IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR DIRECTED VERDICT

I. INTRODUCTION

Directed verdict, like summary judgment, presents a question of law to the trial court to decide whether the nonmoving party submitted ***any*** probative evidence to support its claims.[1] In this case, Defendants[2], are seeking directed verdict on Plaintiffs'[3] claims for libel (as to the Student Senate Resolution only), tortious interference with contract and business relationships, intentional infliction of emotional distress, negligent hiring, retention, and supervision, lost business opportunities damages, and punitive damages. Because Plaintiffs submitted substantially probative evidence in support of each element of these claims, Defendants' Motion must be denied.

For the Court's convenience and in lieu of attaching more than seventy (70) pages of exhibits, Plaintiffs have embedded pertinent testimony and documentary evidence into the body of this response brief.

[1] *See, e.g. Gibson v. Drainage Products, Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, 766 N.E.2d 982, ¶ 21 [citations omitted].
[2] "Defendants" refers to Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Vice President Raimondo").
[3] "Plaintiffs" refers to Gibson Bros., Inc. ("Gibson's Bakery"), David Gibson ("Dave"), and Allyn W. Gibson ("Grandpa Gibson").

II. LAW & ARGUMENT

A. Standard of Review.

Civ.R. 50(A)(4), governing motions for directed verdict, provides:

> When a motion for a directed verdict has been properly made, and the trial court, ***after construing the evidence most strongly in favor of the party against whom the motion is directed***, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue [emphasis added].

"When a motion for a directed verdict is entered, ***what is being tested is a question of law; that is, the legal sufficiency of the evidence to take the case to the jury. This does not involve weighing the evidence or trying the credibility of witnesses***. * * * The 'reasonable minds' test of Civ.R. 50(A)(4) calls upon the court ***only to determine whether there exists any evidence of substantial probative value in support of [the claims of the party against whom the motion is directed]***. * * * A motion for a directed verdict raises a question of law because it examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence." *Ruta v. Breckenridge–Remy Co.*, 69 Ohio St.2d 66, 68–69, 430 N.E.2d 935 (1982) [emphasis added].

B. Plaintiffs submitted substantially probative evidence that Defendants published the Student Senate Resolution to thousands of people.

In order to satisfy the "publication" element with regard to the Student Senate Resolution, Plaintiffs simply need to show **any** intentional or **negligent act** which communicates the defamatory matter to a third party. *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 743, 756 N.E.2d 1263 (9th Dist. 2001), citing 3 Restatement of the Law 2d, Torts (1965), Section 577(1) ("**Any act** by which the defamatory matter is communicated to a third party constitutes publication.") (Emphasis added.); *see Gosden v. Louis*, 116 Ohio App.3d 195, 687 N.E.2d 481 (9th Dist. 1996). A plaintiff may satisfy this element by showing the defendant acted negligently

and that the negligent act caused the publication. *Hecht v. Levin*, 66 Ohio St.3d 458, 460, 1993-Ohio-110, 613 N.E.2d 585.

Further, Ohio law recognizes that:

> As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication. Hence, one who requests, ***procures, or aids and abets*** another to publish defamatory matter is liable as well as the publisher.

Cooke v. United Dairy Farmers, Inc., 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25 (citations omitted) (emphasis added). *See also, Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶ 104 (citations omitted) ("a person who requests, procures, or aids or abets in the publication of defamatory matter is liable.").

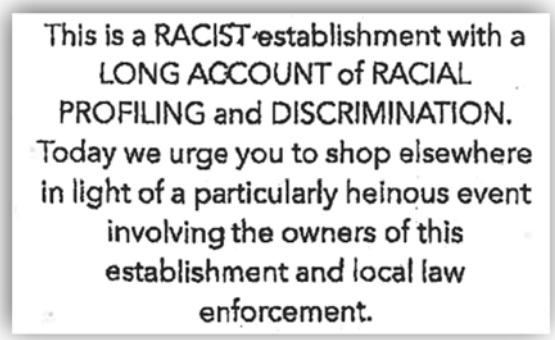
Plaintiffs have submitted substantially probative evidence proving Defendants acted negligently and that their negligence caused the Student Senate Resolution to be published, or that Defendants aided and abetted the Student Senate:

- The Student Senate faculty advisor, Vice President Raimondo, was at the protests all day on November 10, 2016, handing out numerous copies of the defamatory flyer [Tr. Trans. Vol. V, 178:22-180:2];

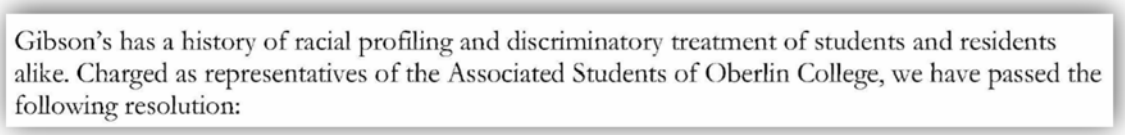
- The Student Senate faculty advisor advises the protestors to get more copies of the defamatory flyer at the College Conservatory office [Tr. Trans. Vol. V, 177:19-178:5];

- After witnessing their faculty adviser supporting the protests and passing out the defamatory flyer, the Student Senate, including Kameron Dunbar (who, according to Defendants' discovery responses, attended the protests (Def. Raimondo's Answers to Plaintiffs' First Set of Discovery Requests, Interrogatory No. 10)), used the College-approved defamatory flyer as a template for the resolution:

  From the defamatory Flyer:



From the Student Senate Resolution:



- Defendants are fully aware, the first night of the protests, that the resolution was published to the thousands of Oberlin College students within mere minutes of that publication [Tr. Trans. Vol. IV, 56:11-15, Plaintiffs' Tr. Exh. 34];

- Defendants promptly adopt and ratify the content of the Student Senate Resolution through a public statement, designed to give "props" to those who drafted and published the resolution [Plaintiffs' Tr. Exh. 67; Plaintiffs' Tr. Exh. 460, p. 8];

- Defendants permit the Student Senate Resolution to be prominently posted in Wilder Hall, which Defendants know is a high traffic location, for over a year [Tr. Trans. Vol. IV, 54:25-56:1];

- Vice President Raimondo enters Wilder Hall every day because her office is located in that building [Tr. Trans. Vol. V, 9:1-3];

- At all times relevant, Vice President Raimondo had the power to unleash the students and the power to leash the students, considering she commanded them to take the resolution down from the display case and they complied with that command [Plaintiffs' Tr. Exh. 211; Tr. Trans. Vol. V, 9:4-9, 9:17-10:9].

Had Defendants acted like the adults in the room at the very early stages of the protests, including by not copying or handing out the defamatory flyer and by telling their students that making false accusations of racism or racist behavior was beyond the pale, the Student Senate Resolution would not have been published. However, this did not happen.

Moreover, based on the substantial amount of evidence detailed above, *Kinney v. Kroger*

Co., 146 Ohio App.3d 691, 767 N.E.2d 1220 (10th Dist.2001) is distinguishable. In *Kinney*, the plaintiff failed to submit any evidence that a single third party received the alleged defamatory statement. 146 Ohio App.3d 691, ¶ 27. Unlike the plaintiff in *Kinney*, Plaintiffs have submitted substantially probative evidence on the publication of the Student Senate Resolution to third parties – the Student Senate, with the full support of Defendants, mass distributed the resolution to all Oberlin College students.

Finally, Defendants' reference to Vice President Raimondo's testimony about when she became aware of the resolution's publication in Wilder Hall is an issue of witness credibility, not an issue for directed verdict. *Ruta*, 69 Ohio St.2d at 68–69 (a review of a motion for directed verdict "does not involve weighing the evidence or trying the credibility of witnesses.") Furthermore, even if one were to review her credibility, one should conclude her testimony is suspect because she was the faculty advisor to the Student Senate and thus, aware of their posting proclivities and because she entered the very building in which the resolution was posted every working day. Furthermore, Oberlin College clearly owns Wilder Hall and it must be inferred that Defendants had presumed knowledge of how that building, including its display cases, was being used. *Gibson v. Drainage Products, Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, 766 N.E.2d 982, ¶ 21 (2002) ("Moreover, the party against whom the motion is directed is entitled to have the trial court construe the evidence in support of its claim as truthful, giving it its most favorable interpretation, ***as well as having the benefit of all reasonable inferences*** drawn from that evidence.") (Emphasis added.)

C. Plaintiffs presented sufficient probative evidence to avoid a directed verdict on their claims for tortious interference with contract or business relationship.

"The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional

procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260, 707 N.E.2d 853, paragraph one of the syllabus. Tortious interference with business relationship "'is similar [to a tortious interference with contract claim] but occurs when the result of the interference is not breach of contract, but that a third party does not enter into or continue a business relationship with the plaintiff.'" *Deems v. Ecowater Sys.*, Inc., 9th Dist. Summit No. 27645, 2016-Ohio-5022, ¶ 26, quoting *Magnum Steel & Trading, L.L.C. v. Mink*, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431.

1. Defendants cannot escape liability under an agency theory because Bon Appetit made all purchases of goods for CDS, the bills were sent solely to Bon Appetit, and the invoices were paid directly by Bon Appetit.

Defendants' argument that they are parties to Plaintiffs' contract and business relationship with Bon Appetit, which is based solely on the fact that Oberlin College is in an agency relationship with Bon Appetit, fails as a matter of law and ignores the facts of this case.

Oberlin College can only be a party to the Bon Appetit/Gibson's Bakery contract or business relationships if, under the Management Agreement, which was discussed during the cross examination of Michele Gross, Bon Appetit had ***actual authority*** to bind Oberlin College, as the purchaser. *See Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929, ¶¶ 20, 24 (2012) (binding the principal to agent-made contracts "requires that the agent must make the contract on the principal's behalf *with actual authority to do so.*" (emphasis in original).) *Cincinnati Gulf* then held that a principal/agent relationship, sufficient to make the principal a party to its agent's contracts, does not exist where (1) the purchases were made solely by the alleged agent, (2) the bills were sent solely to the alleged agent, and (3) the invoices were paid directly by the alleged agent. *Id.* at ¶¶ 22-23 (adopting analysis of *Russell Harp of Ohio, Inc.*

v. Lindley, 9th Dist. No. 9895, 1981 WL 3979, *2 (May 13, 1981). This analysis applies ***even if the alleged principal and alleged agent have a contract stating that an agency relationship exists***. *See Russell Harp* at **2-3. *Willoughby Hills Dev. & Distrib., Inc. v. Testa,* 155 Ohio St.3d 276, 2018-Ohio-4488, 120 N.E.3d 836, ¶¶ 33-34 (2018) (no agent/principal relationship where alleged agent had no authorization to make commitments/incur obligations on behalf of Sunoco).

In this case, it is ***undisputed*** that Bon Appetit did not have the authority to bind Oberlin College. Michele Gross, then-Director of Dining Services, testified that Bon Appetit managed all aspects of the Gibson's Bakery purchases, including managing the daily standing orders:

Q. And with regard to getting food and goods for dining services, who would be responsible for actually going out and getting those goods from vendors?
A. Bon Appétit.
Q. And who would actually be responsible for paying those vendors for those goods?
A. Bon Appétit.

***

Q. And who would be responsible for managing those daily standing orders?
A. Usually, it was the manager of the dining hall.
Q. And would that be Bon Appétit?
A. Yes.

[Trial Trans., Vol. V, 78:4-10, 80:11-15].

David Gibson specifically testified that the daily orders and "tweaks" to those orders were communicated to Gibson's Bakery by employees of Bon Appetit. [Tr. Trans. Vol X, p. 165]. David Gibson also testified that the invoices were given to Bon Appetit and paid directly by Bon Appetit,

usually within 15 to 30 days. [Id., 166:10-19]. As provided above, Michele Gross confirmed that all financial transactions flowed through, and were handled solely by, Bon Appetit. [Trial Trans., Vol. V, 78:4-10, 80:5-15].

Vice President Raimondo further confirmed this fact when she testified that Oberlin College was only responsible for paying a "management fee" to Bon Appetit, not individual invoices. Vice President Raimondo was reticent to fully admit this fact:

Q. Okay. And can we agree that the college pays a fee to Bon Appétit, and for that fee, Bon Appétit places orders with other suppliers and it pays those other suppliers itself for those orders?
A. I believe that's correct.

[Tr. Trans., Vol. V, pp. 53-54]. To help her clarify her understanding, the following excerpt from her 30(B)(5) deposition was played during trial:

Q. Yeah. So they -- they go out and place orders directly with vendors like Gibson's Bakery for food items, correct?
A. Yes.
Q. And they directly pay any sort of bills or invoices from those third parties, correct?
A. Yes, the college pays a management fee that covers all of the related expenses from food costs to manager costs, personnel costs.

[M. Raimondo 30(B)(5) Dep., p. 127]. Thereafter, she agreed that Oberlin College merely pays a management fee to Bon Appetit, who then goes out on its own to secure and pay for goods. [Tr. Trans. Vol V, 53:25-54:1].

Based on the foregoing, under Ohio law, there is no principal/agent relationship between Bon Appetit and Oberlin College, and therefore, Oberlin College is a third party "stranger" capable of interfering with the Bon Appetit/Gibson's Bakery contract or business relationships.

This is true even though the Management Agreement between Oberlin College and Bon Appetit (like the agreement in *Harp*) provides:

> 1.2 Agency Relationship. Bon Appétit shall act as agent for Oberlin in the management of the Food Service operation at the following locations: Stevenson Hall, Dascomb Hall, Lord Saunders Hall, Wilder Hall and such other locations as mutually agreed to by the Parties. Bon Appétit shall purchase food and supplies in Bon Appétit's name and shall pay the invoices. As principal, Oberlin may supervise Bon Appétit's daily operation of the Food Service Operations, including working conditions for Food Service Employees and safety, sanitation and maintenance of the Premises.

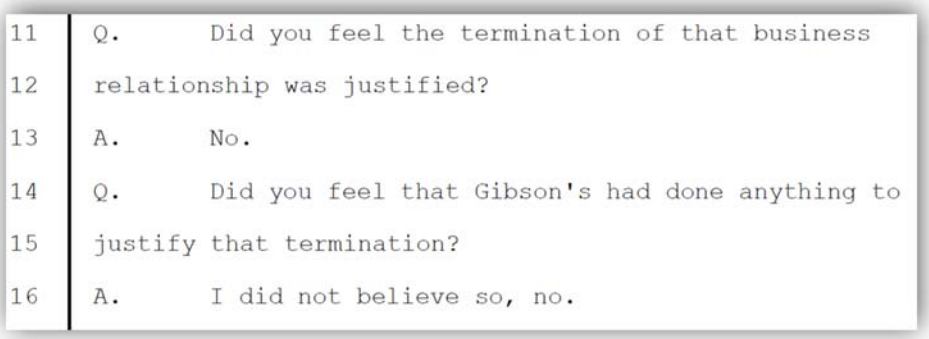
[Plaintiffs' Trial Exh. 367[4] § 1.2]. Nearly identical to the *Russell Harp* decision, which is binding Ninth District case law, the Management Agreement does not grant Bon Appetit the specific authority to bind Oberlin College to specific vendor contracts. *See Russell Harp* at **2-3. In fact, the agreement ***specifically states*** that "Bon Appetit shall purchase food and supplies in Bon Appetit's name and shall pay the invoices", and Oberlin College is simply obligated to reimburse Bon Appetit for purchases approved by Oberlin College. [Id., § 6.4]. Furthermore, Oberlin College does not pay the wages of Bon Appetit's employees; instead, Oberlin College merely pays a management fee to Bon Appetit and Bon Appetit is responsible for paying its own employees. [Id., § 4.7].

Interestingly, Defendants acknowledged that Bon Appetit is a third-party contractor, not an agent, in their Amended Answer to Plaintiffs' Complaint: "Defendants admit that Bon Appetit Management Company is a food services ***contractor*** for the College." [Defs. Amend. Answer, ¶

[4] Plaintiffs did not introduce this exhibit during their direct or cross examinations of witnesses. However, the exhibit was authenticated and discussed at length during Defendants' cross examination of Michele Gross. [Trial Trans. Vol. V, pp. 96:25-97:14].

56]. Thus, under *Cincinnati Gulf* (adopting *Harp*) and *Willoughby Hills*, no principal/agent relationship exists between Oberlin College and Bon Appetit and thus, Oberlin College is a third party/separate party for the tortious interference analysis.

Moreover, even if the requisite principal/agent relationship existed (and it does not under Ohio law), Oberlin College would still be liable for tortious interference with the Bon Appetit/Gibson's Bakery contract or business relationships because Oberlin College acted outside the scope of any principal/agent relationship. Nowhere within the Management Agreement does the principal have the authority to require Bon Appetit to terminate contracts, especially a termination that Oberlin College's own Director of Dining felt was not warranted:



Q. Did you feel the termination of that business relationship was justified?
A. No.
Q. Did you feel that Gibson's had done anything to justify that termination?
A. I did not believe so, no.

Oberlin College's Chief of Staff, Ferdinand Protzman, separately testified that the highest echelons of College management did not believe the termination was justified. [Tr. Trans. Vol. III, 13:7-19]. Even if the Management Agreement provided that Oberlin College could require Bon Appetit ***to use*** the goods and services of local Oberlin or Lorain County vendors [Id., 99:16-100:12], Plaintiffs could not locate any provision within that same section of the Management Agreement which permits Oberlin College to force Bon Appetit to terminate its relationship with its vendors, regardless of whether the particular vendor was identified by Oberlin College. And Defendants did not elicit any testimony to that effect. Once Bon Appetit entered into those relationships with its vendors, Oberlin College did not have the right to interfere with the relationships. *See, e.g.,*

Kuvedina, LLC v. Cognizant Tech. Solutions, 946 F. Supp.2d 749, 758 (S.D. 2013) (principals and agents become third parties and strangers to contracts when they act outside the scope of the agency at issue or with malice or for an improper purpose); *Parker v. BAC Home Loans Servicing LP,* 831 F.Supp.2d 88, 92-3 (D.C. Dist. 2011); *CSDS Aircraft Sales & Leasing, Inc. v. Lloyd Aereo Boliviano,* 2011 WL 1559823, *5 (S.D. Fla. 2011).

Additionally, the caselaw cited by Defendants at page 6 of their Motion, including those cases cited within footnote 6, are distinguishable because none deal with an "agent" who is purchasing goods in order to fulfill its own obligations to the "principal." *Boyd v. Archdiocese of Cincinnati*, 2nd Dist. Montgomery No. 25950, 2015-Ohio-1394 (involved claims by one employee against other employees claiming they interfered with an employment agreement with the common employer); *Dolan v. Glouster*, 173 Ohio App.3d 617, 879 N.E.3d 838 (4th Dist. 2007) (involved a claim that an employee of a company interfered with a business relationship between his company and a third-party); *Allstate Ins. Co. v. Papanek*, S.D.Ohio No. 3:15-CV-240, 2018 WL 3537140 (the alleged tortfeasor was conclusively determined to be a mandatory party to the prospective business relationship).

Based on the foregoing, Defendants cannot escape liability for their tortious interference with the Bon Appetit/Gibson's Bakery contract or business relationships by arguing that Oberlin College was a party to that contract or business relationship.

Finally, Defendants too narrowly construe the scope of Plaintiffs' tortious interference with business relationship by claiming it is limited to only the relationship between Plaintiffs and Bon Appetit. (*See*, Mtn. For Dir. Verdict, fn. 5). In actuality, the evidence submitted during Plaintiffs' case-in-chief shows additional relationships with which Defendants interfered: (1) the Oberlin College departments and faculty [Tr. Trans. Vol. XI, 90:1-22, 93:11-24]; (2) the students [Tr.

Trans. Vol. X, 9:7-10:6]; and (3) members of the Oberlin Community who would sit with Grandpa Gibson outside the bakery [Tr. Trans. Vol. VI, 152:12-25]. The final one is the most tragic, considering Grandpa Gibson found this to be one of the most enjoyable parts of his work, especially after his wife passed. [Tr. Trans. Vol. VII, 29:1-19].

D. Oberlin College is not entitled to directed verdict on Plaintiffs' claim for negligent hiring, retention, and/or supervision.

Negligent hiring, retention, and/or supervision claims require proof of the following elements:

> (1) The existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Evans v. Ohio State Univ., 112 Ohio App.3d 724, 739, 680 N.E.2d 161 (10th Dist.1996) [citations omitted]. *See, Collins v. Flowers*, 9th Dist. Lorain No. 04CA008594, 2005-Ohio-3797, ¶ 32.

Contrary to Defendants' assertion, liability under negligent hiring, retention, or supervision does not ***only*** arise when an employer employs an individual whom it knew or should have known had a past involving criminal, tortious, or other dangerous conduct. (Def. Mtn. for Dir. Verdict, p. 9). Indeed, there are various cases which do not cite any such requirement. *See Ball v. Stark*, 10th Dist. Franklin No. 11AP-177, 2013-Ohio-106; *Ford v. Brooks*, 10th Dist. Franklin No. 11AP-664, 2012-Ohio-943; *Sheldon v. Kettering Health Network*, 2nd Dist. No. 26432, 2015-Ohio-3268, 40 N.E.3d 661; *Nye v. Ellis*, 5th Dist. Licking No. 09-CA-0080, 2010-Ohio-1462.

Instead, the *Ball* court identifies that under negligent hiring, retention, and supervision, "if an employer, without exercising reasonable care, employs an incompetent person in a job that brings him into contact with others, then the employer is subject to liability for any harm the employee's incompetency causes." *Ball* at ¶ 75, citing *Abrams v. Worthington,* 169 Ohio App.3d

94, 2006–Ohio–5516, ¶ 14 (10th Dist.); *accord* Restatement of the Law 3d, Agency, Section 7.05(1)(2006) ("A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.").

Plaintiffs have submitted substantial probative evidence showing that Vice President Raimondo was negligently hired, retained, and/or supervised and sufficient probative evidence showing that Julio Reyes was negligently supervised.

1. There is substantially probative evidence that Oberlin College negligently hired, retained, and/or supervised Vice President Raimondo.

Plaintiffs have produced substantial probative evidence supporting their negligent hiring, retention, and supervision claim related to Vice President Raimondo, whom Defendants identified was working on Oberlin College's behalf at the protests.

a. *Meredith Raimondo lacked the qualifications and training to fulfill the role of Vice President and Dean of Students.*

Former President Marvin Krislov ("President Krislov") testified on May 10, 2019, through his prior video deposition testimony, that following the retirement of the first Dean of Students he worked with during his tenure with Oberlin College, there was a national search performed to pick the successor. [Plt. Ex. 460, Dep. pp. 22-23]. Following a national search, which included both a search committee and likely an outside hiring company, Oberlin College hired Eric Estes. [Id.]. However, when Eric Estes left to go to Brown University, deviating from prior practice, Oberlin College did not conduct a national search prior to hiring Meredith Raimondo as the Interim Vice President and Dean of Students. [Id.]. President Krislov explained that Estes' abrupt departure resulted in lack of "lead time" to select a replacement. [Id.].

Meredith Raimondo testified in court that between the time Eric Estes left and she was

appointed as interim Vice President, she ***did not receive any additional training***. [Tr. Trans. Vol. V, pp. 55-56]. Then, following her appointment to the interim position as Vice President and Dean of Students, where she acquired new responsibilities and was allegedly wearing many "hats," Vice President Raimondo testified that the only training she received for her new role were "two professional meetings that fall." [Id., p. 71]. Raimondo has no training in properly responding to protests or crowd control. Vice President Raimondo was then hired into the position permanently beginning on November 1, 2016, only eight days prior to the shoplifting at Gibson's Bakery. [Id.]. Despite her lack of experience, training and qualifications, President Krislov then placed her in charge of the protests. This evidence is sufficient for a reasonable juror to conclude that Vice President Raimondo lacked the qualifications and specific training to fulfill the role of Vice President and Dean of Students.

b. *Vice President Raimondo was incompetent during her handling of the protests.*

Once the protests began on November 10 and 11, 2016, Vice President Raimondo did not perform in a manner to deescalate the environment. Vice President Raimondo admitted during her testimony that if people were blocking citizens who were trying to take pictures, it could escalate the protests into a potentially dangerous situation:

4	Q. Okay. You would agree that if people are
5	putting signs or flyers or their hands in front of other
6	citizens that are trying to take pictures, you would
7	agree that can escalate a situation, right?
8	A. It could.

[Tr. Trans. Vol. IV, p. 97].

While Vice President Raimondo blamed the blocking of photographers on the students, ***her own incompetence led her to engage in that very behavior***. Jason Hawk testified that Dean

Raimondo, after approaching him and telling him who she was, stood closely in front of him and ***prevented him from taking photos***. [Tr. Trans. Vol. III, pp. 100-101]. Even after Jason Hawk moved to the side, ***she again moved in front of him to block him***. [Id., p. 102]. Not only did she tell Mr. Hawk to stop taking photos, but she also approached another couple to tell them the same thing. [Id., pp. 102-103].

As further evidence of her incompetence during the protests, Vice President Raimondo was seen with a stack of flyers that said that Gibson's Bakery "is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." [See, Tr. Ex. 263]. The Flyer also stated that an owner of Gibson's Bakery ***assaulted*** a member of the community. [Id.]. Trey James testified that she handed a stack of Flyers to students who then passed them out. [Tr. Trans. Vol. V, pp. 178-179]. Vice President Raimondo even admitted under oath that she handed a copy of that same flyer to Jason Hawk. [Tr. Trans. Vol. IV, p. 53].

Taking overt actions to escalate the protests while also distributing defamatory materials reveals Vice President Raimondo's incompetence during her handling of the protests.

c. *Vice President Raimondo acted incompetently when she ordered Bon Appetit to cancel its longstanding business relationship with Gibson's Bakery.*

While the protests were ongoing, Vice President Raimondo instructed Michele Gross to order Bon Appetit to stop serving Gibson's Bakery products. [Plt. Ex. 55]. Later, Vice President Raimondo, through Ms. Gross, ordered Bon Appetit to terminate all business with Gibson's Bakery. [Tr. Trans. Vol. V, pp. 83-85].

d. *Oberlin College was aware of Vice President Raimondo's incompetence.*

Plaintiffs produced substantially probative evidence that Oberlin College was aware of Vice President Raimondo's incompetence.

- Oberlin College was aware that no national search was conducted to find a new Vice President and Dean of Students. [Plt. Ex. 460, Dep. pp. 22-23].

- Oberlin College was also aware of Vice President Raimondo's incompetence during the protests. According to Oberlin College, Vice President Raimondo was supposed to be a "calming influence" at the protests, but she failed in this responsibility. Indeed, former Sergeant Victor Ortiz testified that he was forced to call a senior level Oberlin College administrator about the need for a riot squad at the protests:

> I have a personal relationship with Adrian Bautista, who is the dean at the college. He and I used to coach our boys basketball team together. So I had his number. I called him and I told him, I says, "Hey, if we can't get this under control, I'm going to end up calling the county riot team in."

[Tr. Trans. Vol. III, p. 155].

- Oberlin College was also aware the Vice President Raimondo published the defamatory Flyer to at least one other person. Ferdinand Protzman testified as follows during trial:

> Q. Can we agree that at one time you believed that at the protests Vice President Raimondo was holding the flyer and gave it to at least one other person?
> A. Yes, I became aware of that, yeah.
> Q. And that's the flyer that said that the Gibsons are racists, that the Gibsons have a long history of racial profiling and that the owners of Gibsons assaulted somebody else, a student; is that right?
> A. That's correct.

[Id., p. 40]. Additionally, it was reported in the Oberlin News Tribune both online and in print that Dean Raimondo published the defamatory literature. [Tr. Trans. Vol. III, pp. 40, 107].

- Following the termination of business between Bon Appetit and Gibson's Bakery, Ferdinand Protzman, President Krislov, and former Chief of Staff Jane Mathison met on multiple occasions to discuss Vice President Raimondo's decision. Except for Vice President Raimondo (presumably), everyone agreed that the decision to terminate business was wrong. [Tr. Trans. Vol. III, p. 13]. Instead of correcting the mistake, President Krislov doubled down and continued to support Vice President Raimondo

despite her incompetence:

Q. But President Krislov and former chief of staff Mathison, although they agreed that it had been a bad decision to cancel the order, at that point they were concerned about protecting Vice President Raimondo, correct?
A. They were concerned about supporting her.
Q. Supporting her, protecting her; they wanted to support her even though they believed that she had made an inappropriate decision, correct?
A. Yes, that's correct.

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Q. They disagreed with her decision. But even though they felt it was a decision that wasn't the right decision, they wanted to support her, right?
A. That was my understanding at the time, correct.

[Tr. Trans. Vol. III, pp. 14, 18]. Instead of remedying Vice President Raimondo's conduct, Oberlin College chose to support her inappropriate decision and the continued economic sanctions against Plaintiffs.

e. *Vice President Raimondo's incompetence contributed to Plaintiffs' injuries.*

The jury has also been presented with substantially probative evidence that Vice President Raimondo's incompetence caused the Plaintiffs' injuries. Specifically, Plaintiffs presented evidence that Vice President Raimondo published the defamatory flyer to numerous people and aided in the spreading of the defamatory flyer by handing stacks of them to students to distribute. Additionally, Vice President Raimondo ordered the termination of the business relationship between Bon Appetit and Gibson's Bakery, resulting in further injuries. Despite Oberlin College's awareness of Vice President Raimondo's incompetence, she has remained an employee and

Oberlin College ratified her inappropriate conduct.

2. There is sufficient evidence for a reasonable juror to conclude that Oberlin College negligently supervised Julio Reyes.

Plaintiffs presented sufficient probative evidence that Oberlin College was negligent in supervising Julio Reyes.

a. *Julio Reyes was incompetent in fulfilling his role and Oberlin College had actual or constructive knowledge of his incompetence.*

As Vice President Raimondo testified, blocking photographers could be an escalating event during the protests on November 10 and 11, 2016. [Tr. Trans. Vol. IV, p. 97]. However, as community member Rick McDaniel testified, Julio Reyes identified himself as being "with the college," he had a stack of flyers and gave one to Mr. McDaniel, and blocked Mr. McDaniel from taking photographs, just like his supervisor, Vice President Raimondo, had done. [Id., pp. 16-19]. Former Sergeant Ortiz, who was a Sergeant in November 2016, testified that he saw Julio Reyes getting in Mr. McDaniel's face and blocking him from taking pictures. [Tr. Trans. Vol. III, p. 157]. After Sergeant Ortiz approached them and asked if there was a problem, Julio Reyes walked away to where his superior Vice President Raimondo was standing. [Tr. Trans. Vol. IV, p. 19].

Oberlin College, through Vice President Raimondo, had actual or constructive knowledge of Julio Reyes' incompetence during the protests as Vice President Raimondo was there in a supervisory capacity. Further, Vice President Raimondo confirmed in her testimony on the stand that Julio Reyes was within the realm of student affairs and was either a direct or indirect report to her. [Id., pp. 67-68].

b. *Julio Reyes' incompetence and Oberlin College's failure to supervise him contributed to Plaintiffs injuries.*

Julio Reyes, following the lead of his supervisor Vice President Raimondo's lead, published the defamatory flyer to at least one person, Rick McDaniel, and there is circumstantial

evidence that he published the defamatory flyer to additional people. This distribution of the defamatory flyer contributed to Plaintiffs' injuries related to defamation as it was spread. Additionally, despite Vice President Raimondo's knowledge of Julio Reyes' incompetence and actions at the protests, he remained employed at Oberlin College until mid-2017.

E. Defendants are not entitled to directed verdict on Grandpa Gibson and Dave's claims for intentional infliction of emotional distress.

To succeed on a claim for intentional infliction of emotional distress (IIED), the plaintiff must show the following elements:

> (1) that the defendant [intentionally or recklessly caused] the plaintiff serious emotional distress;
>
> (2) that the defendant's conduct was extreme and outrageous; and
>
> (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress.

Phung v. Waste Mgt., Inc., 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994) [citations omitted].

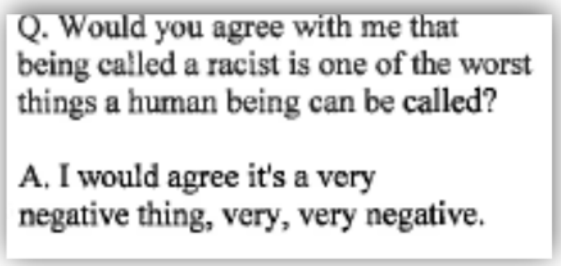
In their Motion, Defendants claim that Plaintiffs did not submit evidence to support elements two and three. However, during their case-in-chief, Plaintiffs submitted probative evidence to support both elements.

1. Defendants' decision to publish the defamatory Flyer, among other conduct, was extreme and outrageous.

Conduct is "extreme and outrageous conduct" where it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983) [citations omitted], abrogated on other grounds, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, syllabus.

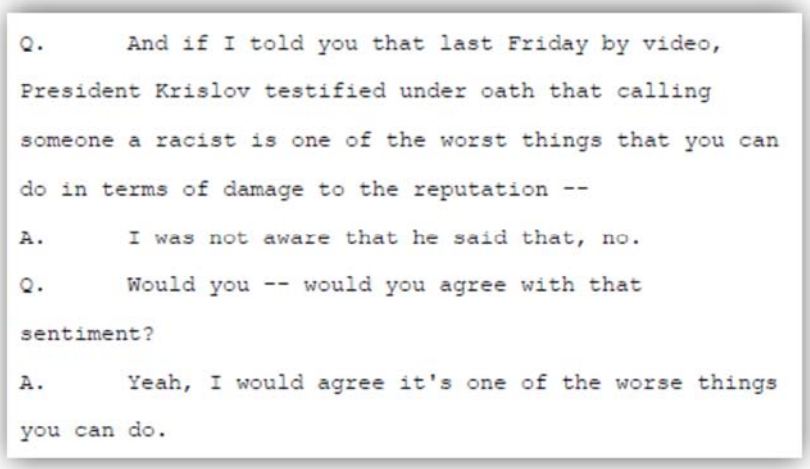
There is substantially probative evidence showing that Defendants' conduct was extreme and outrageous:

First, President Krislov specifically testified that being called a racist is one of the ***worst*** things that can happen to a person:


Q. Would you agree with me that being called a racist is one of the worst things a human being can be called?

A. I would agree it's a very negative thing, very, very negative.

(Ex. 460, p. 2). This was reiterated by Professor of Music Theory Jan Miyake:


Q. And if I told you that last Friday by video, President Krislov testified under oath that calling someone a racist is one of the worst things that you can do in terms of damage to the reputation --

A. I was not aware that he said that, no.

Q. Would you -- would you agree with that sentiment?

A. Yeah, I would agree it's one of the worse things you can do.

(Tr. Transcript Vol. VI, p. 126). Despite the acknowledgement that calling someone a racist is one of the ***worst things*** a person can do to someone else, Vice President Raimondo, while acting in the course and scope of her employment, published the Flyer, which accused Grandpa Gibson and Dave of having a "LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" (see, Ex. 263). First, Vice President Raimondo published a copy of the Flyer to local reporter, Jason Hawk, who then published the contents of the Flyer in the newspaper on two separate occasions. (Tr. Transcript Vol. III, pp. 104-05) (See, Def. Tr. Ex. W-23, X-23). Indeed, Gibson's Bakery employee Clarence "Trey" James testified that Vice President Raimondo distributed ***numerous***

copies of the Flyer at the protests:

A. Well, throughout, the most specific thing I can recall is she had a stack of them. It looked like it might have been half a stack of a paper ream. And while she was talking through the bullhorn, she actually handed it, about half of that stack, to another student who was standing next to her, who walked off and started passing out the flyers.

Q. From your observation, were there a lot of flyers being passed out?

A. Yes.

Q. And did you see, in addition to seeing doctor -- excuse me -- Vice President Raimondo taking that half a ream, or whatever, that stack of flyers and giving them to a student who then passed them out, did you see her do anything else with those flyers?

A. Yeah, she did. There was a table behind her and she had things behind her, so she turned and put some down and picked some up and handed some to another kid, and handed them several times.

(Tr. Transcript Vol. V., p. 179).

By Defendants' own admission, being called a racist is one of the ***worst*** things that can happen to someone. Despite this recognition, ***Defendants distributed a Flyer calling Grandpa Gibson and Dave racist with a "LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION."*** (Ex. 263). Doing one of the worst possible things to a person certainly qualifies as extreme and outrageous behavior.

Second, Defendants' outrageous conduct was not limited to the distribution of defamatory materials. Indeed, the evidence presented in Plaintiffs' case-in-chief shows that Oberlin College's upper-level administrators wanted to use the college's purchasing power from the Gibson's as

leverage to eliminate the criminal prosecutions of the students caught shoplifting at Gibson's Bakery. After the initial cancelation of orders, Tita Reed advocated for drafting a contract for the renewal of business that required Plaintiffs to "drop charges" against the three students:

From: Tita Reed <treed@oberlin.edu>
Sent: Friday, December 02, 2016 3:27 PM
To: Marvin Krislov
Subject: Re: The College and Gibson's

So can we draft a legal agreement clearly stating that once charges are dropped orders will resume? I'm baffled by their combined audacity and arrogance to assume the position of victim.

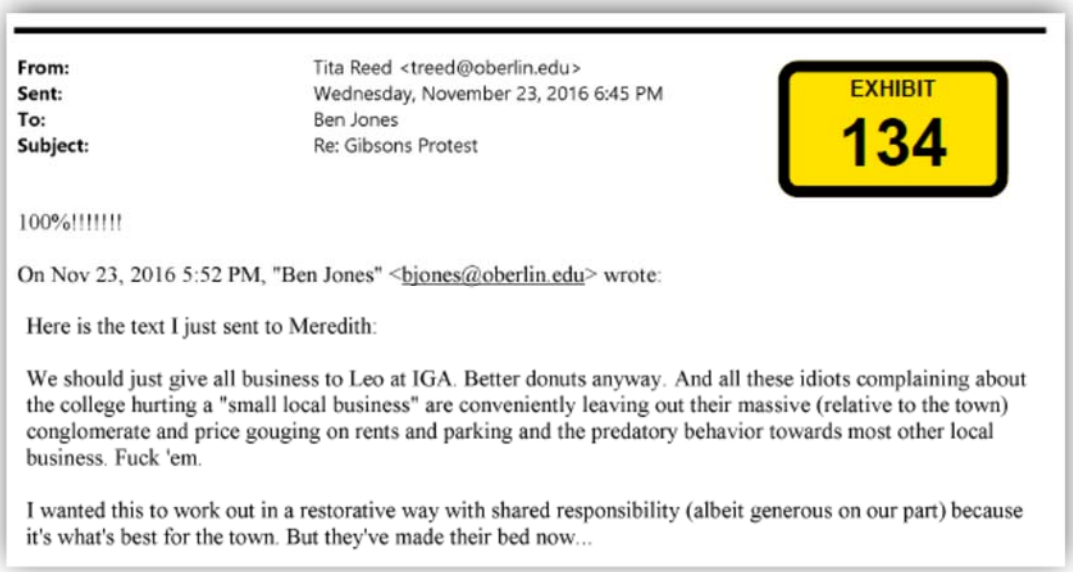
(Tr. Trans. Vol. III, pp. 85-86, Ex. 145). Defendants even attempted to use Obie dollars, which are a form of student debit card, as ***leverage*** against the Gibsons:

Q. That question was asked and that answer given under oath. So as we move forward from that, in terms of having leverage or bringing Dave Gibson to the table, you at one time identified the ability to perhaps use Obie Dollars as a leverage point, correct?
A. I did use the term "leverage," yes.
Q. And you also tried to and received information as how much Obie Dollars were being spent on an average annual basis; you remember that, right?
A. I did receive that information.
Q. When you saw that it was approximately 50 or 60,000 a year, that's when you said "Obie Dollars, another tool for leverage." You said that, right?
A. I did say that.

(Tr. Trans. Vol. III, p. 83). In essence, Defendants were using their financial power and authority in the community to force Dave and Grandpa Gibson to ignore the rule of law and drop the criminal prosecutions in exchange for the resumption of business that was wrongfully eliminated in the first

place.[5]

Defendants' outrageous conduct continued as senior level administrators denigrated Dave and Grandpa Gibson's family business using profane and unprofessional language:



From: Tita Reed <treed@oberlin.edu>
Sent: Wednesday, November 23, 2016 6:45 PM
To: Ben Jones
Subject: Re: Gibsons Protest

EXHIBIT 134

100%!!!!!!!

On Nov 23, 2016 5:52 PM, "Ben Jones" <bjones@oberlin.edu> wrote:

Here is the text I just sent to Meredith:

We should just give all business to Leo at IGA. Better donuts anyway. And all these idiots complaining about the college hurting a "small local business" are conveniently leaving out their massive (relative to the town) conglomerate and price gouging on rents and parking and the predatory behavior towards most other local business. Fuck 'em.

I wanted this to work out in a restorative way with shared responsibility (albeit generous on our part) because it's what's best for the town. But they've made their bed now...

(Tr. Ex. 134).

Defendants' sole argument on the extreme and outrageous element is that "mere insults" cannot support IIED claims. (See, Def. Mt. Dir. Ver., p. 12). Defendants even cite to a case finding that calling some a racist is insufficient conduct for an IIED claim. *See, e.g. Lennon v. Cuyahoga Cty. Juvenile Ct.*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587 ¶ 23. However, the language in both the Flyer and Student Senate Resolution are ***not mere insults***. Instead, the Flyer and Student Senate Resolution make specific factual allegations about Plaintiffs' treatment of people of color for the entire 134-year-old duration of the business. These allegations were particularly damaging as they were the exact opposite of the actual history of Gibson's Bakery and

[5] Interestingly, even had Dave and Grandpa Gibson been amenable to ignoring the law, they had no power or ability to "drop" charges as that power rests solely with the state through the Lorain County Prosecutor. *See, Brown v. Best Products, Inc.*, 18 Ohio St.3d 32, 35, 479 N.E.2d 852 (1985) [emphasis added] ("A release executed between private parties, the consideration of which, in whole or in part is the suppression of a criminal prosecution, ***is void because of a lack of consideration.*** … ***The decision to pursue or drop criminal charges is vested in the state***.").

the Gibson family.

Thus, Plaintiffs produced substantially probative evidence showing that Defendants' conduct was extreme and outrageous.

2. Plaintiffs submitted substantially probative evidence that Dave and Grandpa Gibson suffered severe emotional distress.

To succeed on a claim for IIED, the plaintiff must show that serious emotional distress, which is defined as severe and debilitating emotional injury. *See, Paugh v. Hanks*, 6 Ohio St.3d 72, 80, 451 N.E.2d 759 (1983), ¶ 3a of the syllabus.

Defendants' initial argument is that because Dave and Grandpa Gibson's medical records were determined by this Court to be irrelevant to this case, their emotional injuries cannot be severe and debilitating. This is a clear misstatement of the law. In Ohio, "***lay witnesses who were acquainted with the plaintiff, may testify as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff***." *Paugh v. Hanks*, 6 Ohio St.3d 72, 80, 451 N.E.2d 759 (1983) [emphasis added]. Thus, medical records and expert medical testimony are not necessary to show severe emotional injury.

Defendants then claim that Plaintiffs submitted no evidence of Dave and Grandpa Gibson's emotional injuries. (See, D. Mt. Dir. Ver., p. 14). However, this is clearly not true. In Plaintiffs' case-in-chief, several witnesses testified about the severe emotional changes for Dave and Grandpa Gibson after the protests and defamation:

- Lorna Gibson, Dave's wife, testified that after the protests and defamation Dave:

A. He was -- he was upset. Everything pretty much devastated him. To have the lies being told about him and the store, it was very upsetting. He, he kind of

got withdrawn and wouldn't speak to people. He just really tried to internalize a lot of it. It was a very upsetting time.

(Tr. Transcript Vol. VI, pp. 149-50). She further testified that the changes in Dave's emotional state occurred immediately after the protests and continued to build:

A. Yeah. I mean, it would build. It would -- you know, it started after the protests, and it just seemed to build. He just kept getting more and more emotional and upset about it.

A. Yes. It got to where not only was -- could he not -- he wouldn't talk to people or socialize, he couldn't eat, he was always sick to his stomach, he couldn't eat, wasn't sleeping well. He started having some heart issues, and just completely beside himself.

(Id., p. 150). Lorna testified that, even though he did not express it in exact terms, after the protest and the destruction of his reputation, Grandpa Gibson's emotional wellbeing changed:

A. It upsets him completely. He was so well-known in the community, and now he's made comments to us that that he's ashamed now that when he, when he passes away they're going to put "racist" on his tombstone.

(Id., p. 153).

- The testimony of the severe emotional distress was not limited to family members. Indeed, Mr. Eddie Holoway, a longtime Oberlin community member and friend of the Gibson family, testified about Grandpa Gibson's wellbeing immediately before the protests:

> Allyn was jovial, as he always is, and you know, we had a chance to talk about -- you know, we usually talk about a lot of things, you know, our families, you know, what we were -- you know, what we were doing in life. And he was in very good spirits too. I just had a good day, just talking to Allyn.

(Tr. Transcript Vol. VII, p. 56). But ***after*** the protests and defamation, Mr. Holoway noticed a significant change in Grandpa Gibson:

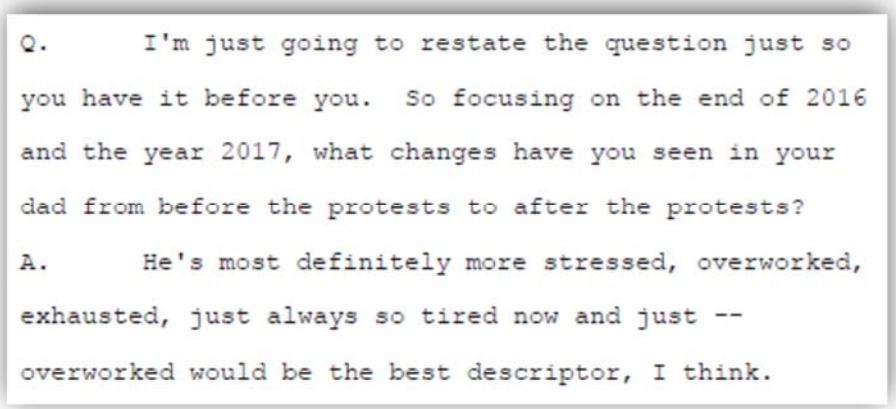
> A. He was accused of being something that I know he's not. And that's a reason. In my -- I have been a marginalized person, so I know what it feels like to be called something that you know you are not. And I could, I could feel his pain. You know, I knew where he was coming from.

(Id., p. 60).

- Steven Gibson, Dave's son and Grandpa Gibson's grandson, testified that Dave was distraught and extremely worried as soon as he found out about the protests:

> Q. How did your dad react when he found out about the protests?
> A. Shocked; confused. A lot of words I could use to describe that. He was worried, very worried about everyone in the store, about my family, my friends, anyone, you know, affiliated with this. He was nervous, stressed out, upset.
> Q. Were you concerned about his well-being?
> A. I was. I was. He seemed very upset.

(Id., p. 128). Steve further testified that Dave's stress and anxiety have continued since the protests and defamation:



Q. I'm just going to restate the question just so you have it before you. So focusing on the end of 2016 and the year 2017, what changes have you seen in your dad from before the protests to after the protests?
A. He's most definitely more stressed, overworked, exhausted, just always so tired now and just -- overworked would be the best descriptor, I think.

(Id., p. 132).

All that is required to avoid directed verdict (or summary judgment) is some guarantee of genuineness related to the serious emotion distress. *See, e.g. Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 135, 447 N.E.2d 109 (1983).[6] Considering the testimony of ***numerous*** witnesses and construing the facts most strongly in Plaintiffs favor, which is required at the directed verdict stage, Plaintiffs have presented evidence of substantially probative value that Dave and Grandpa Gibson suffered serious emotional injuries.

F. Defendants are not entitled to directed verdict on Plaintiffs' damages claim for lost business opportunities.

1. It is not speculative to base damages on Plaintiffs' lost business opportunities even though a zoning change would be required.

Without providing any citation in support, Defendants contend that Ohio law provides that "there must be competent, credible evidence that the zoning might be changed in the reasonably

[6] The cases cited in Defendants' Motion are inapposite as they dealt solely with testimony from the plaintiff regarding the serious emotional distress with no corroborating testimony from third parties or medical experts. First, Defendants cite to *Oswald v. Fresh Mark/Sugardale, Inc.*, 5th Dist. Stark No. CA-8906, 1992 WL 330282 (Nov. 9, 1992). This case is highly distinguishable as the only evidence underlying the claim for IIED was a self-serving affidavit from the plaintiff regarding his emotional injuries. *Id.* at *4. As detailed above, Dave and Grandpa Gibson's IIED claims are supported by substantial evidence from numerous sources, including family members and disinterested third-party community members. *Thibodeaux v. B E & K Construction Co.*, 4th Dist. Ross No. 04CA2761, 2005-Ohio-66, ¶ 31 and *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 2002-Ohio-443, 771 N.E.2d 874, ¶ 17 suffer from the same deficiency as they involve self-serving affidavit or deposition testimony. Because Plaintiffs' IIED claim is supported by numerous third parties, including family and community members, these cases have no application.

foreseeable future." [Defs. Motion, pp. 14-15] As explained further below, evidence abounds for reasonable minds to conclude that zoning of the lots at 549 W. College St. would be changed to allow for the completion of David's business plan. Moreover, Defendants' proposition of law is not even supported by Ohio law.

Citing an eminent domain valuation case, Defendants incorrectly assert that when a property owner does not pursue a rezoning prior to the *eminent domain* proceeding, it would be speculation to base a damage report on a use for which the property is not currently zoned. *Clark County Board of Commissioners v. Seminole Avenue Realty,* 179 Ohio App.3d 37 (Clark Cty. 2008). First, the *Seminole* case involved a "business losses" rule that is specific to appropriations cases. *Id*. at 44 (explaining that this judicial construct in appropriations cases holds that the owner of appropriated property may not be compensated for the loss of future profits from any commercial enterprise on the property). Obviously, this is not an appropriations case. Further, in *Seminole*, it was undisputed that the landowner never even contemplated having an assisted-living facility on his property prior to the appropriation proceedings. *Id*. Here, in contrast, the evidence shows that David Gibson's plans for the property at 549 W. College St. have long been in place.

Moreover, Defendants' proposition of law does not even stand up in eminent domain cases. Instead, eminent domain compensation can also properly be based upon a use of land *even if a change in zoning would be required and even without evidence of a probable change in the zoning regulations in the foreseeable future*. O. Jur. 3d Eminent Domain, Section 147.

In *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 152, the Supreme Court of Ohio held that an expert need not confine his valuation testimony to the use permitted under existing zoning regulations. *Id.* (experts could testify to use for an apartment building even though area currently zoned single-family residences). Instead, an expert may testify to a use that is not permitted

under existing zoning regulations even without evidence of a probable change in the zoning within the foreseeable future." *Proctor v. Davison*, 2010-Ohio-3273, ¶¶39-40, *citing Wray v. Stvartak* (1997), 121 Ohio App.3d 462, 477 (zoned agricultural/residential and valued as commercial).[7] The *Davison* Court held that the record contained competent, credible evidence from which the trial court could conclude that the likelihood exists that the property would be rezoned and the necessary permits obtained. *"Even in the absence of such testimony, it was not error to permit Appellee to present evidence at trial of the highest and best use of the property for a use other than its zoned use." Id.* at ¶43.

Likewise, the Ohio Supreme Court has also ruled that compensation can properly be based upon a use of the land *even where the land is held under a deed containing restrictions against such use. In re Appropriation of Easement for Highway Purposes v. Thormyer,* 169 Ohio St. 291 (1959) (could base damages on evidence of value for commercial uses notwithstanding that deed contained restrictions against selling land/using land except for children's home).

As such, contrary to Defendants' suggestion, Ohio law certainly does not preclude Plaintiffs from obtaining damages relating to a future use of the property other than its currently zoned use.

2. Reasonable minds could certainly conclude that Gibson's plan for additional apartment buildings would have been fulfilled.

Can reasonable minds conclude that David Gibson's plan for additional apartment buildings could have been fulfilled? Most definitely. The evidence demonstrates that:

- Gibson has a track record in which he began implementing the business plan 20+ years ago;

[7] *Bd. of Trustees of Sinclair Community College Dist. v. Farra*, 2010-Ohio-568, 2010 WL 597098 (Ohio Ct. App. 2d Dist. Montgomery County 2010); *Proctor v. King*, 2008-Ohio-5413, 2008 WL 4615990 (Ohio Ct. App. 5th Dist. Licking County 2008); *Proctor v. Dennis*, 2006-Ohio-4442, 2006 WL 2474340 (Ohio Ct. App. 5th Dist. Fairfield County 2006).

- In 1996, David purchased land at 189 W. College St., got it rezoned, and built a successful 7-unit apartment building on it [Tr. Trans., p. 48];

- He implemented the next phase of his plan in 2003 when he acquired the real estate located at 549 W. College St. [Tr. Trans., pp. 48, 54];

- The 549 W. College St. property already had a 12-unit apartment building [Tr. Trans., p. 48];

- In addition, the 549 W. College St. property was attractive to Gibson because it had ample space to build additional apartments in the future, and the jury saw the substantial vacant greenspace to be used for those buildings in Exhibit 333.4-1:

- Gibson already had the plans for the build, as the two additional buildings would be replicas of the units he built at 189 W. College St. These 7-unit buildings would be significantly smaller than the existing 12-unit building at 549 W. College. In fact, the two additional buildings *combined* would only be about 70% of the size of the existing 12-unit building on the property. [Tr. Trans., pp. 56-57]

- In furtherance of the plan, Gibson began installing infrastructure for the planned buildings in 2008 by expanding and upgrading the sanitation lines, sewer lines, and storm drainage and installing sidewalks. [Tr. Trans., pp. 55-56]

- Gibson paid down the financing in an accelerated manner and was therefore able to pay off the properties in March 2018, at which time he would have been able (but for the Defendants' tortious conduct) to complete the next phase of his plan. [Tr. Trans., pp. 48, 54]

Why would reasonable minds believe that the property could be rezoned? In addition to the 20-year track record discussed above, the evidence also demonstrates that:

- David Gibson has 30-years' experience on the Oberlin City Planning Commission and 20-years' experience on the Lorain County Planning Commission and is adamant that the rezoning is not only likely, but is a certainty [Tr. Trans., pp. 59-60];

- Frank Monaco explained his 37-years of experience consulting with developers and reviewing whether development projects are practically and financially reasonable, including his roles on the boards of the Stark County Port Authority and the Pro Football Hall of Fame in which he is currently involved in overseeing the largest building project in Ohio [Tr. Trans., pp. 13-14, 59-60];

- The current planning commissioner agreed that it was reasonable to assume that this property would be rezoned [Tr. Trans. Vol. IX, pp. 57-60];

- After thorough review and analysis of the plan and financials and inspecting the property and surrounding areas, Monaco concluded that the plan was logistically and financially reasonably certain [Tr. Trans., pp. 59-62];

- Monaco applied the AICPA-recognized 'yardstick methodology' in arriving at his conclusions [Tr. Trans., pp. 60-62];

- The surrounding properties all evidence that rezoning is not only reasonably likely, it is the only logical use of the property and is inevitable:

    - There is already a 12-unit apartment building sitting on the property;

    - The neighboring properties also contain multi-family apartment buildings:

- There are commercial properties across the street [Tr. Trans., pp. 57-59];

- Also across the street, there sits 4 multi-family unit apartment buildings on just 1.4 acres of land (see below). [Tr. Trans., pp. 57-59] In contrast, David Gibson's plan would only have had 3 buildings sitting on 1.5 acres of land, allowing even more remaining greenspace than the units across the street:

3. The lost opportunity damages are not speculative.

Under Ohio law, a business, even a new business (which this is not), may establish lost profits with reasonable certainty through the use of evidence such as expert testimony, economic and financial data, business records of similar enterprises, and any other relevant facts. *AGF, Inc. v. Great Lakes Heat Treating Co.,* 51 Ohio St.3d 177, 555 N.E.2d 634 (1990), syllabus ¶3. A plaintiff seeking to establish future lost profits need only offer sufficient evidence, which may include expert testimony, to demonstrate the lost profits with reasonable certainty. *Advanced Travel Nurses LLC v. Watson,* 2nd Dist. Montgomery No. 24628, 2012–Ohio–3107, ¶¶ 18–19 (award of future lost profits was not speculative despite the "relative youth" of the company). A

fact is "reasonably certain" if it is probable or more likely than not. *Bob Forest Products, Inc. v. Morbark Industries, Inc.,* 151 Ohio App 3d 63, 88-89.

In the case at hand, the evidence establishes the future lost profits with reasonable certainty. Based on the foregoing, Ohio law does not preclude Plaintiffs from pursuing these lost opportunity damages relating to the planned additional apartment buildings. Further, Plaintiffs presented substantially probative evidence proving these damages.

G. Plaintiffs submitted substantially probative evidence on the issue of constitutional actual malice.

As this Court recognized prior to trial, Plaintiffs' defamation claim involves private figures regarding a matter of public concern. In those circumstances, a defamation plaintiff is required to prove constitutional actual malice to be entitled to ***presumed damages***. *See, e.g. Gosden v. Louis*, 116 Ohio App.3d 195, 687 N.E.2d 481 (9th Dist.). For purposes of defamation, actual malice requires proof that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 281, 84 S.Ct. 710 (1964). Reckless includes publishing a statement where the publisher has "a high degree of awareness of the statement's ***probable falsity***" or where the publisher "entertained ***serious doubts as to the truth*** of his publication." *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 12 (emphasis added) (citations and internal quotations omitted). While not dispositive, common law hatred and ill will malice is relevant on the issue of defamation actual malice. *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 147-48, 2000-Ohio-118, 729 N.E.2d 364 [citations omitted] ("finding that "evidence of ill will can be relevant" as "circumstantial evidence of the defendant's actual state of mind – either subjective awareness of probable falsity or actual intent to publish falsely.").

1. The standards for "actual malice" on presumed damages and punitive damages are different.

Before delving into Defendants' irrelevant arguments, Plaintiffs must correct a mistake in Defendants' brief. Because this case involves private figure/public issue defamation and punitive damages, two different standards for actual malice are in play:[8]

- ***First***, as identified above, to receive ***presumed damages***, Plaintiffs must show constitutional actual malice, *i.e.* that the Flyer and/or Student Senate Resolution were published with actual knowledge of their falsity or with reckless disregard as to their falsity. *See, New York Times*, 376 U.S. at 281.

- ***Second***, to receive ***punitive damages***, Plaintiffs must show common law actual malice, *i.e.* that Defendants acted with hatred, ill will, a spirit of revenge or with reckless disregard for the rights and safety of others that has a great probability of causing substantial harm. *See, Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus.

Defendants conflate these two standards by implying that constitutional actual malice is necessary for an award of punitive damages. However, this is a misstatement of the law. Constitutional actual malice is necessary for presumed damages and common law actual malice is necessary for punitive damages. And, as discussed below, because Defendants filed a motion for bifurcation, Plaintiffs have yet to present their punitive damages case to the jury.

2. Plaintiffs submitted substantially probative evidence of constitutional actual malice.

Plaintiffs submitted substantially probative evidence of actual malice:[9]

First, as disclosed in the testimony of Grandpa Gibson and Dave, Plaintiffs have been conducting business with Oberlin College for a century. (Tr. Trans. Vol. X, p. 180; Tr. Trans. Vol.

[8] *See, Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 117 (1988), ¶ 1 of the syllabus ("The concept of actual malice in defamation cases involving public officials is separate and distinct from the traditionally defined common-law standard of malice or actual malice.").

[9] Defendants intimated in their brief that the issue of actual malice is one of law. However, that assertion is incorrect. As Plaintiffs indicated in their response to summary judgment motions, whether or not a defendant acted with actual malice is a question of fact that "***does not readily lend itself to summary disposition***." *Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶ 65 (citations omitted) (emphasis added).

Vol. Vol. VII, pp. 16-17). For that entire period of time, Oberlin College did not hear even a hint of racial profiling or discrimination relating to Gibson's Bakery or the Gibson family. Indeed, several high-level Oberlin College administrators testified that ***before*** the protests, they had never heard even a hint of racism or racial profiling from Gibson's Bakery, Dave, or Grandpa Gibson. Now Chief of Staff Ferdinand Protzman testified as follows:

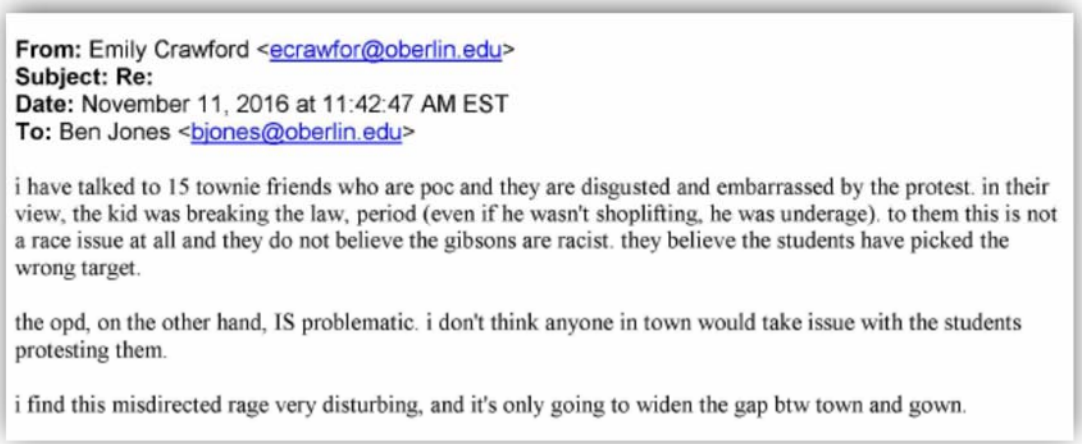
Q. And in your own relation -- in your own experience, you had confirmed that prior to any rumors or justifications flying around after the arrests of November 2016, in your own experience, you had never heard anything that suggested, prior to November of '16, that the Gibson family or the Gibson's Bakery had a long history of racial profiling, correct?
A. That is correct.

[Tr. Trans. Vol. III, p. 19]. Special Assistant to President Tita Reed provided similar testimony:

So at least when you were asked in deposition, there was no basis for you to say that you believed that David Gibson was a racist, correct?
A. I agree with what I said in my deposition. I've not had that experience with Dave Gibson.

[Id., p. 76].

Second, while the protests were ongoing, several high-level administrators from the college, including Vice President Raimondo, Special Assistant Reed, and Vice President Jones, received significant information from Emily Crawford, the art director in the communications department under Vice President Jones, indicating that Gibson's Bakery was not racist and did not have a history of racial profiling:



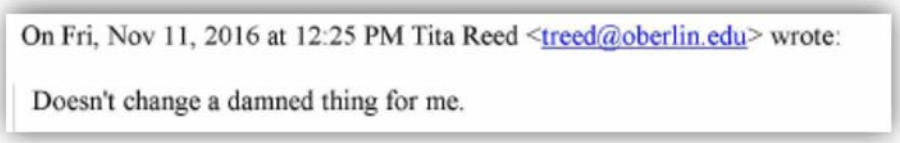
From: Emily Crawford <ecrawfor@oberlin.edu>
Subject: Re:
Date: November 11, 2016 at 11:42:47 AM EST
To: Ben Jones <bjones@oberlin.edu>

i have talked to 15 townie friends who are poc and they are disgusted and embarrassed by the protest. in their view, the kid was breaking the law, period (even if he wasn't shoplifting, he was underage). to them this is not a race issue at all and they do not believe the gibsons are racist. they believe the students have picked the wrong target.

the opd, on the other hand, IS problematic. i don't think anyone in town would take issue with the students protesting them.

i find this misdirected rage very disturbing, and it's only going to widen the gap btw town and gown.

[Tr. Ex. 63]. Instead of considering this information from Emily Crawford, who Vice President Jones confirmed was a reputable source [see, Tr. Trans. Vol. VI, p. 45], high level administrators, including Tita Reed, ignored it:



On Fri, Nov 11, 2016 at 12:25 PM Tita Reed <treed@oberlin.edu> wrote:

> Doesn't change a damned thing for me.

[Tr. Ex. 63] [Tr. Trans. Vol. VI, p. 50-51].

Defendants attempt to minimize this email by claiming (without citing to any evidence) that it was sent after the defamation occurred. This is clearly not true. Ms. Crawford's email was sent on November 11, 2016 at 11:42 AM. [See, Tr. Ex. 63]. November 11, 2016 ***was right in the middle of the protests***, where copies of the Flyer were being distributed, and only a few hours before Vice President Raimondo and President Krislov issued their statement giving "props" to the Student Senate for issuing the defamatory resolution. Despite acknowledging and receiving information strongly indicating there was no history of racial profiling and discrimination at

Gibson's Bakery, Defendants published copies of the Flyer and orchestrated the protests, which were centered around the Flyer. [Tr. Trans. Vol. III, p. 142].[10]

Third, Plaintiffs submitted ***numerous*** witnesses for purposes of showing that Plaintiffs do not have a long history of racial profiling and discrimination. Defendants' completely ignore these witnesses. However, each and every witness was or is a longtime resident of the City of Oberlin with significant interaction with Plaintiffs, just like Oberlin College.

Fourth, Defendants' Motion completely ignores the statement in the Flyer accusing Grandpa Gibson and Dave of assault. The first line of the Flyer states that "[a] member of our community was assaulted by the ***owner*** of [Gibson's Bakery] yesterday." [Tr. Ex. 263]. Dave clearly testified that only he and Grandpa Gibson were the owners of Gibson's Bakery. [Tr. Trans. Vol. X, p. 127]. Vice President Raimondo and numerous other Oberlin College administrators knew for certain that neither Dave nor Grandpa Gibson assaulted anyone. Vice President Raimondo among other administrators were ***present at the police station on November 9, 2016, the night of the arrests***. [Tr. Trans. Vol. III, p. 149]. Further, Officer Victor Ortiz specifically testified that he explained the charges alleged against the three students and the circumstances of their arrest to Vice President Raimondo and the other administrators. [Id., pp. 149-150].[11]

Thus, when Vice President Raimondo published the Flyer during the protests, at a minimum, she had serious doubts that Dave or Grandpa Gibson assaulted someone on the previous day.

Fifth, Defendants disregard the Student Senate Resolution because it was allegedly passed by the Student Senate without input from Vice President Raimondo. This argument is completely

[10] Henry Wallace testified that a student attempted to give him a copy of the Flyer while exclaiming that the Flyer was the basis and reasoning behind the protests. [Id.].
[11] Tita Reed also received a copy of the police report via email on November 10, 2016. [Id., p. 73].

irrelevant. The Student Senate Resolution was posted in an Oberlin College public building until November of 2017. [Tr. Trans. Vol. IV, p. 55]. In other words, it was published well after Oberlin College administrators, including Vice President Raimondo, received the email from Emily Crawford (November 11, 2016), the criminal convictions of the three students were completed (August of 2017), and after the publication of the Oberlin Police Department arrest statistics.

Sixth, while common law malice for purposes of punitive damages is decided during the punitive phase of trial, common law malice is also relevant on the issue of constitutional actual malice. *See, McKimm* at 147-48. There is substantial evidence that Defendants acted with common law malice. In emails and text messages, Defendants showed their ill will, hatred, and desire to get revenge on Plaintiffs by using profane language, attempting to use power in the community as a form of leverage to bribe Plaintiffs into doing what they wanted, and threatening to "rain fire and brimstone" on Gibson's Bakery. [See, e.g., Tr. Ex. 63, 100, 101, 134, 145, 207].

Clearly, Plaintiffs submitted substantially probative evidence supporting the element of constitutional actual malice for purposes of presumed damages.

H. Because Defendants filed a motion to bifurcate the compensatory and punitive phases of trial, Defendants cannot seek directed verdict on Plaintiffs' punitive damages request as Plaintiffs have not presented their case for punitive damages.

After filing a motion to bifurcate[12] the compensatory and punitive phase, Defendants, for some unknown reason, moved for directed verdict on Plaintiffs' request for punitive damages ***during the compensatory phase of trial***. However, as clearly outlined in the statute, where a party moves to bifurcate, the plaintiffs' punitive damages claim is not presented to the jury until ***after*** the completion of the compensatory phase. Thus, because the punitive phase of Plaintiffs' case has not even begun, Defendants cannot move for directed verdict.

[12] Defendants' Motion to Bifurcate was filed on April 15, 2019.

Pursuant to R.C. 2315.21(B)(1), any party may move the trial court to bifurcate the punitive phase of trial, and the court is required to grant the motion. R.C. 2315.21(B)(1) ("upon the motion of any party, the trial of the tort action shall be bifurcated"). When the case is bifurcated, the first phase of trial deals ***solely*** with compensatory damages. *See,* R.C. 2315.21(B)(1)(a) ("The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to ... compensatory damages"). Only ***after*** the plaintiff succeeds on the compensatory phase is the punitive damages phase presented to the jury. *See,* R.C. 2315.21(B)(1)(b) ("If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages ... evidence may be presented in the ***second stage of the trial*** ... with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages").

On April 15, 2019, Defendants submitted a motion to bifurcate the compensatory and punitive phases of trial. As required by statute, this Court specifically excluded evidence solely related to punitive damages:

> Based on the foregoing, Defendants' Motion to Bifurcate is granted. As outlined above and as provided in O.R.C. § 2315.21, the initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the Plaintiffs are entitled to recover compensatory damages for the injury or loss to person or property from the Defendants. ***During this stage, no party to the tort action shall present, and the Court shall not permit a party to present, evidence that relates solely to the issue of whether the Plaintiffs are entitled to recover punitive or exemplary damages for the injury or loss to person or property from the Defendants.***

[Apr. 22, 2019].

According to the clear language of Ohio R. Civ. 50, Defendants cannot move for directed verdict before the punitive damages phase of trial has even begun. Therefore, Defendants' Motion for Directed Verdict on Plaintiffs' claim for punitive damages must be denied.

III. CONCLUSION

Therefore, for the foregoing reasons, Defendants' Motion for Directed Verdict should be

denied in its entirety, and Plaintiffs' claims should be submitted to the jury.

DATED: May 25, 2019

Respectfully submitted,

TZANGAS | PLAKAS | MANNOS | LTD

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