send the letter. I have a big problem with an elected official lying about his age. (Exhibit J, 10:48).
64. Douglas Krushinski: We're not supposed to be lying about anything. (Exhibit J, 12:00).
65. Douglas Krushinski: Sherrod, if you were to download pornography at work and leave in your office, what would happen to you? (Exhibit J, 20:00).
66. Douglas Krushinski: I found pornography in office. I confronted them and they told me a story. I kept it private until I saw the MySpace. (Exhibit J, 22:00).
67. Douglas Krushinski: I asked Chantel [Orphanos, the Secretary for the Board of Fire Commissioners] to leave because I don't want her to sue us all for not doing anything right now. (Exhibit J, 24:25).

68. Douglas Krushinski: You want the police to go to your work and look through those computers? I don't want you to lose your [private sector] job and I don't want to hurt you financially. (Exhibit J, 25:18).

69. Douglas Krushinski: You lied when you told the audience you were not going to close fire houses. You told me over the phone you planned to do so. You had Chantel call two fire chiefs to say if you don't sign the contract, you're coming to get the fire trucks. (Exhibit J, 25:42).

70. Douglas Krushinski: I don't care about preference. (Exhibit J, 26:47).

71. Sherrod Middleton: You saw these pictures before, but you were okay with it because you kept it a secret. (Exhibit J, 27:30).

72. Douglas Krushinski: I wish you [Mr. Gilliam] well, but I don't want to be a fire commissioner with you. I want to save face and keep your picture out of the paper and internet. The cop said he'd come back here and take the computers. (Exhibit J, 28:38).

73. Douglas Krushinski: Douglas said the pornographic pictures were found 2 years ago and Michael Gilliam told me a story about why the pictures were in the office. I'm not repeating because I want Michael to remember. (Exhibit J, 29:50).

74. Douglas Krushinski: I'm trying to save Michael's face and whatever is left of what the public thinks about him. Franklin is going to take the computers and the press agent will report. (Exhibit J, 31:30)

75. Michael Gilliam: Give me until tomorrow, I'm going to call all of you. (Exhibit J, 36:38)

76. Douglas Krushinski: I don't wish you harm, Michael. (Exhibit J, 37:08)

77. Douglas Krushinski: I have a lot of respect for you. The last thing I want would be for you to get messed up at the job you have. It can go away now, or it can go all over the place.

(Exhibit J, 40:15)

78. The April 19, 2010 letter was never read during the April 21, 2010 executive session.

79. Douglas Krushinski was the only named defendant to speak during this meeting.

III. Statements made by Daniel Krushinski during a May 19, 2010 meeting of the Board of Fire Commissioners

80. As for the May 19, 2010 public meeting, a copy of the public meeting minutes is attached hereto as "Exhibit K" and a copy of the audio for the public and executive sessions is attached hereto as "Exhibit L."

81. The meeting minutes for the May 19, 2010 summarize what was said as follows:

Chief Krushinski ...The other question I have is, the Chiefs of both Fire Companies and the Chairmen of the Board's sent a letter to Mr. Barnes and we have not received any correspondence from him. Do you know if anything will be forthcoming?

John Antonas, what is the correspondence you sent to him? I get correspondence but I don't know about the ones that go directly to him.

Chief Krushinski, do you want me to read it?

John Antonas, you might as well because I don't know what it is about.

Chief Krushinski, [Reads the first paragraph³ **ONLY** of the April 19, 2010 letter].

(Exhibit K, p. 2-3).

³ ...Enclosed you will find the printout of a disturbing social networking page [owned] by the current Chairman of the Board, [plaintiff]. In this "profile" he attempts to imitate a 14-year-old boy... We are deeply concerned for the welfare of any minors who may choose to contact Michael via this alias, and disturbed at the prospect of accepting guidance and leadership from an individual who brazenly displays deceptive and immoral information...(Exhibit E).

82. The above exchanges occur on the audio recording from 5:59 to 7:11. (Exhibit L).
83. Daniel Krushinski testifies that he is very upset the Commissioners have not done anything regarding Michael Gilliam. (Exhibit L, 30:50).
84. Daniel Krushinski also testified that he could not believe the plaintiff was still a Commissioner. He went on to indicate that the plaintiff improperly moved to Burlington County for six months. Inappropriate use of computers. (Exhibit L, 32:05).
85. The public portion of the meeting runs until 33:46
86. Daniel Krushinski was the only named defendant to speak during this meeting.

IV. Statements published on Station 25's and Station 27's Websites

87. As for the website publications, both Station 25 and Station 27 published statement's regarding Mr. Gilliam on their respective websites.
88. True and exact copies of Station 25's and Station 27's statements are attached hereto as "Exhibit O."
89. Both Stations' websites contained identical statement which indicated the following:

Printouts of [the plaintiff's] social networking "MySpace" page have recently come to light from 2006, in which he identifies himself as "Mysterwriter20", a 14-year-old boy who believes that "Intimacy is that of legitimacy.....". He was well into his 20s at this point in time. It should be noted that this alias is the same one used in the email address to which all of his Fire District business is forwarded. The most recent act in this trend was just discovered by another commissioner. Commissioner Gilliam is, at the time of this writing, under investigation by the Franklin Township Police Department for potentially using township computers, located in the District Office, to print nude pornographic images.

(Exhibit O, p. 2 of 5 and p. 2 of 2)

V. **Anonymous Letter**

90. Regarding the anonymous letter, it indicates:

Here are some things to keep you up to speed on what's going on in Fire District #3. We ask you to please step down by Tuesday Night's meeting or we are going to be forced to send this same package to your bosses at the Prison on Fort Dix. Just to think the biggest rule maker was the biggest BREAKER [sic] what a jerk off

Exhibit F

91. Nothing in the record shows who drafted or sent this letter.
92. This letter was not distributed to anyone other than the plaintiff.

May 25, 2010 Franklin Township Council Meeting

93. Daniel Krushinski also appeared and spoke at a Franklin Township Meeting on May 25, 2010.
94. A true and exact copy of the May 25, 2010 meeting minutes is attached hereto as "Exhibit M" and a copy of the audio is attached hereto as "Exhibit N."
95. The following is a summary of the meeting minutes from the May 25, 2010 Township meeting minutes.

Dan Krushinski, East Franklin Fire Company Chief, spoke on matters relating to Fire Commission Michael Gilliam. Ms. London cautioned Chief Krushinski to be careful not to use slandering comments about Mr. Gilliam. Chief Krushinski spoke of Mr. Gilliam's Facebook page where he has posed as a 14 year old boy and has posted pictures of himself in uniform as well as coming out of the shower. Chief Krushinski spoke of Mr. Gilliam living out of the Township for 6 months while Commissioner. He reported that volunteer firefighters are expected to sign a 3 year agreement with the district and if they leave before the 3 years is up, they have to pay the district back for costs incurred by the district. Currently, the fire companies in District 3 are working without a contract. Chief Krushinski asked for Council's help in obtaining Mr. Gilliam's resignation. If he does not resign, they will appear before Council with a petition to dissolve the

Fire District. Ms. London explained the process of dissolving and/or re-creating a fire district. Chief Krushinski also alleged that Mr. Gilliam used Fire District computers inappropriately.

(Exhibit M, p. 3)

96. The above appears on the audio of the meeting from 36:28 to 51:00. (Exhibit N).

97. During his statements, Daniel Krushinski specifically indicates the named defendants are not sure what Mr. Gilliam's intentions were regarding the MySpace page. (Exhibit N, 38:49).

98. Daniel Krushinski stated that, if Mr. Gilliam does not resign, they will attempt to dissolve Fire District #3. (Exhibit N, 46:07).

99. The April 19, 2010 letter was not read or distributed during this meeting.

100. Daniel Krushinski was the only named defendant to speak during this meeting.

TESTIMONY

101. Defendant, Daniel Krushinski, was deposed on April 23, 2013.

102. A true and exact copy of Daniel Krushinski's deposition transcript is attached hereto as "Exhibit P."

103. Daniel Krushinski was the Chief of Station 27 at the time relevant to this case. (Exhibit P, 7:15-22).

104. Named defendant, Douglas Krushinski is Daniel Krushinski's brother. (Exhibit P, 10:19-21).

105. The issues Daniel Krushinski had with the plaintiff include the plaintiff's attempts to change policy without consulting the rest of the Fire Commissioners. (Exhibit P, 19:8-21).

106. Specifically, the plaintiff attempted to unilaterally change the Length of Service Awards Policy (“LOSAP”) so that members in the Armed Forces would not receive an award if they re-enlisted. (Exhibit P, 20:2-18).

107. The plaintiff also unilaterally changed the interviewing process whereby he would interview all prospective junior members at the District Office and not at the firehouses. (Exhibit P, 21:20-22:3).

108. Finally, the plaintiff tried to force the firefighters to sign a “fire agreement” contract with the District without allowing the chiefs to hold a special meeting to discuss it. (Exhibit P, 25:12-22).

109. After the chiefs refused to sign the agreement, the plaintiff indicated that they had until midnight to sign it or he would essentially shut down Station 27. (Exhibit P, 25:22-26:3).

110. Regarding the April 19, 2010 letter, Daniel Krushinski did not draft the letter. He does not know who drafted the letter. (Exhibit P, 28:24-29:2, 30:21-31:3, 32:15-17).

111. Regarding the plaintiff’s MySpace profile page, Daniel Krushinski first saw this in 2006. (Exhibit P, 34:6-12).

112. At that time, Deputy Chief of Station 27, Tom Cicerale, showed Daniel Krushinski his 13-year old brother’s account showing that Mr. Gilliam was in contact with this minor. (Exhibit P, 34:13-37:7).

113. The 2006 MySpace profile surfaced again in 2010 after someone posted on a bulletin board in Station 27. (Exhibit P, 46:8-48:2).

114. The April 19, 2010 letter was sent to Mr. Barnes, the attorney for Fire District #3. (Exhibit P, 52:23-53:11).

115. Douglas Krushinski was deposed on May 13, 2013.

116. A true and exact copy of Douglas Krushinski's deposition transcript is attached hereto as "Exhibit Q."

117. Douglas was a fire commissioner between March 2006 and March 2012. (Exhibit Q, 6:23-7:11).

118. Douglas Krushinski indicated he had absolutely no problem with Michael Gilliam up until 2010 when he was told that Mr. Gilliam had instructed the secretary for the fire commissioners, "Chantal" to call each of the fire chiefs and tell them that if he did not sign their new contract by midnight, that he was going to lock up the fire houses and take back the fire trucks and equipment. (Exhibit Q, 15:9-24).

119. Douglas Krushinski disagreed strenuously with Michael regarding the audits; not that the audits would be performed, but who would pay for them. (Exhibit Q, 16:1-17:13).

120. As for the April 19, 2010 letter, he indicated that he believes that he first saw this document just prior to the April 2010 public meeting. He believed that the documents were placed in the Fire Commissioners' *private mailboxes* either during or just prior to the "executive session." (Exhibit Q, 22:8-23:3, 27:18-24).

121. The only people present at the "executive session" were the Fire Commissioners, their attorney and the secretary. (Exhibit Q, 23:22-24:11).

122. Douglas Krushinski does not know who drafted the April 19, 2010 letter. (Exhibit Q, 24:21-23).

123. Douglas Krushinski testified that he did not believe the plaintiff intended to solicit minors. He did not believe the plaintiff was a danger to minors. He also stated that he had no reason to believe that Michael Gilliam had ever engaged in inappropriate sexual liaisons with minors or intended to do so. (Exhibit Q, 48:24-49:7, 59:22-60:7).

124. Herman Calvo was deposed on March 12, 2013.

125. A true and exact copy of Herman Calvo's deposition transcript is attached hereto as "Exhibit R."

126. Mr. Calvo is the Assistant Chief of Station 25 and has been for the last seven years. In the past, he has been both the President of the fire department and also the Chief. For 21 years, he acted as a fire commissioner through the early 1990s. Eight of those years he acted as Chairman of the Board. (Exhibit R, 6:14-7:11).

127. Mr. Calvo indicated that he had no information that plaintiff was having sex with minors or attempting to do so. In fact, while he was a fireman, he indicated that he had no issues at all with Mr. Gilliam. The issues only arose after the plaintiff became a commissioner. (Exhibit R, 10:19-11:23).

128. Mr. Calvo's real problems with Mr. Gilliam started when the contract was changed individually by Mr. Gilliam and when he tried to force the fire departments to undergo audits at their cost. (Exhibit R, 12:16-13:24,).

129. As to the April 19, 2010 letter, he indicated that he first saw the letter at the time that it was signed. He had been told by Daniel Krushinski that he wanted to discuss some issues. He believes that Mr. Krushinski came to a meeting at the fire department sometime around a department meeting on April 13, 2010. He brought with him a letter which Mr. Calvo believed was drafted by someone at the East Franklin Fire Department along with a copy of the MySpace page. He had seen the MySpace page a few days earlier when someone posted it on the bulletin board. He didn't specifically discuss the MySpace profile page until the day that the letter was signed. (Exhibit R, 20:9-23:23).

130. Mr. Calvo definitely had a problem with the plaintiff posing as a 14 year old and being dressed inappropriately. As a public official, he thought this was particularly offensive. (Exhibit R, 36:8-37:8).

131. Mr. Calvo indicated that he had no idea why the plaintiff was posing as a 14 year old, but thought as a public official it was totally inappropriate to lie about his age. While he didn't necessarily believe that he was intending to have sex with minors, there were some suspicions given his requests that he meet individually with prospective junior firefighters. (Exhibit R, 38:9-23).

132. Mr. Calvo specifically testified that, through the letter, he was not accusing the plaintiff of trying to solicit sex from minors. He indicated that he didn't intend to suggest anything like that, only that it was inappropriate. He did think that a reasonable person could believe that someone posing as a 14 year old was enough for him to resign. (Exhibit R, 40:1-41:16, 42:11-43:24, 50:8-24, 53:7-19, 66:21-68:6).

133. Richard Ries was deposed on March 12, 2013.

134. A true and exact copy of Richard Ries' deposition transcript is attached hereto as "Exhibit S."

135. Mr. Ries is currently the Chief of Station 25. He has been the chief on and off for the last 21 years, including the last nine. (Exhibit S, 7:7-22).

136. The first issue he recalled with Mr. Gilliam was when Gilliam ordered that audits be done of both fire departments in the district, East Franklin and Community Volunteer. He had no problem with the audits, but objected to who was going to pay for it. He also felt that the only money that should be audited was the \$86,000 given annually to the fire departments by the commissioners. (Exhibit S, 18:15-19:1).

137. The next issue came up when he received a call from Daniel Krushinski indicating that the commissioner's secretary, Chantal told him that Mr. Gilliam was going to pull the trucks from the fire department and shut the fire department down if the annual contract was not signed. Later, he received a message from Chantal indicating basically the same thing and stating that she was relaying the message for commissioner Gilliam. (Exhibit S, 23:9-24:7).

138. Mr. Ries reiterated that he had no problems with Michael Gilliam personally, only the way he ran things as the Chairman of the Board of Commissioners and the way he handled meetings, often not permitting certain people to speak and cutting them short. (Exhibit S, 29:6-22).

139. Regarding the April 19, 2010 letter, Mr. Ries indicated that the actual letter itself was given to him by Chief Daniel Krushinski. When he signed the letter, the MySpace page was not attached to it, but he had seen it before placed on the bulletin board in the fire department meeting room. (Exhibit S, 34:16-37:7).

140. Regarding the letter indicating that "we believe that Commissioner Gilliam intends" to his MySpace page and the fact that he is posing as a 14 year old to engage in immoral liaisons with minors, Mr. Ries indicated that he specifically did not have that belief, but that it was a possibility. He became particularly concerned when he realized that Mr. Gilliam had previously indicated that he was changing the policy for interviewing new firefighters. Specifically, he was going to interview all potential junior firefighters (ages 16 to 18) in the Board of Commissioners office and not at the individual fire houses. (Exhibit S, 53:24-57:20).

141. Christopher Fischer was deposed on February 19, 2013.

142. A true and exact copy of Mr. Fischer's deposition transcript is attached hereto as "Exhibit T."

143. Mr. Fischer is currently the Safety and Administrative Officer for Station 25. He just recently stepped down as Chief of the company. In 2010, he was the President, a position he had kept for approximately nine years. (Exhibit T, 6:24-8:22).

144. Mr. Fischer indicated that he had no problems or issues with the plaintiff prior to January 2010. In fact, he indicated that East Franklin was instrumental in getting the plaintiff originally elected to the Board of Fire Commissioners. The plaintiff came to East Franklin before he was going to run actively campaigning for their votes. (Exhibit T, 12:8-13:6).

145. Mr. Fischer acknowledged that he was extremely upset when he learned that Gilliam wanted audits of the fire company. The main reason for this was the fact that he was told by Herman Calvo that the cost of such an audit would range between \$5,000 and \$10,000 and it was his understanding that Gilliam wanted the individual fire companies to bear that expense. While admitting that the audits would be intrusive, he stated that the fire companies "had nothing to hide," and that they agreed to the audits once the commissioners agreed to pick up all costs related thereto. (Exhibit T, 14:13-15:17).

146. Mr. Fischer's major problem with Gilliam occurred in late March 2010 when he was told by the board's secretary that Gilliam insisted that the fire departments sign the annual fire contract immediately or that he would "take the fire trucks away." The reason he originally did not sign the contract was because Gilliam, without the knowledge of the board's attorney or anyone else on the board put extra pages in the fire contract which included mutual aid agreements. He indicated that Gilliam "just made up crap and stuck it in the contract." (Exhibit T, 24:1-26:20).

147. The April 19, 2010 letter which Mr. Fischer signed was written by one of the guys (he didn't know who) at Community Fire Company. It was brought to his attention by Chief

Daniel Krushinski on the day that he was asked to sign it, which he believed was the date of the letter, April 19. He indicated there was no discussion or meeting about preparation of the letter beforehand. Additionally, he indicated that he first saw the MySpace page when he was given a copy of the April 19 letter. He was never told about the MySpace page prior to that time, nor did he know originally who downloaded it, however, it was his understanding that Douglas Krushinski found a copy of the MySpace profile page in the Commissioner's office shortly before the letter was signed. (Exhibit T, 29:22-34:23).

148. Mr. Fischer indicated that he was totally put off and disgusted by the fact that plaintiff was posing as a 14 year old on the internet. Additionally, it was his opinion that if you did that, and used the words "intimacy" within the profile page, then it was his opinion that Michael Gilliam was seeking communication with underage people. (Exhibit T, 38:1-40:14).

149. He stated that the April 19, 2010 letter was not accusing the plaintiff of anything. (Exhibit T, 40:6-42:4, 45:17-46:9).

150. The plaintiff was deposed on two separate occasions; February 18 and June 14, 2013.

151. True and exact copies of the plaintiff's deposition transcripts are attached hereto as "Exhibit U."

152. The plaintiff was originally a member of Station 25 and served as a fire fighter from 2003 through 2006. (Exhibit U, 55:7-56:7).

153. He was first elected to the Board of Fire Commissioners in 2003. (Exhibit U, 55:23-56:2).

154. The plaintiff became chairman of the Board in 2010. (Exhibit U, 72:4-9).

155. He acknowledged being a public official of Franklin Township Fire District 3. (Exhibit U, 276:15-277:1).

156. The plaintiff acknowledged he owned the MySpace profile associated with “Mysterywriter20.” (Exhibit U, 126:23-127:10, Exhibit E).

157. The plaintiff did not deny that he identified himself as a 14-year old boy on his MySpace account. (Exhibit U, 178:7-22).

158. The plaintiff indicated he was holding himself out as a 14-year old boy so his MySpace page could remain private. (Exhibit U, 265:15-25).

159. When asked why he did not disclose his real age, he indicated he was “young and dumb.” (Exhibit U, 266:14-23).

160. The plaintiff has no information that anyone other than the Fire Commissioners ever saw the April 19, 2010 letter. (Exhibit U, 317:12-19).

161. The plaintiff is not aware of any time wherein the first sentence of the second paragraph of the April 19, 2010 letter (“we believe Michael Gilliam intends to engage in potentially illegal or immoral liaisons with individuals of this age group, assuming he has not already done so.”) was repeated in public. (Exhibit U, 325:2-8).

162. The plaintiff admitted to using Fires District computers to access pornographic material. (Exhibit U, 147:6-148:20, 296:3-297:2).

163. The plaintiff also admitted that he left pornographic photos in the Fire District office. (Exhibit U, 149:3-153:14, 226:1-229:9, Exhibit V⁴).

⁴ An undated letter from Douglas Krushinski *without* attached pornographic images is attached hereto as “Exhibit V).

LEGAL ARGUMENT

POINT I

THE COMPLAINT AGAINST THE PUBLIC ENTITIES MUST BE DISMISSED AS THEY ARE IMMUNE

The plaintiff's Complaint contains three separate claims: 1) Defamation; 2) False Light; and 3) IIED. (Exhibit B). Before addressing the merits of each claim and whether the plaintiff has presented a prima facie case to allow any of his claims to proceed against the individual defendants, all three claims must be dismissed as to the public entity defendants⁵ pursuant to the Tort Claims Act. (*See* Defendants' Answer, Exhibit C, Affirmative Defenses, ¶ 27).

Although the Tort Claims Act specifically indicates that public entities may be vicariously liable for employees' acts or omissions (*See* N.J.S.A. 59:2-2(a)), a public entity is immune if such acts or omissions constitute actual malice or willful misconduct. N.J.S.A. 59:2-10⁶ and *see* O'Connor v. Harms, 111 N.J. Super. 22, 27-28 (App. Div. 1970) *cert. den.* 57 N.J. 137 (1970). In fact, New Jersey Courts have applied this immunity specifically in claims for defamation,⁷ false light⁸ and IIED.⁹

⁵ The public entity defendants include the Township of Franklin, Community Fire Co. #1, a/k/a Station 25 Volunteer Fire Company, East Franklin Fire Department Station 27 and Franklin Township Fire District #3. (Exhibit B).

⁶ 59:2-10. Public employee conduct - limitation on entity liability

A public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct.

⁷ Even if individual public employees acted with malice in publishing a resolution that was aimed at bringing attention to what was locally perceived as plaintiff's deficient performance of a county road construction contract, a township was entitled to unqualified immunity in plaintiff's defamation action. Seal Tite Corp. v. Bressi, 312 N.J. Super. 532, 539 (App. Div. 1998); Loigman v. Board of Chosen Freeholders of County of Monmouth, 329 N.J. Super. 561 (App. Div. 2000)(defamation is, by its nature, willful misconduct).

In this case, every one of the plaintiff's causes of action (including IIED) includes allegations that the individual defendants acted maliciously.¹⁰ Moreover, as outlined below in Point II, since the plaintiff was a public official during the relevant time, in order to prevail on his claims, the plaintiff must argue that the defendants acted with actual malice. That is, the very nature of the plaintiff's claims requires him to take a position consistent with finding the public entities immune.

Moreover, defamation is, by its very nature, "willful misconduct" entitling the public entity defendants to immunity. See Loigman v. Board of Chosen Freeholders of County of Monmouth, 329 N.J. Super. 561, 566-567 (App. Div. 2000) *rev'g* Palmentieri v. Atlantic City, 231 N.J. Super. 422 (Law Div. 1988) and see Fielder v. Stonack, 141 N.J. 101, 130 (1995)(Where a public employee can only be found liable under a theory of willful misconduct, the public entity is of course entitled to summary judgment).

Since the plaintiff's defamation, false light and intentional infliction of emotional distress claims are based upon allegations that the individual defendants' actions were

⁸ School board could not be held for claims of defamation, false light, intentional infliction of emotional distress brought by a parent and a student, who alleged that school employees falsely reported that the parent had sexually abused the student. R.K. v. Y.A.L.E. Schs., Inc., 621 F. Supp. 2d 188 (D.N.J. 2008).

⁹ Leang v. Jersey City Bd. of Educ., 399 N.J. Super. 329 (App. Div. 2008), *aff'd in part, rev'd in part* 198 N.J. 557 (2009). R.K. v. Y.A.L.E. Schs., Inc., 621 F. Supp. 2d 188 (D.N.J. 2008); Ward v. Barnes, 545 F. Supp. 2d 400 (D.N.J. 2008).

¹⁰ Exhibit A, #4 – "[The individual defendants] intentionally and maliciously made false statements regarding Mr. Gilliam portraying him as someone who engages in unlawful sexual acts with minors."

Count I – Defamation, the plaintiff alleges the defendants "knowingly and maliciously defamed [the plaintiff] to the citizens of Franklin Township in both libelous and slanderous manners..." (Exhibit B, ¶ 36).

Count II – False Light, the plaintiff also alleges the defendants "knowingly and maliciously portrayed [the plaintiff] in a false light to the citizens of Franklin Township ..." (Exhibit B, ¶ 40).

Count III – Intentional Infliction of Emotional Distress, the plaintiff alleges the defendants "intentionally inflicted upon [the plaintiff] emotion [sic] distress when it [sic] knowingly and maliciously defamed him and portrayed him in a false light to the citizens of Franklin Township ..." (Exhibit B, ¶ 43).

malicious and/or willful misconduct, the public entity defendants are immune from suit and entitled to summary judgment.

POINT II

SUMMARY JUDGMENT MUST BE GRANTED AS TO THE INDIVIDUAL DEFENDANTS BECAUSE THEIR CONDUCT WAS NOT DEFAMATORY AND THEY DID NOT ACT WITH ACTUAL MALICE

A. Elements of Defamation

The New Jersey Supreme Court identified the elements of the cause of action for defamation to be: (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. DeAngelis v. Hill, 180 N.J. 1, 13 (2004).

B. Public Figure Defamation: The Actual Malice Standard

A political or other public figure must satisfy a very high standard in order to maintain a suit for defamation: actual malice. Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999) *citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).¹¹ In the absence of actual malice on the part of the publisher of the defamatory statement, the First Amendment

¹¹ If the subject of the speech is a “matter of public concern”, the plaintiff is also required to establish actual malice. Senna v. Florimont, 196 N.J. 469 (2008). To determine whether speech involves a matter of public concern that will trigger the actual-malice standard, a court should consider the content, form, and context of the speech. Senna, 196 N.J. at 497 (citation omitted). Content requires the Court look at the nature and importance of the speech. Id. For instance, does the speech in question promote self-government or advance the public's vital interests, or does it predominantly relate to the economic interests of the speaker? Id. Context requires that we look at the identity of the speaker, his ability to exercise due care, and the identity of the targeted audience. Id.

Discourse on political subjects and critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard. Id. Public policy and common sense also suggest that the same protections be given to speech concerning significant risks to public health and safety. Id. (citation omitted). On the other hand, there is no great societal benefit or higher free speech value in providing heightened protection for the defamatory and false statements uttered by one business competitor against another. Id. That form of commercial speech, generally, will call for the application of the negligence standard. Id.

prohibits a public official from recovering damages for defamation related to his official position. New York Times v. Sullivan, 376 U.S. 254 (1964).

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 it with reckless disregard for the truth. Id. To prove publication with reckless disregard for the truth, a plaintiff must show that the publisher made the statement with a “high degree of awareness of [its] probable falsity or with “serious doubts” as to the truth of the publication.” Id. quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964), St. Amant v. Thompson, 390 U.S. 727, 731 (1968). 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 (citation omitted). Significant to this motion is the necessity that actual malice be found by the court as a question of law. Lynch, 161 N.J. at 168 (citations omitted).

The actual malice standard applies in New Jersey to defamation cases involving public officials. New York Times Co. v. Sullivan, 376 U.S. 254, 279-283 (1964); Durando v. Nutley Sun, 209 N.J. 235, 247-248 (2012). Supporting the actual-malice standard is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials.” New York Times, 376 U.S. at 270. When a candidate enters the political arena, he or she “must expect that the debate will sometimes be rough and personal.” Lynch, 161 N.J. 152, 166 (1999) (citations omitted). Readers know that statements by one side in a political contest are often exaggerated, emotional, and even misleading. Id. (citations omitted).

The relevant test for actual malice is not whether a reasonably prudent man would have published, or would have investigated before publishing, but whether the defendant in fact entertained serious doubts as to the truth of his publication. Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 149-150 (1986). The existence of malice depends on publishing with knowledge that a statement is false, rather than with ill will. Spite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement, but not publication with a reckless disregard for its truth. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 166-167 (1999)(citations omitted).

In order to safeguard the right to free and open discussion of political issues, “[e]xpressions of ‘pure’ opinion on matters of public concern may no longer be the basis of an action for defamation.” Kotlikoff v. Cmty. News, 89 N.J. 62, 69 (1982).

A protected “pure” opinion

is found when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then states a view as to the plaintiff’s conduct, qualifications or character. “Pure” expression of opinion occurs also when the maker of the comment does not spell out the alleged facts on which the opinion is based but both parties to the communication know the facts or assume their existence and the statement of opinion is obviously based on those assumed facts as justification for the opinion. Kotlikoff v. Cmty. News, 89 N.J. 62, 68-69 (1982).

Whether a statement constitutes a protected “expression of opinion” is a matter of law for the court to decide. Id. at 67. Statements of opinion, like unverifiable statements of fact, generally cannot be proved true or false. Opinion statements reflect a state of mind. Although they do not enjoy “a wholesale defamation exemption,” opinion statements do not trigger liability unless they imply false underlying objective facts. Restatement (Second) of Torts, §

566. Loose, figurative or hyperbolic language is not likely to imply specific facts, and thus is not likely to be deemed actionable. Ward v. Zelikovsky, 136 N.J. 516, 532 (1994).

Political 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. Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 168 (1999). Emotion, partisanship, or self-interest, although they may impair the appraisal's value, do not justify its suppression. Id.

C. The Specifically-Alleged Conduct Was Not Defamatory

Although the factual basis for the plaintiff's allegations is significant (as evident from the provided 6 hours of audio and 750 pages of testimony), the plaintiff's claims arise out of five specific instances of allegedly defamatory conduct. They include:

1. The April 19, 2010 letter;
2. Statements made by Daniel Krushinski and Herman Calvo during an April 21, 2010, District #3 Fire Commissioner's public meeting;
3. Statements made by Daniel Krushinski during a May 19, 2010 meeting of the Board of Fire Commissioners;
4. Statements published on Station 25's and Station 27's websites; and
5. An anonymous letter.

(Exhibit B, Exhibit D, p. 9 No. 9).

While not specifically indicated by the plaintiff in his Complaint, the plaintiff's MySpace page was also discussed at the May 25, 2010 Franklin Township Council Meeting.

Of these instances of allegedly defamatory conduct, defendants submit that this Court only needs to focus on the April 19, 2010 letter. (Exhibit E). All of the other allegedly defamatory incidents, including the audio recordings, website statements and the anonymous letter, were not at all defamatory. While these other instances include harsh or negative

language directed toward the plaintiff, none of the language was knowingly false or malicious.

D. Nothing Shows the Defendants Acted with Actual Malice

As for the April 19, 2010 letter, while defendants certainly deny this letter was defamatory, it contains language at the heart of the plaintiff's claim, specifically the first sentence of the second paragraph.¹² This language was never repeated during any of the public meetings or executive sessions.¹³ This language was not duplicated on the Stations' website

¹² "[W]e believe Michael Gilliam intends to engage in potentially illegal or immoral liaisons with individuals of this age group, assuming he has not already done so." (Exhibit E).

¹³ The meeting minutes from the April 21, 2010 public portion of the Commissioners' meeting summarize what was said as follows:

Dan Krushinski, Chief of East Franklin Fire Department

...This entire Board received a letter and we feel you are accountable for actions unbecoming of a Fire Commissioner and I have contacts with everybody from here to Toledo With newspapers, and before it gets that far, that's why all these people are here, I'm going to ask that you please resign at the end of the meeting. I don't want an applause I don't want anything, I don't want to make it worse than what it is okay it's bad. I also today got information from another individual that did some background searching and it comes from Burlington County and I think you know what that is, if you want I can go into that under public portion, I don't want to.

I think to save grace with all of us, you've done a fine job, you got these two fire companies together but I think for the benefit of everybody in this room, it's time to move on. And if the Commissioners don't think it's a good idea for you to move on, we do. I think we could give you a round of applause for what you did, but I can't tell you what's going to be in Fridays Star Ledger. I can't tell you what's going to be in the NY Post if you don't resign. Because it's not going to be good, my name has already been in the paper and I don't need it there, you have a job to uphold at the jail and I want you to keep that job. But you're looking me in the eye and we've had these conversations and you know it's not good Michael. I'm giving you a man to man in front of everybody in this room, please step down. That's all I have to say.

Herman Calvo, Assistant Chief at Station 25

Michael I just want to make one point, the issue that got this whole thing going was you making a phone call directing your secretary to call two Chiefs. You did that on your own to tell them you were shutting down District 3 that came from you. The other Commissioners were contacted immediately, they knew nothing about it. You made that decision. I agree

postings¹⁴ or in the anonymous letter.¹⁵ In fact, the only time the April 19, 2010 letter was read aloud was at the May 19, 2010 meeting. At that point, however, Daniel Krushinski only read

with Chief Krushinski he said it all. There's papers going around streets, everything Michael your pictures are on them, nobody else's. You are a disgrace to District 3 you should resign immediately. It's coming down the road, that's all I can tell you. You're the one who said we're shutting the firehouses nobody else, nobody else knew about it except you.

(Exhibit F, p. 8-9).

The above appears in the audio recording at 47:42 through 51:06. (Exhibit J).

Regarding the meeting Executive Session, Douglas Krushinski specifically indicated he was not going to repeat the allegations. (Exhibit J, 3:00).

As for the May 25, 2010 Franklin Township Council meeting, the meeting minutes indicate:

Dan Krushinski, East Franklin Fire Company Chief, spoke on matters relating to Fire Commission Michael Gilliam. Ms. London cautioned Chief Krushinski to be careful not to use slandering comments about Mr. Gilliam. Chief Krushinski spoke of Mr. Gilliam's Facebook page where he has posed as a 14 year old boy and has posted pictures of himself in uniform as well as coming out of the shower. Chief Krushinski spoke of Mr. Gilliam living out of the Township for 6 months while Commissioner. He reported that volunteer firefighters are expected to sign a 3 year agreement with the district and if they leave before the 3 years is up, they have to pay the district back for costs incurred by the district. Currently, the fire companies in District 3 are working without a contract. Chief Krushinski asked for Council's help is obtaining Mr. Gilliam's resignation. If he does not resign, they will appear before Council with a petition to dissolve the Fire District. Ms. London explained the process of dissolving and/or re-creating a fire district. Chief Krushinski also alleged that Mr. Gilliam used Fire District computers inappropriately.

(Exhibit M, p. 3)

The above appears on the audio of the meeting from 36:28 to 51:00. (Exhibit N).

During his testimony, Daniel Krushinski specifically indicates the named defendants are not sure what Mr. Gilliam's intentions were regarding the MySpace page. (Exhibit N, 38:49).

¹⁴ Both Stations' websites contained identical statement which indicated the following:

Printouts of [the plaintiff's] social networking "MySpace" page have recently come to light from 2006, in which he identifies himself as "Mysterwriter20", a 14-year-old boy who believes that "Intimacy is that of legitimacy.....". He was well into his 20s at this point in time. It should be noted that this alias is the same one used in the email address to which all of his Fire District business is forwarded. The most recent act in this trend was just discovered by another commissioner. Commissioner Gilliam is, at the time of this writing, under investigation by the Franklin Township Police

the first paragraph and not the second.¹⁶ The plaintiff himself is not aware of any time wherein the first sentence of the second paragraph of the April 19, 2010 letter was repeated in public. (Exhibit U, 325:2-8).

It is undisputed that the plaintiff was a public official at the time he claims he was defamed. Additionally, the alleged defamatory statements involved the plaintiff's conduct while in office making the issue a matter of public concern. Therefore, in order to defeat this motion, the plaintiff must demonstrate the individual defendants acted with "actual malice"¹⁷

Department for potentially using township computers, located in the District Office, to print nude pornographic images.

(Exhibit O, p. 2 of 5 and p. 2 of 2)

¹⁵ Regarding the anonymous letter, it indicates:

Here are some things to keep you up to speed on what's going on in Fire District #3. We ask you to please step down by Tuesday Night's meeting or we are going to be forced to send this same package to your bosses at the Prison on Fort Dix. Just to think the biggest rule maker was the biggest BREAKER [sic] what a jerk off (Exhibit F).

¹⁶ The meeting minutes for the May 19, 2010 summarize what was said as follows:

Chief Krushinski ...The other question I have is, the Chiefs of both Fire Companies and the Chairmen of the Board's sent a letter to Mr. Barnes and we have not received any correspondence from him. Do you know if anything will be forthcoming?

John Antonas, what is the correspondence you sent to him? I get correspondence but I don't know about the ones that go directly to him.

Chief Krushinski, do you want me to read it?

John Antonas, you might as well because I don't know what it is about.

Chief Krushinski, [Reads the first paragraph ONLY of the April 19, 2010 letter].

(Exhibit K, p. 2-3).

The above exchanges occur on the audio recording from 5:59 to 7:11. (Exhibit L).

¹⁷ Plaintiff alleges that the defendants made defamatory statements that, for the purposes of this motion must be considered as "defamation per se." Defamation per se deals with the plaintiff's obligation to establish damages and is not relevant to this motion regarding liability.

The need to demonstrate damages is waived when the defamation is oral and can be categorized as slander per se. In such a case, damages are presumed." Slander per se exists when one accuses another: "(1) of having committed a criminal offense, (2) of having a loathsome disease, (3) of engaging in conduct or having a

in drafting the April 19, 2010 letter. Simply put, actual malice requires the plaintiff to show that the statements contained in the April 19, 2010 letter were false and the defendants knew or should have known they were false. Nothing in the record establishes the defendants acted with actual malice.

The first paragraph¹⁸ does not contain any false statements whatsoever. The plaintiff's MySpace profile indicated the plaintiff is 14 years old and that "Intimacy is that of legitimacy." (Exhibit E). The plaintiff admitted ownership of the MySpace page and testified he intentionally held himself out to be 14 years old. (Exhibit U, 178:7-22, 265:15-25, 266:14-23). That the defendants had a negative reaction to the plaintiff lying about his age¹⁹ on his MySpace page is not defamatory and certainly does not rise to the level of actual malice.

condition or trait incompatible with his or her business, or (4) of having engaged in serious sexual misconduct." McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 313-314 (App. Div.), *cert. den.*, 166 N.J. 606 (2000). Remarks are defamatory per se if they impute directly or by innuendo malfeasance on the part of a public official. Earl v. Winne, 14 N.J. 119, 125-126 (1953). (citations omitted). *and see* Earl v. Winnie, 14 N.J. 119, 125-126 (1953). As such, the plaintiff will not have to prove damages to survive summary judgment. W.J.A. vs. D.A., 210 N.J. 229, 240 (2012). (the libel aspect of the plaintiff's claim would not require proof of special damages and, since the slander portion could be considered "per se", plaintiff does not have to prove special damages.

¹⁸ ...Enclosed you will find the printout of a disturbing social networking page [owned] by the current Chairman of the Board, [plaintiff]. In this "profile" he attempts to imitate a 14-year-old boy. The purpose of social networking sites such as MySpace is to make contact with new individuals based on the information posted. We are deeply concerned for the welfare of any minors who may choose to contact Michael via this alias, and disturbed at the prospect of accepting guidance and leadership from an individual who brazenly displays deceptive and immoral information...

¹⁹ At the April 21, 2010 meeting, Douglas Krushinski said that it was unacceptable for the plaintiff to lie about his age. (Exhibit J, 10:48).

Herman Calvo testified he had a problem with the plaintiff posing as a 14 year old and being dressed inappropriately. As a public official, he thought this was particularly offensive. (Exhibit R, 36:8-37:8). Mr. Calvo indicated that he had no idea why the plaintiff was posing as a 14 year old, but thought as a public official it was totally inappropriate to lie about his age. (Exhibit R, 38:9-23).

Christopher Fischer testified that he was totally put off and disgusted by the fact that plaintiff was posing as a 14 year old on the internet. Additionally, it was his opinion that if you did that, and used the words "intimacy" within the profile page, then it was his opinion that Michael Gilliam was seeking communication with underage people. (Exhibit T, 38:1-40:14).

The second paragraph²⁰ does not indicate that the plaintiff had, in fact, engaged in illegal sexual contact with minors. None of the defendants thought this to be the case as was illustrated during the meetings and during the defendants' depositions.²¹ The second paragraph merely indicates that the information contained in the plaintiff's MySpace page led the defendants to the *belief* that the plaintiff may contact minors using this profile.²² After all, it was defendants' understanding that MySpace was used to make "contact with new individuals based on the information posted." (Exhibit E). And, while the defendants did not necessarily claim the plaintiff posed any danger to children, they certainly made it clear that they found Mr. Gilliam's MySpace profile troubling.

²⁰ We believe that [plaintiff] intends to engage in potentially illegal or immoral liaisons with individuals of this age group, assuming he has not already done so. [Plaintiff] is well into his twenties, and we find this prospect to be reprehensible, and completely unfitting behavior for an elected official.

²¹ During the April 21, 2010 Board of Fire Commissioners Executive Session meeting, Douglas Krushinski said he never accused the plaintiff of being a "pedophile" and was not accusing him of contacting anyone. (Exhibit J, 6:44, 10:48). During the May 25, 2010 Franklin Township Council meeting, Daniel Krushinski specifically indicated the named defendants were not sure what Mr. Gilliam's intentions were regarding the MySpace page. (Exhibit N, 38:49).

During depositions, Douglas Krushinski testified that he did not believe the plaintiff intended to solicit minors. He did not believe the plaintiff was a danger to minors. He also stated that he had no reason to believe that Michael Gilliam had ever engaged in inappropriate sexual liaisons with minors or intended to do so. (Exhibit Q, 48:24-49:7, 59:22-60:7). Herman Calvo testified that he had no information that plaintiff was having sex with minors or attempting to do so. (Exhibit R, 10:19-11:23). Mr. Calvo specifically testified that, through the letter, he was not accusing the plaintiff of trying to solicit sex from minors. He indicated that he didn't intend to suggest anything like that, only that it was inappropriate. He did think that a reasonable person could believe that someone posing as a 14 year old was enough for him to resign. (Exhibit R, 40:1-41:16, 42:11-43:24, 50:8-24, 53:7-19, 66:21-68:6).

Richard Ries testified that he specifically did not have a belief the plaintiff would have sexual relations with minors, based on the MySpace page, this was a possibility. (Exhibit S, 53:24-57:20).

Christopher Fischer testified that the April 19, 2010 letter was not accusing the plaintiff of anything. (Exhibit T, 40:6-42:4, 45:17-46:9).

²² 145. Mr. Fischer testified that it was his opinion that if you lied about your age and indicated you were a minor and used the words "intimacy" within the profile page, it was possible that Mr. Gilliam was seeking communications with underage people. (Exhibit T, 38:1-40:14).

Simply put, the language of the second paragraph was not a conclusion created by the defendants out of thin air in an attempt to defame the plaintiff. The defendants' conclusion was based on the objective facts that the plaintiff's MySpace page did indicate he was 14 years old and that the plaintiff felt "Intimacy is that of legitimacy." That it was defendants' *belief* cannot be proven or disproven. The very nature of the defendants' beliefs does not lend itself to a true or false test.²³ Instead, this is a textbook example of a "pure opinion"²⁴ and is constitutionally-protected speech. Even if their belief was unreasonable, the plaintiff's case fails because their opinion was based on disclosed facts and "[w]here an opinion is accompanied by its underlying nondefamatory factual basis..., a defamation action premised upon that opinion will fail, no matter how unjustified, unreasonable or derogatory the opinion might be." Kotlikoff v. Community News, 89 N.J. 62, 72-73 (1982).

The third paragraph²⁵ illustrates how past circumstances – specifically the facts that the plaintiff left pornographic images in the Fire District Office and was using Fire District computers to access pornographic material²⁶ – contributed to the defendants' opinions. These

²³ Statements of opinion, as a matter of constitutional law, enjoy absolute immunity. A factual statement can be proved or disproved objectively while an opinion statement generally cannot. Only if the statement suggests specific factual assertions that can be proven true or false could the statement qualify as actionable defamation. DeAngelis v. Hill, 180 N.J. 1, 14 (2004)(citations omitted).

²⁴ A protected "pure" opinion is found when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then states a view as to the plaintiff's conduct, qualifications or character. Kotlikoff v. Cmty. News, 89 N.J. 62, 68-69 (1982).

²⁵ Accordingly, we request that [plaintiff] immediately resigns as a Commissioner...While we wish we could have imagined that he had innocent intentions for the use of his webpage, past acts lead us to believe otherwise. His actions are immoral and possibly criminal, making him unfit to represent the taxpayers of our district...

²⁶ The plaintiff admitted to using Fires District computers to access pornographic material. (Exhibit U, 147:6-148:20, 296:3-297:2). The plaintiff also admitted that he left pornographic photos in the Fire District office. (Exhibit U, 149:3-153:14, 226:1-229:9, Exhibit V).

are not false or defamatory statements. They are the defendants' opinions based on objective facts. The facts on which they based their opinions were true.

There is no denying that the parties had a contentious relationship in the months leading up to the April 19, 2010 letter.²⁷ Ill will, hostility or even intent to harm, however, do not satisfy the actual malice requirement and, in the political arena, are specifically protected.²⁸

²⁷ Douglas Krushinski testified that he had absolutely no problem with Michael Gilliam up until 2010 when he was told that Mr. Gilliam had instructed the secretary for the fire commissioners, "Chantal" to call each of the fire chiefs and tell them that if he did not sign their new contract by midnight, that he was going to lock up the fire houses and take back the fire trucks and equipment. (Exhibit Q, 15:9-24).

Herman Calvo testified that he had no issues at all with Mr. Gilliam until the plaintiff became a commissioner. (Exhibit R, 10:19-11:23). Mr. Calvo's real problems with Mr. Gilliam started when the contract was changed individually by Mr. Gilliam and when he tried to force the fire departments to undergo audits at their cost. (Exhibit R, 12:16-13:24).

Richard Ries testified that he had no problems with Michael Gilliam personally, only the way he ran things as the Chairman of the Board of Commissioners and the way he handled meetings, often not permitting certain people to speak and cutting them short. (Exhibit S, 29:6-22). The first issue he recalled with Mr. Gilliam was when Gilliam ordered that audits be done of both fire departments in the district, East Franklin and Community Volunteer. He had no problem with the audits, but objected to who was going to pay for it. He also felt that the only money that should be audited was the \$86,000 given annually to the fire departments by the commissioners. (Exhibit S, 18:15-19:1). The next issue came up when he received a call from Daniel Krushinski indicating that the commissioner's secretary, Chantal told him that Mr. Gilliam was going to pull the trucks from the fire department and shut the fire department down if the annual contract was not signed. Later, he received a message from Chantal indicating basically the same thing and stating that she was relaying the message for commissioner Gilliam. (Exhibit S, 23:9-24:7).

Christopher Fischer testified that he had no problems or issues with the plaintiff prior to January 2010. In fact, he indicated that East Franklin was instrumental in getting the plaintiff originally elected to the Board of Fire Commissioners. The plaintiff came to East Franklin before he was going to run actively campaigning for their votes. (Exhibit T, 12:8-13:6). Mr. Fischer acknowledged that he was extremely upset when he learned that Gilliam wanted audits of the fire company. The main reason for this was the fact that he was told by Herman Calvo that the cost of such an audit would range between \$5,000 and \$10,000 and it was his understanding that Gilliam wanted the individual fire companies to bear that expense. While admitting that the audits would be intrusive, he stated that the fire companies "had nothing to hide," and that they agreed to the audits once the commissioners agreed to pick up all costs related thereto. (Exhibit T, 14:13-15:17). Mr. Fischer's major problem with Gilliam occurred in late March 2010 when he was told by the board's secretary that Gilliam insisted that the fire departments sign the annual fire contract immediately or that he would "take the fire trucks away." The reason he originally did not sign the contract was because Gilliam, without the knowledge of the board's attorney or anyone else on the board put extra pages in the fire contract which included mutual aid agreements. He indicated that Gilliam "just made up crap and stuck it in the contract." (Exhibit T, 24:1-26:20).

²⁸ Actual malice has nothing to do with hostility or ill will; rather it concerns a publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it. DeAngelis v. Hill, 180 N.J. 1, 17

Based on the above, there is nothing showing any of the individual defendants acted with actual malice.²⁹

In the alternative to dismissing all of the individual defendants, it is undisputed that Douglas Krushinski did not draft, sign or distribute the April 19, 2010 letter. In fact, Douglas Krushinski went out of his way to say he did not think the plaintiff ever had appropriate relationships with minors and indicated he respected what the plaintiff did of the fire departments.³⁰ As such, nothing in the record establishes defamatory conduct or actual malice by Douglas Krushinski and the plaintiff's Complaint must be dismissed as to Douglas Krushinski with prejudice.

E. Summary Judgment is a Favored Means of Disposing of Defamation Claims When the Plaintiff is a Public Official

The New Jersey Supreme Court has repeatedly concluded that “summary judgment practice is particularly well-suited for the determination of libel [and defamation] actions” because those actions tend to “inhibit comment on matters of public concern.” DeAngelis v.

(2004) *citing* Lawrence v. Bauer Publishing & Printing, 89 N.J. 451, 468 (1980) (internal citations omitted). The existence of actual malice depends on whether defendant published the article knowing that it was false or with a reckless disregard for its truth. Id. At 17-18 (citations omitted). Spite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement, but not publication with a reckless disregard for its truth. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 166-167 (1999)(citations omitted); Although spite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement, only evidence demonstrating that a publication was made with knowledge of its falsity or a reckless disregard for its truth will establish the actual malice requirement for public official defamation. DeAngelis v. Hill, 180 N.J. 1, 14 (2004)(citations omitted).

²⁹ In fact, absent the showing of actual malice, the individual defendants are immune from suit. N.J.S.A. 59:2-3; N.J.S.A. 59:3-14.

³⁰ Douglas Krushinski: No (not trying to say he's a pedophile). (Exhibit J, 6:44). Douglas Krushinski: I'm not accusing him of contacting anyone. I did not send the letter. I have a big problem with an elected official lying about his age. (Exhibit J, 10:48). Douglas Krushinski: I wish you well, but I don't want to be a fire commissioner with you. I want to save face and keep your picture out of the paper and internet. The cop said he'd come back here and take the computers. (Exhibit J, 28:38). Douglas Krushinski: I don't wish you harm, Michael. (Exhibit J, 37:08). Douglas Krushinski: I have a lot of respect for you. The last thing I want would be for you to get messed up at the job you have. It can go away now, or it can go all over the place. (Exhibit J, 40:15).

Hill, 180 N.J. 1, 12 (2004) *quoting* Dairy Stores, Inc. v. Sentinel Publ'g Co., 104 N.J. 125, 157 (1986). Summary judgment practice is encouraged. Durando v. Nutley Sun, 209 N.J. 235, 254 (2012). Specifically, if the plaintiff in a defamation case is a public figure, “the court should grant summary judgment dismissing the complaint if a reasonable jury could not find that the plaintiff had established actual malice by clear and convincing evidence.” Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 169 (1999)³¹(citations omitted). Constitutionally protected freedom and a timely grant of a summary judgment motion has the salutary effect of discouraging frivolous lawsuits that might chill the exercise of free speech on matters of public concern. G.D. v. Kenny, 205 N.J. 275, 304-305 (2011).

This case is a prime example of type of case that should be disposed of by granting the defendants’ summary judgment motion. The plaintiff has completely failed to show how the defendants’ belief that he may have acted inappropriately was either defamatory or rooted in actual malice. The issues here were part of an ongoing series of disputes between the parties as part of a political power struggle. The defendants did not like the way the plaintiff was running the District, so they took steps to force him from power. None of the steps they took, however, included “knowingly” publishing false information.

³¹ Certainly, there are cases out there holding that, the state of mind analysis required for an actual malice determination may not lend itself to summary judgment. *See* Gray v. Press Communications, LLC, 342 N.J. Super. 1, 12 (App. Div.) *cert'n den.* 170 N.J. 390 (2001) (summary judgment improper in defamation claim where a reasonable factfinder could conclude by clear and convincing evidence that a defendant acted with reckless disregard of the truth in uttering his statement, where his sources were of dubious veracity and so vague that a jury could find that they were contrived after the fact and where the defendant’s claim that his statement was common knowledge was not credible; Ricciardi v. Weber, 350 N.J. Super. 453, 469-470 (App. Div.) *cert'n den.* 175 N.J. 433)(Sufficient evidence to show that the statements were uttered with actual malice to withstand summary judgment.)

On the other hand, there are certainly cases where summary judgment was appropriate. Specifically, the Court in Lynch dismissed the Complaint against all defendants except one who was show evidence that the statement was in fact false prior to publication. 161 N.J. at 169; *See also* Trump v. O'Brien, 422 N.J. Super. 540, 549, 560 (App. Div. 2011). The Court in Trump did not disturb the lower court’s decision to dismiss the plaintiff’s Complaint because there was no triable issue as to actual malice; DeAngelis v. Hill, 180 N.J. 1 (2004).

F. Conclusion

Based on the above and the plaintiff's failure to establish actual malice, all Counts I (Defamation), II (False Light)³² and III (IIED)³³ of the plaintiff's Complaint must be dismissed with prejudice.

³² A claim of "false light" requires a showing of actual malice. See Durando v. Nutley Sun, 209 N.J. 235, 249 (2012)(To prove the tort of false light, a plaintiff must show (1) that the false light in which he was placed would be highly offensive to a reasonable person; and (2) that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter. The second prong of a false-light claim parallels the requirements of the actual malice standard.)(internal citations omitted).

Therefore, plaintiff's failure to establish actual malice as to his defamation claims contained in the Count I is fatal to his false light claim contained in Count II. Summary judgment is appropriate.

³³ Public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing that the publication contains a false statement of fact which was made with actual malice. DeAngelis v. Hill, 180 N.J. 1, 20 (2004); Walko v. Kean College of New Jersey, 235 N.J. Super. 139, 149 (Law Div. 1988) citing Hustler Magazine v. Falwell, 485 U.S. 46, 56-57 (1988).

Plaintiff's failure to establish actual malice is fatal to his claim for IIED and summary judgment is appropriate.

POINT III

DEFENDANTS ARE ENTITLED TO THE COMMON INTEREST PRIVILEGE

In New Jersey, it has been long-recognized that “in particular situations...private people [should] be able freely to express private concerns to a limited and correlatively concerned audience...” Bainhauer v. Manoukian, 215 N.J. Super. 9, 36 (App. Div. 1987). Thus, otherwise defamatory comments are accorded a privilege “where the publisher is...protecting...an interest common to [him] and the recipient.” Id. Whether an otherwise defamatory statement may be immunized by a qualified privilege turns on consideration of three factors: first, the “appropriateness of the occasion on which the defamatory information is published”; second, “the legitimacy of the interest thereby sought to be protected or promoted”; and third, “the pertinence of the receipt of that information by the recipient.” Id. at 37.

A statement “made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable.” Lutz v. Royal Ins. Co. of Am., 245 N.J. Super. 480, 496 (App. Div. 1991) (citation omitted); Williams v. Bell Tel. Labs., Inc., 132 N.J. 109, 121 (1993); Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 375-376 (1959).

The threshold determination of whether a privilege exists does not require that the court also conclude the statement was made in good faith. Nor is the court concerned with whether the communication was true or false. Feggans v. Billington, 291 N.J. Super. 382, 392-393 (App. Div. 1996).

The defendants clearly sought to handle this matter in-house. The April 19, 2010 letter was sent to the Township Attorney and the Committee of the Board of Fire Commissioners.³⁴ It was never distributed to the general public or verbally repeated at any meeting open to the public.³⁵ None of the defendants ever distributed the April 19 letter to anyone outside of the Board or repeated the specific language of the letter in any of the public meetings.

Even if the language of the April 19 letter is found to be defamatory (which the defendants expressly deny), summary judgment is still appropriate because the defendants are entitled to a qualified, common interest privilege.

In the minds of the defendants, the plaintiff's MySpace profile raised potentially troubling issues that they needed to discuss with members of the Executive Committee. As fellow volunteer firefighters and commissioners, the individual defendants had a common interest to alert the District to any and all troubling behavior. In fact, not only did they have an interest, they had an obligation to address potential issues in order to protect the District and

³⁴ During the public meeting portion of the April 21, 2010 Fire District meeting, Daniel Krushinski stated "...This entire Board received a letter...(Exhibit F, p. 8); (Exhibit J, 47:42 through 51:06). During the public meeting portion of the May 19, 2010 Fire District meeting, Daniel Krushinski stated "the Chiefs of both Fire Companies and the Chairmen of the Board's sent a letter to Mr. Barnes..." (Exhibit K, p. 2-3). Daniel Krushinski testified that Mr. Barnes was the attorney for Fire District #3. (Exhibit P, 52:23-53:11).

Douglas Krushinski testified that he believed that the documents were placed in the Fire Commissioners' *private mailboxes* either during or just prior to the "executive session." (Exhibit Q, 22:8-23:3, 27:18-24). The only people present at the "executive session" were the Fire Commissioners, their attorney and the secretary. (Exhibit Q, 23:22-24:11).

³⁵ The plaintiff testified he has no information that anyone other than the Fire Commissioners ever saw the April 19, 2010 letter. (Exhibit U, 317:12-19).

The plaintiff is not aware of any time wherein the first sentence of the second paragraph of the April 19, 2010 letter was repeated in public. (Exhibit U, 325:2-8).

the firehouses from any potential liability. They are therefore entitled to a qualified privilege³⁶ and summary judgment is appropriate.

POINT IV

THE PLAINTIFF IS BARRED BY THE TORT CLAIMS ACT FROM RECOVERING PUNITIVE DAMAGES FROM PUBLIC ENTITIES

Pursuant to the Tort Claims Act, specifically N.J.S.A. 59:2-2, “[n]o punitive or exemplary damages shall be awarded against a public entity.” N.J.S.A. 59:2-2 (c); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (“a municipality is immune from punitive damages under 42 U.S.C. § 1983.”).

In this matter, the plaintiff seeks punitive damages against all of the defendants. (Exhibit B, Counts I, II and III). In the event any Counts of the Complaint survive summary judgment, the Tort Claims Act bars the plaintiff from recovering punitive damages. As such, summary judgment is appropriate to dismiss this portion of the plaintiff’s claim.

³⁶ “[T]he qualified privilege enables principled employees to report actual or suspected misconduct without fear of legal liability for defamation.” Feggans, 291 N.J. Super. at 392-393.

POINT V

THE MOVING DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, AS THERE IS NO GENUINE ISSUE OF MATERIAL FACT

According to the leading case, Brill vs. Guardian Life, summary judgment requires the judge to consider “whether competent evidential material presented, when viewed in the light most favorable to the nonmoving party in consideration of applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve alleged dispute in favor of nonmoving party.” 142 N.J. 520, 524 (1995), *citing* R. 4:46-2.

Further, the essence of the analysis is whether the evidence provides adequate disagreement to require a submission of the case to the jury, or whether it is so one-sided that one party should prevail as a matter of law. Id. at 535 *citing* Anderson vs. Liberty Lobby, 477 U.S. 242, 251-52 (1986).

Pursuant to Rule 4:46-2, summary judgment should be granted if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to judgment as a matter of law.” R. 4:46-2.

The party opposing the motion is required “to demonstrate by competent evidential material that a genuine issue of [material] fact exists.” Robbins v. New Jersey, 23 N.J. 229, 241 (1957). It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 3662, 383 (App. Div.1960). Therefore, a party’s conclusion and pleadings, without factual support in tendered affidavits, will not and should not defeat meritorious application

for summary judgment. United States Pipe and Foundry Co. v. American Arbitration Assoc., 67 N.J. Super. 384 (App. Div. 1961).

It is defendant's contention that giving all reasonable inference in favor of the party opposing this motion, as required by Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954), there is no genuine issue of material fact which would preclude the granting of this motion for Summary Judgment.

Based on plaintiff's failure to establish actual malice and the fact that summary judgment is encouraged in defamation claims, there are no issues of material fact present in this case and summary judgment is proper.

CONCLUSION

For the foregoing reasons, defendants respectfully requests summary judgment be granted in its favor and plaintiff's Complaint be dismissed, with prejudice.

Respectfully submitted,

Jay A. Gebauer

Date: January 9, 2014