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 JUDGMENT NOTWITHSTANDING THE VERDICT

After six (6) weeks of evidentiary hearings and trial, a fair and impartial jury of eight (8) Lorain County citizens found that Defendants[1] were responsible for the destructive libel campaign aimed at Gibson's Bakery,[2] David Gibson,[3] and Grandpa Gibson.[4] Now, after hearing the verdict, Defendants challenge the jury's decision based on irrelevant, already decided arguments.

For the following reasons, Defendants' Motion for JNOV must be denied:

- ***First***, Defendants' are not entitled to JNOV on Plaintiffs' libel claims. Defendants' challenge to the libel verdicts consists mostly of regurgitated arguments that this Court already decided during summary judgment briefing and that can be dismissed out of hand. Defendants' other arguments related to evidence of publication and Defendants' degree of fault are also wrong as Plaintiffs submitted substantial evidence of both elements such that reasonable minds could (and did) find that Defendants libeled Plaintiffs;

- ***Second***, Defendants also rehash agency arguments related to Gibson's Bakery's tortious interference with business relationships claim against Dean Raimondo. However, the jury could (and did) find that Bon Appetit is not an agent of Dean Raimondo when it found Dean Raimondo liable for tortious interference. Further, the evidence submitted by Plaintiffs clearly showed that Dean Raimondo was not justified in terminating Plaintiffs' business relationship with Bon Appetit;

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[1] "Defendants" refers to Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Dean Raimondo").
[2] "Gibson's Bakery" refers to Plaintiff Gibson Bros., Inc.
[3] "David Gibson" or "David" refers to Plaintiff David R. Gibson.
[4] "Grandpa Gibson" refers to Plaintiff Allyn W. Gibson.

- ***Third***, reasonable minds could (and did) find that Oberlin College is liable to David and Grandpa Gibson for intentional infliction of emotional distress. Plaintiffs submitted substantial evidence showing that Defendants conduct was extreme and outrageous, and that David and Grandpa Gibson suffered severe and debilitating emotional distress;

- ***Fourth***, Defendants are not entitled to JNOV on Plaintiffs' punitive damages verdicts. Because Defendants filed a motion to bifurcate the compensatory and punitive phases of trial, libel actual malice was two separate issues that were required to be submitted in both phases of trial. Further, Plaintiffs submitted substantial evidence showing that Defendants acted with libel actual malice in defaming Plaintiffs; and

- ***Finally***, Defendants' cannot challenge the amount of damages awarded to David and Grandpa Gibson on the IIED claims through a JNOV motion, and, even if they could, the IIED claims were based on separate animus than the libel claims.

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I. INTRODUCTION

The most enduring feature of the American justice system is the jury trial. As the Court recognized during the compensatory phase, participating as a juror is "an incredible duty and act of service." (June 6, 2019 Tr. Trans., p. 81). However, before the trial even concluded, Defendants sent a communication to thousands of people questioning the service and decision of the jury, who sacrificed more than a month of their lives to listen to the evidence and decide this case. During the punitive phase of trial, Oberlin College Vice President and General Counsel Donica Varner testified as follows:

> Q. The position following the jury verdict clearly said that Oberlin College did not agree -- "regretted that the jury did not agree with the clear evidence our team presented." That was one pronouncement publicly, correct?
> A. Correct.
> Q. And in addition, Oberlin College, to thousands of people in the public domain, said that neither Oberlin College nor Dean Raimondo defamed a local business or its owners, correct?
> A. Correct.

(June 12, 2019 Tr. Trans., p. 140).

Defendants have continued this theme of disregarding the jury decisions in their Motions for Judgment Notwithstanding the Verdict ("JNOV"). In their JNOV motion, Defendants re-argue ***numerous*** issues this Court has already heard and decided. In short, Defendants' JNOV motion is entirely baseless and should be denied out of hand.

II. DEFENDANTS' IMPROPERLY INTERJECT DOCUMENTS AND OTHER MATERIALS IN THEIR JNOV MOTION THAT WERE NOT SUBMITTED AS EVIDENCE DURING TRIAL

As a preliminary matter, in addressing Defendants' Motion JNOV, the Court should not consider the numerous references Defendants make to evidence outside of the record. For example, Defendants ask the Court to consider: (1) an article from *The Oberlin Review* dated April 27, 1990 (fn. 10); Oberlin police body cam footage available on YouTube (fn. 23); (3) the fact that the local newspaper, the *Chronicle-Telegram*, sent a reporter to cover the trial every day (Defs.' JNOV, p. 23); and (4) KWGD's website addressing frequently asked questions about the Gibson Bakery trial (fn. 32).

Case law is clear that when addressing a motion for judgment notwithstanding the verdict, a court is not permitted to rely on evidence outside the record. In *Posin v. A.B.C. Motor Court Hotel, Inc.*, the Court explained that in ruling on a motion for judgment notwithstanding the verdict, a court must review "[t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made." 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976); *see also Baltimore & O.R. Co. v. Nobil*, 85 Ohio St. 175, 97 N.E. 374 (1911), syllabus, (where the Court held that "[i]n disposing of a motion for judgment notwithstanding the verdict of a jury, the trial court is confined to a consideration of the statements in the pleadings; and the record outside of the statements in the pleadings should not be considered in deciding such motion. [Citation omitted.]").

In line with the above case law, the Court should disregard the above evidence and any other evidence that Oberlin relies upon in support of its motion that is outside of the Court's record in deciding Oberlin's Motion JNOV.

III. LAW & ARGUMENT

A. Standard of Review.

JNOV motions are judged under the same standard as motions for directed verdict. *See,*

Allied Erecting & Dismantling Co., Inc. v. Youngstown, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶ 20 (7th Dist.). Under binding Ninth District case law, JNOV is only proper where "viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the non-moving party reasonable minds could come to but one conclusion, that being in favor of the moving party." *McMichael v. Akron General Medical Center*, 2017-Ohio-7594, 97 N.E.3d 756, ¶ 10 (9th Dist.) (citations omitted). But, "[i]f reasonable minds could reach different conclusions, ***the motion must be denied***." *Magnum Steel & Trading, LLC v. Mink*, 9th Dist. Summit Nos. 26127 & 26231, 2013-Ohio-2431, ¶ 12 (emphasis added) (citations omitted). Importantly, when ruling on a JNOV motion, the trial court ***must not weigh the evidence or test the credibility of the witnesses***. *See, Williams v. Spitzer Auto World Amherst, Inc.*, 9th Dist. Lorain 07CA009098, 2008-Ohio-1467, ¶ 9 (citations and quotations omitted) ("Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon JNOV").

Put another way, without weighing evidence and with all inferences in Plaintiffs' favor, Defendants' JNOV motion ***must be denied*** if reasonable minds could conclude that Plaintiffs' were entitled to judgment on their claims. *See, McMichael* at ¶ 10. Here, unfortunately for Defendants, eight (8) reasonable minds unanimously found that Plaintiffs were entitled to judgment on their libel claims against both Defendants, IIED claims against Oberlin College, and tortious interference claim against Dean Raimondo. Therefore, Defendants' motion for JNOV must be denied.

B. Defendants are not Entitled to JNOV on Plaintiffs' Libel Claims.

Defendants' arguments relating to Plaintiffs' libel claim should sound familiar to the Court considering Defendants have merely rehashed their summary judgment and directed verdict motions. Their JNOV does not present any argument that the Court has not already properly

rejected. The Court should once again tell Defendants they are wrong by denying their JNOV.

Additionally, as Defendants have done throughout this litigation, Defendants ignore the evidence, including the actual content of the defamatory Flyer and the Student Senate Resolution. In Defendants' revisionist history, the defamatory Flyer did not accuse Plaintiffs of having a long, known practice of committing acts of racism, including profiling and discrimination. Judges, attorneys, and litigants involved in employment discrimination cases throughout Ohio should be concerned with Defendants' claim that one cannot prove racial discrimination. In the end, by ignoring the actual content of the libelous statements, Defendants have doomed their arguments on Plaintiffs' libel claim.

1. Plaintiffs' Libel Claim is about Defendants' Speech not the Speech of Students.

Within their JNOV, Defendants repeatedly make the false claim that the speech at issue is the speech of students. (See Defs.' JNOV, p. 4). The evidence undercuts any such claim. As this Court knows, Defendants defamed Plaintiffs through actions independent of the students who stood outside Gibson's Bakery in November of 2016 and shouted against Plaintiffs.

Moreover, Defendants again assert that this case involves fundamental questions of constitutional law under the First Amendment by trying to cloak themselves in the protections afforded to those who criticize public officials. However, this is not a case of defamation relating to the conduct of government or public officials. Instead, it is a case of a small bakery and the family that runs it being defamed for exercising their legal rights as shopkeepers to prevent theft. *See* R.C. § 2935.041. In cases such as this, where private persons and small businesses are subjected to false and defamatory statements, the only recourse to repair reputations is the civil justice system. *See Resenblatt v. Baer*, 383 U.S. 75, 93, 86 S.Ct. 669 (1966) (Stewart, J., concurring) ("The destruction that defamatory falsehood can bring is, to be sure, often beyond the

capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11, 110 S.Ct. 2695 (1990) (citations omitted) ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements.").[5]

While Defendants attempt to cloak themselves in the protections of free speech, this case does not impugn or even impact the freedoms provided by the First Amendment. Instead it involves a small family business and its owners who sought justice for the wrongful destruction of their reputations.

2. Defendants' Defamatory Statements are not Protected Opinions.

Defendants' defense that the defamatory statements at issue are protected opinions is not supported by Ohio law or the facts in evidence. Like it did during summary judgment briefs, Defendants' opinion defense quickly falls apart when one actually examines the entirety of the defamatory statements at issue and the context in which such statements were made, as Ohio law requires. For the reasons to be discussed below, all of the defamatory statements at issue suggest they are supported by verifiable facts, such as a "LONG ACCOUNT of RACIAL PROFILING," and therefore are not opinions.

a. *A plaintiff may bring a defamation claim in Ohio based merely upon being called a racist.*

Contrary to Defendants' suggestion, a publication stating that someone is "racist", in and of itself, can constitute actionable defamation under Ohio law. Defendants know this, considering Plaintiffs made them aware of the applicable Ohio case law on the topic. As Defendants are unable

[5] Indeed, the Ohio constitution specifically states that citizens are responsible for the abuse of the right of free speech: "Every citizen may freely speak, write, and publish his sentiments on all subjects, ***being responsible for the abuse of the right***[.]" Ohio Constitution, Article I, Section 11 (emphasis added).

to cite to supportive Ohio law for their position, Defendants can only point to inapplicable cases from other jurisdictions and seek to hide behind a manufactured protest defense.

In *Lennon v. Cuyahoga Cty. Juvenile Court*, the Eighth District Court of Appeals acknowledged that calling someone a racist may constitute defamation *per se*. 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587 ¶¶ 26, 30 ("In the instant case, the specific language used is unambiguous. One co-worker told another co-worker that appellant was a racist.").

The court in *Lennon* acknowledged that branding someone a racist can be defamatory on its face and "weighs heavily toward actionability, as we cannot think of a scenario in which these words are not pejorative." *Id.* at ¶ 30. Likewise, former President Marvin Krislov and the current Oberlin College Chief of Staff, Ferdinand Protzman, conceded that being called a racist is one of the worst, most damaging things one can be called. (May 29, 2019 Tr. Trans., p. 179 [Krislov – "Q. You would agree that, in your words, 'being called a racist is one of the worst things a human being can be called, correct? A. Yes."]; May 10, 2019 Tr. Trans., pp. 51-52 [Chief of Staff Ferdinand Protzman would institute college disciplinary proceedings against students who posted accusations of racism on an Oberlin College Facebook page.]).

In considering the totality of the particular circumstances involved in *Lennon*, the court ultimately determined that the accusation of racism was an opinion, because it occurred in the context of mere workplace "water-cooler chitchat" and the speaker did not intimate he possessed any undisclosed facts supporting the statement. *See Lennon* at ¶¶ 30-31. The court acknowledged that, under other circumstances and context, Ohio law certainly supports an actionable defamation claim for a statement that one is racist.

In 2017, the Tenth District Court of Appeals also held that calling someone a racist alone could constitute actionable defamation. In *Webber v. Ohio Dept. of Pub. Safety*, the court explained

that under Ohio law, "'being referred to as racist may, at times, constitute defamation per se.'" 10th Dist. No. 17AP-323, 2017-Ohio-9199, 103 N.E.3d 283, ¶ 36.

Likewise, the Sixth Circuit Court of Appeals has acknowledged that the term "racist" has a well-defined and understood meaning, thereby making it "capable of being defamatory." *Armstrong v. Shirvell*, 596 Fed.Appx. 433, 441 (6th Cir.2015), citing *Milkovich*, 497 U.S. 1 (upholding a defamation verdict for a claim which was based, in part, on an accusation of racism), and *Connaughton v. Harte Hanks Commc'ns, Inc.*, 842 F.2d 825 (6th Cir.1988). Other courts have upheld defamation verdicts or judgments which were based on allegations of racism. *See Afro-Am. Pub. Co. v. Jaffe*, 366 F.2d 649, 653 (D.C.Cir.1966).

Here, Defendants' statements ***went well beyond*** merely referring to Plaintiffs as "racist." The statements proclaimed that Plaintiffs had a "long account" of racial profiling and discrimination and violence against minorities. Defendants' statements were far from mere "water-cooler chitchat." Moreover, each of Defendants' statements intimated that they were based on factual information, including undisclosed facts, within Defendants' possession.

The cases discussed above demonstrate that calling someone a racist can constitute actionable defamation. They also reinforce the need for a court to examine the totality of the circumstances surrounding each defamatory statement.

b. *The determination of whether a statement is an opinion examines the totality of the circumstances surrounding the statement.*

This Court has already properly rejected, as a matter of law, Defendants' theory that the subject statements were merely protected opinion. Ohio has adopted a totality of the circumstances test to determine whether a statement is an opinion or a statement of fact. In describing the test, the Ohio Supreme Court has stated:

> In *Scott* we adopted a totality of the circumstances test to be used when determining whether a statement is fact or opinion. Specifically, the court should consider: the

> specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared.

Vail v. The Plain Dealer Publishing Co., 72 Ohio St.3d 279, 282, 649 N.E.2d 182 (1995), citing *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). No one factor is dispositive. *Id.* Instead, the test is "fluid,"

> Every case will present facts that must be analyzed in the context of the general test. Each of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented.

Id.

Here, the circumstances plainly reveal that Defendants' defamatory statements do not constitute mere "opinions."

c. *A statement is not an opinion when the defendant intimates that he or she is basing the statement on nondisclosed facts.*

As will be discussed in greater detail below, the defamatory Flyer, for example, stated: "This [Gibson's Bakery] is a RACIST establishment **with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION.**" (Plaintiffs' Tr. Exh. 263 [Emphasis added.]). Defendants again focus solely on the portion of this sentence preceding the word "with." However, the statement suggests that the claim is supported by a "LONG ACCOUNT" of racial profiling and discrimination. After all, a "long account" suggests that there exists a documented record, and compilation, of a pattern of racial profiling and discrimination events. This makes the entire statement, and each subpart, verifiable, thereby weighing heavily in favor of a determination that they are (false) statements of fact rather than protected opinions. *See Lennon*, 2006-Ohio-2587 at ¶ 30.

Likewise, the defamatory Student Senate Resolution expressly prefaces its defamatory remarks by announcing "we find it important to share a few key facts" before going on to state that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents

alike." (Plaintiffs' Tr. Exh. 35). Again, the publication suggests that its conclusions are based on verifiable facts, thus eliminating the argument that it offers mere opinions.

Additionally, the defamatory Flyer and Resolution go even further to claim that an owner of Gibson's Bakery violently assaulted a member of the Oberlin community. Thus, Defendants accused Plaintiffs of committing a crime.[6] R.C. § 2903.13 (criminalizing assault). None of these statements is ambiguous, thereby weighing heavily in favor of actionability. *See id.*

The Defendants' statements are impactful and highly influential. This is not surprising, as students, faculty, staff, and the community undoubtedly expect an institution of higher learning—which has tremendous resources—to base its public statements on facts, research, and analysis rather than mere off-the-cuff "water-cooler chitchat."

Thus, after examining the actual content of the statements at issue, the Court must once again conclude that the first prong weighs in favor of actionability.

The second prong, whether the statements are verifiable, is also satisfied. Initially, as discussed above, the defamatory statements suggested the claim of racism was supported by known, undisclosed facts, including a "long account" of racial profiling and racial discrimination. This strongly supports holding the statements were verifiable.

Moreover, accusing a business of being a racist establishment or a business owner of being a racist can be verified. In fact, the Oberlin City Police Department conducted a statistical review of the racial makeup of shoplifting arrests at Gibson's Bakery. (Plaintiffs' Tr. Exh. 269). The compilation revealed that the majority of apprehended shoplifters were not racial minorities. (Id.). Of the forty (40) adults arrested for shoplifting at Gibson's Bakery from 2011 through November 14, 2016, ***thirty-two*** (32) were Caucasian. (Id.). The existence of this law enforcement review

[6] Plaintiffs will separately address Defendants' baseless claim that the accusations of assault were clearly directed at non-party Allyn D. Gibson.

weighs heavily in favor of Plaintiffs' position on verifiability.

Further, claiming someone commits discrimination based on a particular characteristic, such as race or disability, is verifiable. To hold otherwise would completely undermine all disability or employment discrimination laws. Courts throughout Ohio, both state and federal, routinely hear cases involving discrimination, including racial discrimination. *See Williams v. Spitzer Auto World Amherst*, Inc., 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 14.[7] A claim for racial discrimination within an employment context must rely upon evidence of actual discrimination, meaning the plaintiff must prove that he or she was discriminated against based on his or her race. *Id.* at ¶ 15 ("Plaintiffs may show that they were the victims of a discriminatory practice by either direct evidence or indirect evidence…") Regardless of which approach the plaintiff chooses (direct or indirect evidence of discrimination), the trier of fact is tasked with examining the evidence to verify the discriminatory act took place. With regard to the indirect approach, "a plaintiff may make a prima facie showing of discrimination by establishing that he (1) was a member of a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and that (4) a comparable nonprotected person received better treatment." *Id.* at ¶ 16, citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (C.A.6, 1992); *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Commission*, 66 Ohio St.2d 192, 197, 421 N.E.2d 128 (1981); *Marbley v. Metaldyne Co.*, 9th Dist. Summit No. 21377, 2003-Ohio-2851, ¶¶ 7-13; *Dunlap v. Tennessee Valley Auth.*, 519 F.3d 626, 629–31 (6th Cir.2008). The point here is that racial discrimination cases are subject to verification through direct or indirect evidence. As a result, Defendants' accusation that Plaintiffs discriminate based on race is

[7] "It is an unlawful discriminatory practice for any employer to 'discharge without just cause, to refuse to hire, or otherwise to discriminate against [a] person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment[,]' on the basis of, among other things, race. R.C. 4112.02(A)."

verifiable, and thus, is not an opinion.

Likewise, claiming someone profiles based upon race can be verifiable. For instance, claims of racial profiling are brought with regard to use of preemptory strikes on prospective jurors. *See Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 676 N.E.2d 872 (1997); *State v. Hicks*, 6th Dist. Wood No. WD-02-44, 2004-Ohio-2780, ¶¶ 17-20. Courts do not merely decide those claims on a mere allegation of illegal profiling. Instead, they undertake an intensive analysis to verify whether an improper intent lay behind the preemptory strike, meaning they attempt to verify the claim of profiling or discrimination. *Id.*

Defendants' discussion of testimony from Vicky Gaines and Sharon Patmon does nothing to undermine this conclusion. Defendants use two, short segments of testimony about whether a person's feelings of being subjected to racism are a matter of that person's opinion. What these questions and answers do not delve into is whether one could verify whether a person or business has a long history and account of racial profiling or racial discrimination or whether a person has committed an assault. Those questions are at issue when dealing with the defamatory Flyer and Student Senate Resolution.[8] Furthermore, Mrs. Gaines closely interacted with Plaintiffs for decades and never witnessed acts of racial profiling or racial discrimination, thereby indicating that she believed those types of actions were capable of personal observation, i.e. verifiable. (May 13, 2019 Tr. Trans., p. 36). Mrs. Patmon likewise had significant experience with Plaintiffs and never observed any profiling or discrimination. (May 10, 2019 Tr. Trans., pp. 93-94).

Additionally, Defendants' discussion of non-Ohio defamation cases involving allegations of racism at page 10 of their JNOV can easily be dispensed. First, as discussed above, Ohio law

[8] At footnote 10 of their JNOV, Defendants reference a purported Oberlin Review article from nearly 30 years ago (1990) relating to an alleged protest at Gibson's Bakery. This document was never entered into evidence and thus cannot be considered. Furthermore, even if Defendants had attempted to introduce it, it would have constituted inadmissible hearsay.

permits defamation claims based on accusations of racism and racist conduct. Additionally, Defendants' cases are distinguishable.

In *Smith v. School Dist. of Philadelphia*, the plaintiff alleged, under Pennsylvania law, that "defendants Barr and Miller 'made public statements that plaintiff is racist and anti-Semitic which were false and malicious [and] which proximately caused injury to plaintiff's reputation....'" 112 F.Supp.2d 417, 429-30 (E.D.Pa.2000). No other details were pled, thereby justifying judgment on the pleadings to the defendant. As discussed above, Defendants' statements go beyond a mere off-the-cuff labeling of someone as racist. Defendants deliberately, while intimating knowledge of additional facts, stated that Plaintiffs' "racism" was supported by a long account of racial profiling and discrimination.

Ayyadurai v. Floor64, Inc. is distinguishable because it did not involve a claim that the plaintiff was racist, but instead involved a statement that the plaintiff accused those who disagree with him as being racists. 270 F.Supp.3d 343, 364–65 (D.Mass.2017). Several of the defamatory statements challenged the plaintiff's position that people who disagree with plaintiff were racists. *Id.* The statements were alleged that plaintiff's claims of others being racist were defamatory and the case did not seek to answer whether being called a racist was defamatory. Furthermore, the defendant disclosed all information upon which it reached its conclusions and thus, (unlike in this case) the defendant was not suggesting it knew additional undisclosed facts. *Id.*

Carto v. Buckley is distinguishable because it involved a book, not a flyer, and was a true political book, meaning it dealt with politics. 649 F.Supp. 502, 504 (S.D.N.Y.1986). The dispute involved a fight between a political figure and a political publication, meaning the parties were prone to using hyperbolic language. *Id.* The author stated that the publication's "distinctive feature is racial and religious bigotry." *Id.* There were no allegations that the publication had a long history

racial profiling or discrimination.

In re Green involved several letters written by an attorney to a judge, wherein the attorney requested that the judge recuse himself from the pending proceedings. 11 P.3d 1078, 1081–82 (Colo.2000). The letters were sent to the plaintiff-judge. *Id.* The disclosed basis for accusations in the letters were not disputed by any of the parties and thus, the author was not implying he had other undisclosed facts. *Id.* This distinguishes the case from the present lawsuit.

Finally, accusing someone of a crime, such as assault, can be verified. *Jorg v. Cincinnati Black United Front*, 1st Dist. No. C-030032, 153 Ohio App.3d 258, 792 N.E.2d 781, ¶ 18 (1st Dist.2003); *Condit v. Clermont Cty. Rev.*, 110 Ohio App.3d 755, 759–62, 675 N.E.2d 475 (12th Dist.1996) (acknowledging that accusations of criminal misconduct can be verified through a trial).

Based on the foregoing, each of Defendants' defamatory statements is verifiable, thereby weighing heavily in favor of actionability.

d. *The general context of a deliberate and calculated protest directed against plaintiffs weighs heavily in favor of actionability.*

The third prong, the general context in which the defamatory statements were disseminated, also demonstrates an actionable claim for libel. The statements, which initially were contained within the defamatory Flyer, were created for use in a deliberate and calculated campaign directed against specific private citizens. The statements were specifically used to target Plaintiffs' reputation within the Oberlin community, including potential customers. They were used to convey a specific message (that Plaintiffs were racists and violently targeted racial minorities) in hopes of driving business away from Plaintiffs. Defendants were very successful in doing so, as they have acknowledged achieving a complete smearing of Plaintiffs' name and brand. (May 15, 2019 Tr. Trans., pp. 128-129).

Another important consideration under the third prong (general context of the statements), especially in this case, is the financial position of the speaker relative to the community in which the statement is made. In *Mauk v. Brundage*, the Ohio Supreme Court emphasized the importance of a defendant's financial condition when deciding whether a reasonable listener would believe and give weight to that defendant's statements. 68 Ohio St. 89, 67 N.E. 152 (1903).

The Ohio Supreme Court affirmatively held that evidence of a defendant's financial condition is highly relevant in a defamation case because it bears "upon the influence the defendants may have had in the community, and the importance which the people of the community would naturally attach to their utterances." *Id.* at 100. Here, between 2016 and 2018, Oberlin College's endowment was anywhere between $700,000,000 and $900,000,000. (June 12, 2019 Tr. Trans., pp. 58-59). Oberlin College's significant financial position would naturally cause a reasonable listener to attach greater importance to its statements. Oberlin College undoubtedly exerts a great deal of influence within the Oberlin community given its vast real estate holdings. (Plaintiffs' Tr. Exh. 457). Furthermore, Chris Jenkins unabashedly testified that the College considers the properties along W. College Street to be its property (of course, with the exception of Gibson's Bakery). (May 30, 2019 Tr. Trans., p. 87). Again, the fact that the defamatory statements were published by a powerful institution of higher learning, with unlimited resources, weighs heavily in favor of a determination that the statements are actionable rather than mere "water-cooler chitchat opinions."

e. *The broader context also weighs heavily in favor of actionability.*

The final prong, the broader context in which the defamatory statements were published, also favors Plaintiffs. Defendants initially disseminated the statements during the course of a targeted protest and boycott campaign against a private business and private citizens. The statements were not presented as hyperbole or sarcasm, which weighs in favor of actionability.

Vail, 72 Ohio St.3d at 282 ("we must consider the full context of the statements. Is the column characterized as statements of objective facts or subjective hyperbole? The general tenor of the column is sarcastic, more typical of persuasive speech than factual reporting.")

This protest and corresponding boycott were not some broader campaign against governmental actors or society in general, like that in *Jorg*. In *Jorg*, a civil rights organization [defendant] led a boycott campaign against the entire city of Cincinnati. *Jorg*, 153 Ohio App.3d 258, ¶ 2. The defendant was an outspoken critic of the police department and advocate for police reform after an individual died in police custody. *Id.* at ¶ 3. As part of the political advocacy efforts, the defendant distributed written materials to "numerous national performers and organizations that were scheduled to appear in Cincinnati." *Id.* The materials accused the city, generally, of instituting "tyranny and general oppression" against minorities. *Id.* at ¶ 20. The defendant was attempting to highlight "an immediate crisis" within Cincinnati. *Id.*

Jorg differs from our case because we have an educational institution, its faculty, administrators, and employees conducting a targeted campaign to destroy a private family business and private citizens. This case is not a protest against the policies of a governmental entity. It is an attack on the livelihood of private citizens. Furthermore, we have pointed statements claiming racial profiling, racial discrimination, and assaults against particular individuals. The defamatory statements in this case were not used to call attention to broader issues in the city of Oberlin or with a governmental department. Ohio Constitution, Article I, Section 3; *see State v. Kalman*, 4th Dist. No. 16CA9, 2017-Ohio-7548, 84 N.E.3d 1088, ¶ 29, appeal not allowed, 152 Ohio St.3d 1421, 2018-Ohio-923, 93 N.E.3d 1003 (2018). Instead, the statements target private citizens and as a result, the fact that the defamatory statements relate to a protest does not *ipso facto* render them opinions. Instead, each statement was one piece of a larger campaign to destroy Plaintiffs

and intimidate the Oberlin business community.

Arrington v. Palmer is likewise not applicable. 971 P.2d 669 (Colo. App.1998), as amended on denial of reh'g (Dec. 24, 1998). The written materials were postcards distributed during a political campaign and targeted a specific candidate. *Id.* at 672-73. Because the plaintiff was a political candidate who was then running for office, his libel claim was subject to higher scrutiny, as political campaigns are generally understood to use hyperbole. *Id.* In contrast, the defamatory Flyer and the Student Senate Resolution were not political literature. They were materials prepared for the sole purpose of destroying Plaintiffs and their family business.

Furthermore, Defendants' suggestion that making statements during a protest or urging a boycott somehow enhances one's claim that he or she is expressing an opinion lacks merit[9]. As, discussed above, Ohio law applies a totality of the circumstances test to all statements. No single factor is outcome determinative, therefore one cannot give extra protection to statements during protests or statements that urge a boycott, because that would impermissibly elevate the significance of the context prongs, while giving too little weight to the statement content and verifiability prongs. Furthermore, comparing the content of the protests to the content of the two written statements at issue is like comparing apples and oranges because there was no evidence in the record showing the protestors' shouts implied they had additional undisclosed facts upon which their shouts were based. [10]

Moreover, Defendants' reference to the protections afforded to legislators is baffling. First, Defendants are not legislators and thus cannot seek protection under the Speech or Debate clauses

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[9] At page 8 of their JNOV, Defendants make reference to a video of the protests on the *Chronicle-Telegram*'s Facebook page. This video was never entered into evidence nor do Defendants cite to any trial exhibit which contains the same. As a result, the Court cannot consider it at this stage of the case.

[10] Like *Jorg, Maddox Defense, Inc. v. GeoData Systems Mgt., Inc.* is inapplicable here. 8th Dist. Cuyahoga No. 107559, 2019-Ohio-1778. *Maddox* involved statements made on a Ripoff Report website by a party in a business dispute with the plaintiff. The court found that because the statements concerned a business deal gone wrong, and because the plaintiff actually *did* breach that contract, plaintiff's claims were subverted by the truth defense.

of the U.S. or Ohio Constitutions. Second, the Speech or Debate clauses do not give legislators carte blanche to commit defamation. *Hutchinson v. Proxmire*, 443 U.S. 111, 112–13, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) ("There is nothing in the history of the Clause or its language suggesting any intent to create an absolute privilege from liability or suit for defamatory statements made outside the legislative Chambers; precedents support the conclusion that a Member may be held liable for republishing defamatory statements originally made in the Chamber."); *Williams v. Brooks*, 945 F.2d 1322, 1330–31 (5th Cir.1991) ("To hold that any statements conceivably within the 'informing function' of members of Congress are absolutely immune from suit for defamation would almost wholly exempt senators and representatives from state defamation laws, and arguably in that respect expand the Speech or Debate Clause."). Finally, even if Defendants could use the clause (which they cannot), the defamatory statements at issue were published outside a legislative session and are thus not covered by the clause. *Hutchinson*, 443 U.S. at 112–13 ("There is nothing in the history of the Clause or its language suggesting any intent to create an absolute privilege from liability or suit for ***defamatory statements made outside the legislative Chambers***...) (emphasis added).

Based on the foregoing, all prongs of the *Scott* test weigh in favor of Plaintiffs' position and as a result, none of the defamatory statements at issue is an opinion.

3. Defendants' Accusations of Assault Were "Of and Concerning" Plaintiffs Because They Accused the Owners of Gibson's Bakery of Committing Assault.

The defamatory Flyer accused the owners of Gibson's Bakery of committing assault. David Gibson and Allyn (Grandpa) Gibson are the only owners of Gibson's Bakery. When a defamatory statement is directed at a small group of individuals, such as owners of a small business or members of a governmental board, any individual member of those groups may bring a claim for libel. *McGuire v. Roth*, 8 Ohio Misc. 92, 94–95, 219 N.E.2d 319, 321 (C.P.1965), citing 33 Amer.Jur.

Section 192 ("It also has been held that where defamatory words are spoken with actual malice of a small group of persons such as a board of public officers, any individual member thereof may maintain an action against the defamer."). Indeed, it has been held that a jury is the proper body for determining whether a publication was intended against a particular plaintiff or an unknown class of persons. *Internatl. Text-Book Co. v. Leader Printing Co.*, 189 F. 86, 89 (C.C.N.D.Ohio 1910) (applying Ohio law).

Further, the statement would not involve Allyn D. Gibson because no one understood him to be an owner of the bakery. Furthermore, the defamatory flyer said "Allyn Gibson" committed the assault. It did not say "Allyn D. Gibson" committed the assault. As a result, those assault allegations were of and concerning Plaintiffs, particularly when read in context with the statements that the owner's establishment had a long account of racial profiling and discrimination.

The Student Senate Resolution also accused the bakery of committing an assault. As the trial testimony established, David Gibson and Grandpa Gibson's names and identities are synonymous with the bakery. As Lorna Gibson testified:

15	Q. I just want to ask generally, can you tell the
16	jury about Gibson's Bakery? What is Gibson's Bakery?
17	A. Gibson's is, it's our life. It's been around
18	since the 1800s. It's just -- I feel like Gibson's is
19	us. We are Gibson's. It's -- we do bakery there, we
20	have ice cream, we have a grocery store, we could just
21	cover a lot of essentials in Oberlin.
22	Q. Has it always been owned by the Gibson family?
23	A. Yes, it has.
24	Q. Has it always had the Gibson name?
25	A. Yes.

(May 15, 2019 Tr. Trans., p. 131). David Gibson separately testified that an attack on the name of

the bakery is the same as an attack on himself and his father. (May 21, 2019 Tr. Trans., pp. 169-170, 184, 202). Thus, the Oberlin Community would know that accusations of improper conduct by the bakery are accusations against David Gibson and Grandpa Gibson.

None of the cases cited by Defendants are applicable here. In *Great Lakes Capital Partners Ltd. v. Plain Dealer Publishing Co.*, the statements did not name the plaintiffs and named companies which did not share plaintiffs' names. 8th Dist. Cuyahoga No. 91215, 2008-Ohio-6495, ¶¶ 47-49. It did not, like in our case, involve allegations against a small family business whose name was the same as its owners and was synonymous with the individuals who owned the business.

The plaintiff in *Ebbing v. Stewart*, was not referred to by name within the alleged statements. 12th Dist. Butler No. CA2016-05-085, 2016-Ohio-7645, ¶¶ 12-17. Instead, the plaintiff would have been identified by reference to the person who was the subject of the article (her husband) and their property. *Id.* at ¶ 16 ("Neither the television news broadcast nor the online article mentions Erin by name. Rather, the only times Erin is identified are in reference to Joseph or the property. Specifically, '[Joseph] said he asked the girl to leave his wife's rental property[,]' and the property 'was owned by Joseph['s] * * * wife.' Erin's interest in the action is limited to the news reports discussion of her husband…"). Additionally, none of the statements within the report were false, providing a separate justification for ruling against the plaintiff.

In *Kassouf v. White*, the defendant made the comment that plaintiff's proposed development project involving a hotel was a "flophouse." 8th Dist. Cuyahoga No. 75446, 2000 WL 235770, *3. The comment named the hotel (Microtel Hotel) and did not mention plaintiff's name. *Id.* Moreover, plaintiff's name was not readily attributable to the hotel.

Finally, *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, actually supports Plaintiffs, despite

applying New York law. 28 N.Y.3d 82, 65 N.E.3d 35, 42 N.Y.S.3d 64 (2016). There, the court acknowledged that a plaintiff need not be necessarily named in the defamatory publication in order to bring a claim of defamation: "Although it is not necessary for the plaintiffs to be named in the publication, they must plead and prove that the statement referred to them and that a person hearing or reading the statement reasonably could have interpreted it as such." *Id.* at 86. The evidence adduced at trial established that the defamatory statements, when placed within their full context (i.e. the use of the term "owner" and the discussion of a "long account" of racially motivated conduct), were of and concerning Plaintiffs and not an unnamed third-party.

Based on the foregoing, Plaintiffs had standing to bring their libel claim for those false statements.

4. The uncontroverted evidence at trial proved that Defendants published multiple libelous statements of or concerning Plaintiffs.

a. *Plaintiffs produced a significant amount of evidence proving Defendants published the Student Senate Resolution.*

The important question is not whether Oberlin College is responsible for the statements of the students. Rather, what Plaintiffs have alleged since the initiation of this litigation is that Oberlin College is responsible for aiding and abetting the publication of the defamatory statements about Plaintiffs (in addition to outright participation and dissemination).

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.").

Contrary to Defendants' claim, the aiding and abetting at issue in this lawsuit is not an independent tort. Instead, within the specific context of a defamation claim, aiding and abetting applies to the publication element, i.e. it provides that one who aids or abets the publication of the statement is treated as being a publisher of the statement.

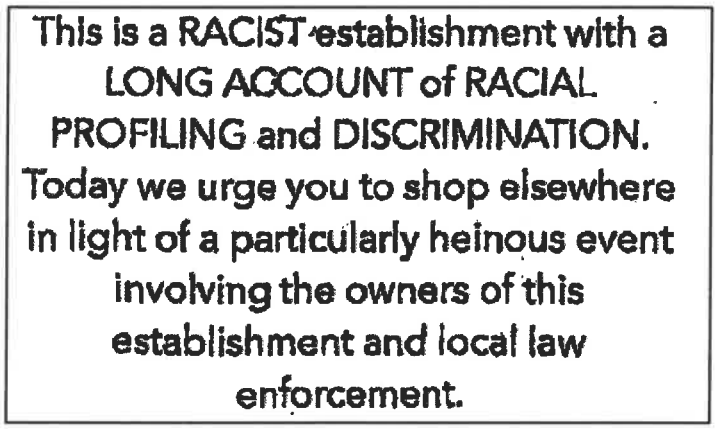
Plaintiffs submitted substantially probative evidence proving Defendants acted negligently and that their negligence caused the Student Senate Resolution to be published, or that Defendants aided and abetted such publication:

- 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 (May 14, 2019 Tr. Trans., p.p. 178-180);

- The Student Senate faculty advisor advises the protestors to get more copies of the defamatory flyer at the College Conservatory office (Id. at pp. 177-178);

- After witnessing their 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:

> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike. Charged as representatives of the Associated Students of Oberlin College, we have passed the following 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 (May 13, 2019 Tr. Trans., p. 56, 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 (May 13, 2019 Tr. Trans., pp. 54-56);

- Vice President Raimondo enters Wilder Hall every day because her office is located in that building (May 14, 2019 Tr. Trans., p. 9);

- 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; May 14, 2019 Tr. Trans., pp. 9-10).

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 and widely disseminated. However, this did not happen.

And based on the totality of the evidence, reasonable minds could also conclude (even though it was not necessary to prove at trial) that Defendants were aware of and participated in the preparation of the Student Senate Resolution. Defendants need not be "caught red-handed" in the act of drafting, editing, and printing the resolution before one could reasonably infer that they participated in its creation. The jury saw evidence that Defendants were aware of the protests in advance. Several high-ranking college officials attended to the protests. Vice President Raimondo had the defamatory Flyers in her hands and passed out flyers. Raimondo further encouraged the copying of the flyers using college-property. Furthermore, as discussed above, these same Flyers (that Raimondo was passing out and encouraging students to copy) were used as a template for the Student Senate Resolution. Reasonable minds could certainly that Raimondo, who happened to be the student senate adviser, was also involved in creation of the Resolution.

Moreover, based on the substantial amount of evidence detailed above, *Kinney v. Kroger Co.* is distinguishable. 146 Ohio App.3d 691, 767 N.E.2d 1220 (10th Dist.2001). In *Kinney*, the plaintiff failed to submit any evidence that a single third party received the alleged defamatory statement. *Id.* at ¶ 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.

Additionally, Defendants cannot prevail by arguing that they were merely passive participants in the dissemination of the Student Senate Resolution. At pages 16 and 17 of their JNOV, Defendants claim they were nothing more than an internet service provider, or ISP. As discussed above, the evidence at trial undercuts such a narrative. Defendants took an active role in the publication of the defamatory statements and actively aided and abetted that publication.

Furthermore, Defendants' student policies provide that Defendants have an active role in the content of messages distributed using College-provided equipment. These facts make *Scott v. Hull* distinguishable. 22 Ohio App.2d 141, 259 N.E.2d 160 (3rd Dist.1970). The defendants in *Scott* were not liable for defamation because they merely owned the building upon which unknown persons placed the defamatory graffiti on the building's exterior. *Id.* at 142. There were no allegations that defendants took any active role with regard to the defamation, which distinguishes it from the present lawsuit. In fact, the *Scott* decision support Plaintiffs. For instance, the *Scott* court acknowledged that if a defendant purchases materials which are then used for defamation (such as materials for making signs), then they are responsible for the publication. *Id.* at 143, citing *In Tidmore v. Mills*, 33 Ala.App. 243, 32 So.2d 769, certiorari denied 249 Ala. 648, 32 So.2d 782. Furthermore, the *Scott* court acknowledges that aiding and abetting a publisher ***is the same as being the publisher***. *Id.* (emphasis added), quoting 53 C.J.S. Libel and Slander s 148, p. 231. As a result, *Scott* is both distinguishable from the case and supportive of Plaintiffs, not Defendants.

Moreover, the present case aligns more closely with two cases discussed by the *Scott* court. In *Hellar v. Bianco*, the California Court of Appeals held that an owner of a tavern was liable for defamatory statements that a third party placed inside the tavern's restroom. 111 Cal.App.2d 424, 244 P.2d 757 (Cal.App.1952). In holding that the tavern owner was responsible for republication of the defamatory statements, the court emphasized that the statements were posted within the tavern, the owner was aware that the statements were in there, and the owner knowingly failed to remove the statements after becoming aware of their existence. *Id.* at 426 ("The theory is that by knowingly permitting such matter to remain after reasonable opportunity to remove the same the owner of the wall or his lessee is guilty of republication of the libel.").

In *Fogg v. Boston & L.R. Co.*, another case referenced in *Scott*, the defamatory materials

were prominently posted within the defendant's Boston building on a bulletin board for 40 days. 148 Mass. 513, 516, 20 N.E. 109 (1889). The court held that the jury could have reasonably concluded that defendant was more than a mere passive conduit for the defamatory statements:

> From the evidence in the case, the jury might have inferred that the defendant's office was used, not merely for advertising tickets, but for advertising and publishing any other information of interest to persons about to purchase tickets, which would be likely to induce them to buy at the defendant's office rather than elsewhere. One who maintains a place of business may be presumed to have general knowledge of what is done there. The jury might properly have found that the defendant, having its principal terminus and the offices of its principal managing agents in Boston, had knowledge from time to time of what kinds of advertisements and notices were posted in its ticket-office there, and that the libel would not have remained so long in that conspicuous place, if the corporation had not originally authorized or afterwards ratified the act of posting it.

Id. at 517.

Here, the Student Senate Resolution was prominently posted on a bulletin board located ***within*** Oberlin College's student center for over a year. It was posted in the exact location where Defendants would have expected such resolutions to be posted. As a result, under the authorities cited by Defendants, they are liable as publishers of the Student Senate Resolution.

And, if Defendants wish to stake their defense on the Restatement, then they should know that the Restatement provides that an owner of land or chattel can be liable if it permits its land or chattel to be used to publish a defamatory statement:

> *Failure to remove defamation.* **One who knows that defamatory matter is exhibited upon land or chattels in his possession or under his control and intentionally and unreasonably fails to remove it, becomes subject to liability for the continued publication.** The basis of the liability is his duty not to permit the use of his land or chattels for a purpose damaging to others outside of the land. Something of an analogy may be found in § 362(c), as to the duty to use reasonable care to remedy a condition upon the defendant's land created by another, which involves unreasonable danger to those outside of the land.
>
> So far as the cases thus far decided indicate, the duty arises only when the defendant knows that the defamatory matter is being exhibited on his land or chattels, and he is under no duty to police them or to make inquiry as to whether such a use is being

> made. He is required only to exercise reasonable care to abate the defamation, and he need not take steps that are unreasonable if the burden of the measures outweighs the harm to the plaintiff. **In extreme cases, as when, for example, the defamatory matter might be carved in stone in letters a foot deep, it is possible that the defendant may not be required to take any action at all. But when, by measures not unduly difficult or onerous, he may easily remove the defamation, he may be found liable if he intentionally fails to remove it.** (Emphasis added.)

Restatement (Second) of Torts § 577 (1977) (emphasis added). As former President Krislov testified, Oberlin College could have easily removed the Student Senate Resolution immediately on November 10, 2016 and its failure to do so for over a year makes it liable for the defamatory statements therein. (May 29, 2019 Tr. Trans., pp. 198-201; May 31, 2019 Tr. Trans., p. 161).

Moreover, Defendants cited authorities are inapplicable to the present case. First, Defendants do not fall under the auspices of 47 U.S.C.A. § 230 because their role in publishing the defamatory statements was not limited to the provision of "computer access by multiple users to a computer server." 47 U.S.C.A §. 230. Second, *Lunney v. Prodigy Services Co.* does not apply Ohio law and involved an email service system where the provider had no editorial control over the messages sent over the system. 94 N.Y.2d 242, 248–51, 723 N.E.2d 539, 701 N.Y.S.2d 684, (1999). The service provider was "merely a conduit" for the messages, making it akin to a telephone company, which under New York is not treated as a publisher. *Id.* Here, Defendants were not merely conduits. They were active participants in the publication of the defamatory statements and the perpetuation of the statements' messages, evidenced by Raimondo's passing out of the defamatory Flyer throughout the protests and providing the template (the Flyer) for the eventual Student Senate Resolution. Furthermore, Ohio law permits a plaintiff to meet the publication element through evidence that the defendant aided and abetted the publisher.

Additionally, the treatises cited by Defendants do not apply because they do not follow Ohio law. Restatement (Second) of Torts § 581 (1977) cites to jurisdictions other than Ohio. After

review, Plaintiffs were unable to locate any Ohio case which has adopted or cited that section of the Restatement. Plaintiffs were likewise unable to find an Ohio case citing to Prosser & Keeton, Law of Torts (5 Ed.1984) 657, Section 113. The treatises cited by Defendants misstate Ohio law, which provides that one can be found to be a publisher of defamatory statements through one's aiding and abetting another publisher. *Cooke*, 2003-Ohio-3118, ¶ 25; *Murray*, 2004-Ohio-821, ¶ 104.

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 a motion for JNOV. *Posin v. A. B. C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275, 344 N.E.2d 334, 338 (1976) ("Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions [referring to motions for directed verdict and JNOV]."); *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 67–68, 430 N.E.2d 935 (1982) (a review of a motion for directed verdict, which is the same standard as applicable for a motion for JNOV, "does not involve weighing the evidence or trying the credibility of witnesses.") 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. Still, 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).

Speaking specifically about Plaintiffs' libel claim as it relates to the Student Senate Resolution, Plaintiffs' response brief to Defendants' original motion for directed verdict identified sufficient evidence to submit that claim to the jury. However, additional evidence came to light during Defendants' case-in-chief which lends further support to Plaintiffs' position. Specifically, former President Krislov and current President Ambar testified about Oberlin College's institutional knowledge of the Student Senate's practice of publicly posting its resolutions, i.e. Oberlin College was at all times aware that Wilder Hall was the designated place for posting resolutions. (May 29, 2019 Tr. Trans., pp. 198-201; May 31, 2019 Tr. Trans., p. 161 ["Q. Are they required to seek approval from anyone in the administration before they take one of the resolutions and hang it in their selected bulletin board in the basement of Wilder Hall? A. No, the students are not required to get any recommendation or guidance about ***where they hang their resolutions in their designated space***."] (emphasis added).). Further, Krislov testified that he was "often" in Wilder Hall and that Wilder Hall was "the right place" to achieve maximum exposure to prospective students and their families. (May 29, 2019 Tr. Trans., pp. 198-201). As a result, there was sufficient probative evidence to submit Plaintiffs' libel claim, as it relates to the Student Senate Resolution, to the jury.

b. *There was no evidence to prove, or even suggest, that the statements within the defamatory Flyer were true and thus, there was sufficient evidence for the jury to conclude that Defendants knew it was false when they published it.*

Defendants' statement at page 20 of their brief that "Plaintiffs resort to after-the-fact emails, text messages, and opinions from members of the Oberlin community to suggest Defendants should have known that Plaintiffs were not racist," is simply not true. All of the evidence submitted at trial proved that Plaintiffs were not racist and did not have a long history of

racially-motivated conduct. For instance, Chief of Staff Ferdinand Proztman had never heard in his many years of living and working in Oberlin that Plaintiffs were racists or targeted minorities for negative treatment. (May 10, 2019 Tr. Trans., pp. 13, 20). Other long-term Oberlin College employees, such as Michelle Gross who has resided in Oberlin for over 40 years and who worked for Oberlin College for over 40 years, confirmed the same. (May 14, 2019 Tr. Trans., pp. 74, 82).[11] Thus, even if the "reason to know" standard were an accurate representation of Ohio law (it is not), then the jury could and did properly decide that Raimondo either knew the defamatory Flyer was false or had reason to know. Thus, JNOV would be inappropriate.

Defendants fail to cite any Ohio authority to support their standard for "with reason to know it was false." They again rely on a couple of treatises and a single New York case. As discussed above, Restatement (Second) of Torts § 581 (1977) cites to jurisdictions other than Ohio and Plaintiffs were unable to locate any Ohio case which has adopted or cited that section of the Restatement. The same applies to Prosser & Keeton, Law of Torts (5 Ed.1984) 657, Section 113. And once again, they conflict with Ohio law on the issue of the mental state of the defamer.

In defamation cases involving private figures and public concerns (which the Court determined during summary judgment proceedings), a plaintiff need not prove that the defendant knew or should have known the statement was false. Instead, such a plaintiff need only prove, by clear and convincing evidence, that the defendant was negligent in failing to ascertain the truth of the defamatory statements. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 179–80, 512 N.E.2d 979 (1987); *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 742, 756 N.E.2d 1263,

[11] This testimony is only a sample of the pertinent, unchallenged testimony on whether Defendants' defamatory statements were false. As the Court knows, numerous members of the Oberlin Community, including numerous minorities, testified that they had never heard any complaints about alleged racial profiling or discrimination. And given the relative small size of Oberlin, it stretches the imagination to suggest that these longtime residents would have been unaware of this alleged pervasive problem, if it were true.

(9th Dist.2001); *Gilson v. Am. Inst. of Alternative Medicine*, 10th Dist. No. 15AP-548, 2016-Ohio-1324, 62 N.E.3d 754, ¶ 41 ("Ohio adopted the ordinary negligence standard as the standard of liability for actions involving a private individual defamed in a statement about a matter of public concern.").

The jury is the proper body for determining the credibility of Raimondo and others when dealing with whether Raimondo was aware of the contents of the flyer and whether she passed it out to multiple persons, which provides the basis for removing issues of credibility from the JNOV analysis. The jury clearly determined that Raimondo knew the contents of the defamatory Flyer when she handed it to Jason Hawk and when she continued to distribute it to others in front of the bakery.

Jason Hawk's testimony paints Raimondo as someone with full knowledge as to the content of the defamatory Flyer, or at a minimum, was negligent in ascertaining the truth:

3	Q. Did you go over to those protests on behalf of
4	the Oberlin News-Tribune?
5	A. Yes.
6	Q. And did you go over on both dates, November 10th
7	and November 11th?
8	A. If those are the dates of the protest, yes, I
9	went on those dates.
10	Q. At those protests, did you encounter vice
11	president and dean of students Meredith Raimondo?
12	A. Yes.
13	Q. Tell us how that came about.
14	A. She approached me.
15	Q. Which day, the first day of the protest or the
16	second day?
17	A. The first day.

18	Q. She sought you out, she approached you; is that
19	right?
20	A. Yes, sir.

(May 10, 2019 Tr. Trans., p. 98).

3	Q. Exhibit 263. Mr. Hawk, on the screen there,
4	there is Exhibit 263. Do you recognize that document?
5	A. I do.
6	Q. I've got one here as well. Did you receive a
7	copy of this flyer at the protest?
8	A. Yes.
9	Q. And as we can see, this flyer says, in big bold
10	print, "Don't Buy. This is a racist establishment with
11	a long account of racial profiling and discrimination."
12	That's the flyer that you received at the
13	protest?
14	A. Yes.
15	Q. And on the back side it has a number of
16	businesses and local establishments where they're
17	telling people to shop at these places instead of
18	Gibson's Bakery, correct?
19	A. Yes.
20	Q. Who gave you this flyer?
21	A. Mrs. Raimondo.
22	Q. Now, when she gave you that flyer, was it folded
23	up in her pocket, she pulled it out of her pocket and
24	handed the flyer to you?
25	A. No, sir.

(Id. at p. 103).

6	Q. What did she do then to get you that flyer that
7	talks about Gibson's Bakery having a long history of
8	racism?
9	A. She asked if I had one already. When I said no,
10	she offered to get one for me.
11	Q. Did you initially ask her for a flyer?
12	A. No.
13	Q. It was Vice President Raimondo's idea to give
14	you a flyer?
15	A. Yes.
16	Q. So if she didn't have one in her pocket, what
17	then did she do to make sure there was a flyer in your
18	hands?
19	A. She asked one of the two people she had with her
20	to go get one for me.

(Id. at p. 104).

Thus, the evidence was not that Raimondo was some passive participant who merely acquired the defamatory Flyer, placed it in her pocket without any regard to its contents, and then handed it to Jason Hawk without ever reading it. According to Mr. Hawk, a disinterested third-party observer, Raimondo knew the contents **and** purpose of the defamatory Flyer and chose to publish it to him. Furthermore, Trey James testified that Vice President Raimondo had not one, but a stack of flyers in her hands and that she was handing them out. (May 14, 2019 Tr. Trans., p. 179). The point here is that there was evidence entered at trial which the jury could utilize to determine that Raimondo was at fault when she published the defamatory Flyer. Reasonable minds could certainly conclude that Vice President Raimondo knew exactly what she was mass distributing. As a result, there is sufficient evidence to meet the proper standard of fault, i.e. negligence, and even Defendants' improper standard, i.e. knew or had reason to know of the defamatory flyer's false content.

5. Reasonable minds could (and did) find that Defendants acted with the requisite degree of fault.

Defendants next argue that they are entitled to JNOV because Plaintiffs are public and/or limited purpose public figures and because Plaintiffs failed to show sufficient evidence of negligence during the compensatory phase of trial. Defendants are wrong on both counts.

a. *Plaintiffs are not public figures or limited purpose public figures.*

In a rehash of more issues already ruled upon during summary judgment briefing, Defendants claim that Plaintiffs are either public figures or limited purpose public figures. These arguments are once again wrong.

Under Ohio and federal case law, the degree of fault necessary to support a claim for defamation rests on the determination of whether a plaintiff is a public officer, a public figure, a limited purpose public figure, or a private figure. Where a plaintiff is a public officer, public figure, or limited purpose public figure, the plaintiff must show "actual malice" to succeed on a defamation claim. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280-281, 84 S.Ct. 710 (1964). 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." *Id.* at 281. On the other hand, where a plaintiff is a private figure, the Ohio Supreme Court has ruled that a negligence standard is the correct level of fault: "In cases involving defamation of private persons ... the question which a jury must determine ... is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication." *Lansdowne*, 32 Ohio St.3d at 178, 512 N.E.2d 979 (citations and quotation marks omitted).

Defendants first argue that Gibson's Bakery is a general-purpose public figure. However, the United States Supreme Court has held that "[a]bsent ***clear evidence*** of general fame or notoriety in the community, and ***pervasive involvement in the affairs of society***, an individual

should not be deemed a public personality for all aspects of his life." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997 (1974). For business plaintiffs, Ohio courts have found that a general-purpose public figure is one "who occupies a position of such pervasive power and influence ... that he assumes special prominence in the resolution of public questions and in the affairs of society." *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 122 Ohio App.3d 499, 508, 702 N.E.2d 149 (1st Dist.1997). Defendants offer no evidence that Gibson's Bakery has pervasive involvement in the affairs of society short of pointing out that the business has been in operation for a long period of time. This argument was properly rejected by the Court during summary judgment briefing (see, April 22, 2019 Order, pp. 5-6). Further, Defendants offer no evidence that Gibson's Bakery resolved public issues or was involved in the affairs of society. *See, Worldnet* at 508. Clearly, Gibson's Bakery is not a general-purpose public figure.

Nor are Plaintiffs limited-purpose public figures. Under Ohio (and federal) law, a person becomes "a limited purpose public figure if one voluntarily injects himself or is drawn into a particular public controversy, thereby becoming a public figure for a limited range of issues." *Gilbert*, 142 Ohio App.3d 725 at 738, 756 N.E.2d 1263. Defendants recycle the same arguments from summary judgment briefing by claiming that nonparty Allyn D. Gibson's actions voluntary injected Plaintiffs into some sort of controversy. This argument was also properly rejected by the Court in its order on the summary judgment motions (see, April 22, 2019 Order, pp. 5-6).

In their Motion, Defendants try to raise additional evidentiary issues supposedly supporting the limited purpose public figure argument. Plaintiffs discussed the fallacy of Defendants' reliance on these materials above, specifically discussing the fact that the materials were never entered into evidence at trial. [*See, supra* Sec. II]. Plaintiffs will therefore provide a limited response to these materials specifically related to the limited-purpose public figure analysis:

- ***First***, Defendants point to body cam footage on YouTube where David Gibson allegedly states that the store was going to be trashed. (See, Defs.' Mt. JNOV, p. 22). The video is unauthenticated and should be disregarded. Further, the video holds no relevance on the issue of the limited-purpose public figure analysis. Allyn D. Gibson (rightfully) suspected the student of shoplifting at Gibson's Bakery and exercised the statutory right to detain the shoplifter. *See,* R.C. 2935.041(A). Defendants decision to attack Plaintiffs for exercising their rights does not make Plaintiffs limited-purpose public figures.[12]

- ***Second***, Defendants point to a Facebook page called the "Gibson's Bakery Support Page" as somehow making Plaintiffs limited-purpose public figures. Defendants did not provide this Facebook page to the Court and did not offer any evidence that Plaintiffs had any involvement in its creation. Defendants' reliance on this alleged Facebook page should be ignored.

- ***Third***, Defendants next point to prevalent media attention throughout the litigation as evidence that Plaintiffs are limited-purpose public figures. Defendants do not provide ***any*** support for the proposition that media attention during litigation can transform someone into a limited-purpose public figure. Indeed, under Ohio law, "a plaintiff does not become a public figure merely because the allegedly defamatory statements create a controversy; the controversy ***must have existed prior to the statements***." *Worldnet* at 508 (emphasis added).[13]

As the Court has already ruled, Plaintiffs are private figures. To recover damages during the compensatory phase for libel, the jury was only required to find that Defendants acted with negligence to recover damages on the libel claims, which is exactly what the jury did. Thus, the Court should deny Defendants' JNOV motion.

b. *Plaintiffs provided substantial evidence that Defendants acted with negligence in publishing the defamatory Flyer and Student Senate resolution.*

In defamation or libel cases involving private figures, the question of negligence asks, "whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory

[12] The same argument applies to Defendants unsupported allegation that students warned David Gibson of the ensuing protests. Despite this statement having no basis in fact or existence in the record, it is entirely irrelevant.

[13] Defendants rely on an unauthenticated hearsay 1990 media article written by the *Oberlin Review*, the student newspaper under the control of Oberlin College, as supposed evidence that a controversy existed prior to 2016. However, an article from nearly three decades ago about a couple protesters does not create a "public controversy." Furthermore, it was never entered into evidence.

character of the publication." *Lansdowne*, 32 Ohio St.3d at 178, 512 N.E.2d 979 (citations and quotation marks omitted). Defendants' sole argument opposing the jury decision is that there is no evidence that they were negligent at the time of publication. This is obviously not true.

Defendants claim that they were unaware of the Student Senate Resolution prior to it being emailed to the student body and therefore could not be negligent in its publication. As discussed above, reasonable minds could certainly have concluded otherwise based on the evidence. [*See supra* Sec. III(B)(4)(a)]. *Regardless*, Defendants conveniently ignore that the Student Senate Resolution was posted in Wilder Hall, a place Dean Raimondo enters every single day, ***for an entire year in a very prominent location***. [*See, id.*].

Further, there is substantial evidence showing that Defendants acted negligently, at a minimum, in relation to the truth or falsity of the defamatory Flyer and Student Senate Resolution:

- ***First***, as Grandpa Gibson testified, Plaintiffs have been conducting business with Oberlin College since ***before World War I***. (May 21, 2019 Tr. Trans., p. 180; May 16, 2019 Tr. Trans., 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, numerous college administrators testified to this fact during trial, including Chief of Staff Ferdinand Protzman (May 10, 2019 Tr. Trans., p. 19) and Tita Reed. (Id., p. 76).[14]

- ***Second***, Oberlin College administrators, including Tita Reed, ***specifically rejected evidence that the defamatory statements were false***. On November 11, 2016, ***while the protests were ongoing***, Emily Crawford, the art director working directly for Ben Jones, sent an email with credible evidence showing that Plaintiffs do not have a long history of racial profiling or discrimination:

[14] Trying to circumvent the college's knowledge regarding the falsity of the statements in the Flyer and Resolution, Defendants cite to a case from Illinois for the proposition that the knowledge of employees cannot be imputed to a corporate entity for purposes of actual malice. *See, Reed v. Northwestern Pub. Co.*, 124 Ill.2d 495, 530 N.E.2d 474, 484 (1988). As an initial matter, this statement from the Illinois court is unsupported by any legal authority. Further, an Illinois decision has no bearing on this case, which is proceeding in Ohio under Ohio law. Further, the statement from the Illinois court in *Reed* does not appear to be in line with Ohio law, which will "impute to a corporation knowledge of facts which its directors ought to know, in the exercise of ordinary diligence in the discharge of their official duties." *West and Knock Tp. Farmers' Aid Soc. V. Burkhart*, 7th Dist. Columbiana, 1931 WL 2767 at *6 (Nov. 13, 1931). Regardless, Plaintiffs are not attempting to "pool" employees' knowledge but are instead looking at specific information within the purview of high-ranking officers at Oberlin College.

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.

and sure you can share if you want.

(Plaintiffs' Tr. Exh. 63). High level administrator Tita Reed responded with complete ambivalence:

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

Doesn't change a damned thing for me.

(Id.). Dean Raimondo ***was also included on this email chain***. (Id.). Ms. Crawford's email was sent on November 11, 2016 at 11:42 AM. (See, Plaintiffs' Tr. Exh. 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. (May 10, 2019 Tr. Trans., p. 142).

- ***Third***, Defendants completely ignore the statement in the Flyer accusing Grandpa Gibson and David 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." (Plaintiffs' Tr. Exh. 263 [emphasis added]). David clearly testified that only he and Grandpa Gibson were the owners of Gibson's Bakery. (May 21, 2019 Tr. Trans., p. 127). Vice President Raimondo among numerous other Oberlin College administrators knew for certain that neither David 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***. (May 10, 2019 Tr. Trans., 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. at pp. 149-150).[15] Thus, when Vice President Raimondo published the Flyer during the protests, at a minimum, she had serious doubts that David or

[15] Tita Reed also received a copy of the police report via email on November 10, 2016. (Id. at p. 73).

Grandpa Gibson assaulted someone on the previous day.

- ***Fourth***, Defendants argue that Dean Raimondo had no reasonable way of determining that the Flyer and Student Senate Resolution were false. However, this is clearly not true. ***The night before the protests began***, Dean Raimondo was notified of the protests and the content of the defamatory statements. Then, the very next morning, on November 10, 2016, Dean Raimondo scheduled a meeting with numerous administrators to discuss supporting the protests:


From: From: [redacted] Meredith Raimondo
Timestamp: 11/10/2016 07:38(UTC-5)
Source App: iMessage: [redacted]
Body:
A staff group will meet at 930 in Wilder 105 to talk about how to support students who are protesting. You're welcome to come but I can also catch you up later

(Plaintiffs' Tr. Exh. 25). She had substantial opportunity, including the opportunity to speak with the administrators within the college like Ferdinand Protzman, to determine the truth of the allegations in the Flyer and Student Senate Resolution. She either chose not to or deliberately ignored their statements.

Clearly, reasonable minds could (and did) find that Defendants acted with negligence at the time of publication. Therefore, Defendants' Motion for JNOV must be denied.

C. Dean Raimondo is not Entitled to JNOV on Gibson's Bakery's Tortious Interference with Business Relationship Claim.

Plaintiffs presented sufficient probative evidence to avoid judgment notwithstanding the verdict on their claims for tortious interference with business relationship. And Defendants' only challenges to this claim are two defenses not supported by law or fact: (a) Oberlin College is a party to the business relationship between Bon Appetit and Gibson's Bakery and Raimondo cannot interfere with a contract of her employer; and (b) the interference was justified.

1. Dean Raimondo cannot escape liability for tortious interference under an agency theory because, under Ohio law on the facts at hand, there was no agency relationship between Oberlin College and Bon Appetit.

Dean Raimondo's argument that she cannot interfere with a contract relationship between her employer, Oberlin College and Gibson's Bakery, is based solely on the faulty analysis that Oberlin College is in an agency relationship with Bon Appetit. The very case law

cited by Raimondo dooms her argument. Two of the Ohio Supreme Court decisions relied on by Raimondo confirm that there is no agency relationship between Bon Appetit and Oberlin College, and, therefore, Dean Raimondo's actions constitute interference with the business relationship between Bon Appetit and Gibson's Bakery. *Willoughby Hills Dev. & Distrib., Inc. v. Testa,* 155 Ohio St.3d 276, 2018-Ohio-4488, 120 N.E.3d 836, ¶¶ 33-34 (2018) and *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929, ¶¶ 20, 24 (2012).

Raimondo ignores the analysis in these cases providing that (1) the legal consequences of agency may attach to only a portion of the relationship between two parties("[T]he legal consequences of agency may attach to only a portion of the relationship between two persons" (*see, e.g. Willoughby Hills,* at ¶¶ 29, 34 ("[T]he legal consequences of agency may attach to only a portion of the relationship between two persons")) and (2) in determining whether there is an agency relationship between Oberlin College and Bon Appetit ***for its purchases from*** Gibson's Bakery, the Court must examine the language of the contract between the parties. *Willoughby Hills,* at ¶¶ 29, 33-34 (even if an agent for some purposes, based on the contract provisions, WHDD was not Sunoco's agent for purposes of its contracts to sell gasoline to retailers because it was not authorized to make any commitments or incur any expense or obligation of any kind on behalf of Sunoco unless Sunoco gives its approval); *Cincinnati Golf,* at ¶¶ 26-27 (there is nothing in the express contract provisions that shows that CGMI could directly bind the city when it made the purchases at issue); *Russell Harp of Ohio, Inc. v. Lindley,* 9th Dist. No. 9895, 1981 WL 3979, *2 (May 13, 1981) (contract provided that Harp was the City's agent to operate and manage City's garage, but the contract provisions establish that Harp was not the City's agent when purchasing as contract required Harp to purchase in its own name and on its own credit, and the City was obligated to reimburse Harp only for those purchases approved by City).

Thus, under Ohio law, Oberlin College can only be a party to the Bon Appetit/Gibson's Bakery contract or business relationship for the ***purposes of its purchases from Gibson Bakery***, if, under the Management Agreement, Bon Appetit had ***actual authority*** to bind Oberlin College as the purchaser. Critically, there is nothing in the Management Agreement that shows that Bon Appetit could directly bind Oberlin College to the purchases that it made from Gibson's Bakery. In *Harp,* even though Harp was an agent to manage the city's Garage, the Ninth District Court of Appeals denied Harp status as an agent for purchases on behalf of the city: "regardless of the degree to which Akron reserved the right to control the actions of Harp *in other aspects of this relationship*, the specific purchases were made solely by Harp, billed to Harp, and paid by check" by Harp. The contract provisions showed that Harp did not "possess[] authority as "agent" to contract for purchases based on Akron's credit. *Harp,* at *2-3 (emphasis added).

Cincinnati Gulf, expressly adopting the *Harp* analysis, likewise could not "imput[e] purchase-agent status to CGMI," where '[n]othing in the express contractual provisions offers support to the notion that CGMI could directly bind the city when it made the purchases at issue." *See Cincinnati Golf*, ¶¶ 26, 27 (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 purchase-agent 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 *Harp,* ***even if the alleged principal and alleged agent have a contract stating that an agency relationship exists for some other purpose***. *See Russell Harp* at **2-3. *Willoughby Hills Dev.,* 155 Ohio St.3d 276, ¶¶ 33-34 (no agent/principal relationship where alleged agent had no

authorization to make commitments/incur obligations on behalf of Sunoco).

Just as the agreements in *Cincinnati Gulf* and *Harp* could not bestow purchase agent status because there was no showing that the alleged agent could bind the alleged principal to the purchases made, the Management Agreement[16] between Oberlin College and Bon Appetit does not permit Bon Appetit to bind Oberlin College to the purchases that Bon Appetit made from Gibson's Bakery—it does not grant Bon Appetit the specific authority to bind Oberlin College to specific vendor contracts. *See Russell Harp* at **2-3. Instead, like the contract at issue in *Willoughby Hills*, 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 only those purchases approved by Oberlin College. (Plaintiffs' Tr. Exh. 367, § 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, ¶ 56).

Moreover, 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:

[16] 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. (May 14, 2019 Trial Trans., pp. 96-97).

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

***

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

(May 14, 2019 Trial Trans., pp. 78, 80).

David Gibson specifically testified that the daily orders and "tweaks" to those orders were communicated to Gibson's Bakery by employees of Bon Appetit. (May 21, 2019 Tr. Trans., 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. at 166). As provided above, Michele Gross confirmed that all financial transactions flowed through, and were handled solely by, Bon Appetit. (May 14, 2019 Trial Trans., pp. 78, 80).

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:

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

(May 14, 2019 Tr. Trans., p. 53). To help her clarify her understanding, the following excerpt from her 30(B)(5) deposition was played during trial:

1	Q. Yeah. So they -- they go out and place orders
2	directly with vendors like Gibson's Bakery for
3	food items, correct?
4	A. Yes.
5	Q. And they directly pay any sort of bills or
6	invoices from those third parties, correct?
7	A. Yes, the college pays a management fee that covers
8	all of the related expenses from food costs to
9	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. (May 14, 2019 Tr. Trans., pp. 53-54).

Moreover, Dean Raimondo's legal argument, however, does not comport with Ohio law which recognizes that being an agent for one purpose does not make one an agent for purposes of making purchases on behalf of the alleged principal. Instead, Defendants were required to analyze the actual contract language in the contract between Bon Appetit and Oberlin College to determine whether there is agency status for purchasing goods—whether Bon Appetit had the right to bind Oberlin College to the purchases from Gibson's Bakery. follow the analyses of *Willoughby Hills* and *Cincinnati Gulf*. This Defendants did not do. Eliciting testimony from Michelle Gross that Section 1.2 of the Management Agreement between Oberlin College and Bon

Appetit designates Bon Appetit as an agent to manage the food service operations in certain designated dining halls is not relevant to the issue of whether Bon Appetit was Oberlin College's agent for purposes of purchasing from Gibson's Bakery.

As outlined above, the Management Agreement does not permit Bon Appetit to bind Oberlin College to the purchases that Bon Appetit made from Gibson's Bakery—it does not grant Bon Appetit the specific authority to bind Oberlin College to specific vendor contracts. *See Russell Harp* at **2-3. Instead, like the contract at issue in *Willoughby Hills*, 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 only those purchases approved by Oberlin College. (Plaintiffs' Tr. Exh. 367, § 6.4). Instead, she merely supports her assertion that Bon Appetit is an agent of Oberlin College with trial testimony of an Oberlin College employee's opinion on whether there is an agency relationship and an unfounded allegation of admissions, and not based on any analysis of the actual contractual relationship between Oberlin College and Bon Appetit as required by Ohio law. (Defs.' JNOV at pp. 29-31). The Ohio Supreme Court in both *Willoughby Hills* and *Cincinnati Gulf* determined that the alleged agent at issue was not endowed with actual authority to bind the alleged principal to contracts with third parties based on the contract language at issue. Likewise, a review of the Management Agreement confirms no agency relationship between Oberlin College and Bon Appetit.

Likewise, Defendants' unfounded attempt to argue at p. 31 that Attorney Plakas admitted that there was no business relationship between Gibson's Bakery and Bon Appetit is also to no avail. There was substantial evidence of the business relationship between Gibson's Bakery and Bon Appetit. Moreover, no statements by an attorney can transform the lack of agency status

under Ohio law into an agency status, and Defendants cite no case law such a proposition.[17] Moreover, it is true that Oberlin College had a century-long and hundred-year long relationship with Gibson's Bakery, sometimes through a direct contract and sometimes through a third party contractual relationship such as with Bon Appetit. In each instance, Defendants have taken the quotes at issue at p. 31 out of context; the questions simply emphasize that Defendants interfered, without justification, with the century-long relationship in which Gibson's Bakery provided quality service to Oberlin College, sometimes through a direct contract and sometimes separate contract with a third-party contractor such as Bon Appetit.

For example, concerning bullet points 2 and 3 on page 31 of the Motion, the immediately preceding testimony outlined that the contract was between Bon Appetit and Gibson's Bakery and then elicited truthful testimony that Gibson's Bakery had been providing baked goods to the College for over a hundred years and that this hundred-year long relationship had been cancelled without justification. (May 21, 2019 Tr. Trans., pp. 157-164; 178).

Particularly egregious, Defendants reference to a "century-long business relationship" is taken completely out of context as the actual quote itself recognized Bon Appetit's role as third party contractor, "And was there any further explanations from the college or Bon Appetit to the sudden cancellation of your century-long business relationship." (Id. at p. 180). The direct examination of Dean Raimondo is the same, where just previously she testified to the exact nature of the third-party contractual relationship between Bon Appetit and Gibson's Bakery (May 14, 2019 Tr. Trans., pp. 49-50). Raimondo then testifies that the College at her direction prohibited Bon Appetit from continuing to order from Gibson's Bakery (Id. at p. 50). Again, the query was to emphasize that there was no justification for terminating the hundred-year long provision of

[17] The lone case cited by Defendants is completely inapposite and discusses only when an opening statement can be used as an admission.

services by Gibson's Bakery. None of the cited quotes in any way an admission that the contract at issue was between the College and Gibson's Bakery.

Thus, under Ohio law, there is no principal/agent relationship between Bon Appetit and Oberlin College for purposes of purchasing product from Gibson's Bakery or other vendors. Therefore, both Oberlin College and Dean Raimondo are third party "strangers" capable of interfering with the Bon Appetit/Gibson's Bakery contract or business relationships, and Dean Raimondo has no employee defense.

Moreover, even if the requisite principal/agent relationship existed (and it does not under Ohio law), Oberlin College and Dean Raimondo would still be liable for tortious interference with the Bon Appetit/Gibson's Bakery contract or business relationships because both Oberlin College and Dean Raimondo 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:

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

(May 14, 2019 Tr. Trans., p. 164).

Oberlin College's Chief of Staff, Ferdinand Protzman, separately testified that the highest echelons of College management did not believe the termination was justified. (May 10, 2019 Tr. Trans., p. 13). 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. at pp.

99-100), there is no 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 and Dean Raimondo 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).

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.

2. Defendants were not justified in terminating Bon Appetit's contract and business relationship with Plaintiffs.

Dean Raimondo next argues that she and Oberlin College were justified in directing Bon Appetit to cease doing business with Plaintiffs because (a) Bon Appetit is the agent of the College so the College could instruct Bon Appetit to do as it requests; (b) neither the College nor Bon Appetit were required to continue placing orders for food products from Gibson's Bakery; and (c) Defendants' decision to temporarily suspend orders was the result of legitimate business and safety concerns and the Bakery suing Defendants.

This is simply subterfuge. The foregoing analysis completely eliminates the purported agency justification. The remaining purported justifications are also belied by the law and facts. To the contrary, Plaintiffs presented probative evidence and the facts show that, without

justification, Oberlin College itself created such a charged environment that property damage was inflicted on Plaintiffs' home and vehicles and employee vehicles. (May 15, 2019 Tr. Trans., pp. 106, 144; May 16, 2019 Tr. Trans., p. 112; May 23, 2019 Tr. Trans., p. 61). Moreover, Defendants were also using their financial power and authority in the community to force David 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. (May 10, 2019 Tr. Trans., pp. 85-86; Plaintiffs' Tr. Exh. 145). Under Ohio law, Oberlin College is not justified in creating such a hostile environment and then directing Bon Appetit to cease all purchases from Gibson's Bakery in order to resolve the very hostile environment that Oberlin College created and is not justified in using its economic power to coerce the Plaintiffs.

Moreover, Oberlin College employees testified that there was no justification for the discontinuation of the Gibson Bakery order. Ferdinand Protzman testified that Gibson's Bakery was supplying good quality baked goods at a fair price and they were a reliable supplier who would comply with special requests, such as creating a vegan bagel. (May 10, 2019 Tr. Trans., pp. 8-9). He further testified that he and the highest echelons of College management did not believe the termination was justified. (Id. at p. 13).

The Ohio Supreme Court set out the seven factors that courts consider in determining whether a defendant's interference with another's contract or business relations is improper: the nature of the actor's conduct, the actor's motive, the interests of the other with which the actor's conduct interferes, the interests sought to be advanced by the actor, the social interests in protecting the freedom of action of the actor and the contractual interests of the other, the social interests in protecting the freedom of action of the actor, and the contractual interests of the other. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E. 2d 853 (1998). Plaintiffs presented

sufficient probative evidence on all of these factors to support the jury's verdict that Dean Raimondo's conduct was improper and not justified. [18]

Fred Siegel and its progeny also negate any defense based on the contract between Bon Appetit and Gibson Bakery being terminable at will. *Only a competitor of Gibson Bakery* (and only after such competitor meets all of the seven factors set out in *Fred Siegel*) can justifiably interfere with a contract based on the fact that it is terminable at will/does not require continuing to place order. *Fred Siegel,* at 179-180 ("where an existing contract is terminable at will, and where all of the elements of Section 768 of the Restatement are met, *a competitor may* take action to attract business, even if that action results in an interference with another's existing contract.") (emphasis added); *Martin v. Jones,* 41 Ohio App.3d 123, 141-42, 2015-Ohio-3168, ¶65; *Stonecreek Dental Care,* 30 N.E.3d 1034, 1045 (12th Dist. 2015) Since Oberlin College is not a competitor with Gibson's Bakery in the sale of baked goods, it has no privilege to interfere with the contract at issue based on the fact that the contract is terminable at will/does not require continuing to place order.

As a result, Defendants' JNOV Motion must be denied.

D. Oberlin College is not Entitled to JNOV on David and Grandpa Gibson's Claims for IIED.

For the third time in as many months, Defendants proffer two arguments allegedly precluding liability for Oberlin College on David and Grandpa Gibson's claims for Intentional Infliction of Emotional Distress ("IIED"): that Oberlin College's conduct was not extreme and

[18] Moreover, in Ohio, even if Oberlin College can establish a qualified privilege to interfere, the analysis does not stop there because a qualified privilege can be overcome by actual malice, *Long V. Mount Carmel Health System,* 93 N.E.2d 436. 445-6, 2017-Ohio-5522, ¶¶28-29, *citing A&B-Abell Elevator Co.,* 73 Ohio St3d 1, 11-12, 651 N.E.2d 1283 (1995).

outrageous, and that David and Grandpa Gibson did not suffer serious mental anguish.[19] Both arguments are wrong, and Defendants are not entitled to JNOV on the IIED claims.

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). Because reasonable minds could and did conclude that David and Grandpa Gibson were entitled to judgment against Oberlin College on their IIED claims, Defendants' motion for JNOV must be denied.

1. Reasonable minds concluded that Oberlin College's 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.

Plaintiffs submitted substantial probative evidence that Oberlin College's conduct, through the acts of its employees, was extreme and outrageous:

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[19] Defendants also argue that the IIED claims should fail because they are derivative of the libel claims. (See, Def. Mt. JNOV, p. 33). However, as explained in substantial detail above, Plaintiffs' libel claims do not fail as a matter of law so the derivative argument is irrelevant. (*See, supra* Sec. III(B)).

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

> Q. You would agree that, in your words, "being called a racist is one of the worst things a human being can be called," correct?
> A. Yes.

(May 29, 2019 Tr. Trans., p. 179). This was confirmed by Oberlin College 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.

(May 15, 2019 Tr. Trans., p. 126). Despite the acknowledgement that calling someone a racist is one of the ***worst things*** a person can do to someone else, Dean Raimondo,[20] while acting in the course and scope of her employment, published the Flyer to numerous people, accusing Grandpa Gibson and David of having a "LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" (See, Plaintiffs' Tr. Exh. 263; May 10, 2019 Tr. Trans., pp. 104-05;[21] May

[20] Defendants erroneously claim that because the jury only found Oberlin College liable for IIED, then Dean Raimondo's conduct is of no import. However, this is untrue. Because Oberlin College acts through its employees and officers, Dean Raimondo's conduct is imputed to the college regardless of the jury's decision on her individual liability.

[21] Local newspaper reporter, Jason Hawk, testified that Dean Raimondo published a copy of the Flyer to him during the protests. (See, id.).

14, 2019 Tr. Trans., p. 179).[22] And Dean Raimondo was not the only college employee distributing defamatory materials. Oberlin College employee Julio Reyes was also in the thick of the protests distributing defamatory Flyers. (See, May 13, 2019 Tr. Trans., pp. 15-18).[23]

The Flyer distributed by Dean Raimondo and Mr. Reyes didn't stop at accusing Plaintiffs of a long account of racial profiling. Indeed, it even accused the owners of Gibson's Bakery, David and Grandpa Gibson, of committing the crime of assault. (See, Plaintiffs' Tr. Exh. 263). The distribution of these materials was extreme and outrageous and should not be tolerated.

Second, Oberlin College's 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.

(See, May 10, 2019 Tr. Trans., pp. 85-86; Plaintiffs' Tr. Exh. 145). Defendants even attempted to use Obie dollars, which are a form of student debit card, as ***leverage*** against the Gibsons. (See, May 10, 2019 Tr. Trans., p. 83). In essence, Defendants were using their financial power and

[22] Gibson's Bakery employee Clarence "Trey" James testified that Dean Raimondo passed numerous copies of the Flyer to individuals at the protest for distribution. (See, id.).

[23] Former Oberlin College director of student safety, Rick McDaniel, testified that Julio Reyes was walking around the protest with a stack of Flyers passing them out. (See, id.). Mr. McDaniel also testified that Julio Reyes was belligerently blocking photographs of the protests and refused to stop until the police intervened. (See, id.).

authority in the community to force David 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.

Defendants disregard these emails and communications and claim that they have no bearing on the IIED claims because they were not disclosed to David and Grandpa Gibson until after this case commenced. This is a blatant misrepresentation. While the emails may not have been disclosed, the demand to ignore the rule of law was communicated to David Gibson on numerous occasions after the protests began. David testified that Tita Reed called him and demanded the dropping of charges in exchange for the resumption of business:

Q. And by Wednesday morning, November 23rd, had you received a follow-up call from special assistant to the president, Tita Reed?
A. Yes, I did. It was two days later in the morning and Tita Reed called me. She asked me, she said, I want to -- I want to fully understand exactly what you're planning on doing with the three students. And I -- then I told her again that -- and she asked, are you dropping the charges? What are you doing with these students? I told her that they would be treated the same as anybody else is. It's not going to be anything more or less. I'm not going to punish them explicitly or anything extra. Everybody gets treated the same. I could hear her anger on the phone with me when she asked me that, and she then simply didn't respond anymore. She hung up on me.

(May 21, 2019 Tr. Trans., pp. 172-73). Indeed, David testified that President Krislov demanded that Gibson's Bakery provide a "first-time-pass" to Oberlin College students caught shoplifting at

the bakery. (See, Id. at p. 172).

Defendants continue to argue (again, for a third time) that the statements directed at the Gibsons were mere insults that society should find tolerable. (See, Defs.' JNOV, pp. 34-35). Defendants even cite to a case finding that calling someone a racist is insufficient conduct for an IIED claim.[24] However, the language in both the Flyer and Student Senate Resolution are ***not mere insults***. Instead, they 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 the Gibson family.

Thus, reasonable minds could (and did) conclude that Oberlin College's conduct was extreme and outrageous.[25]

2. Plaintiffs presented sufficient evidence of severe and debilitating emotional injury.

To succeed on a claim for IIED, the plaintiff must show 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 continue to beat the same dead horse by arguing that David and Grandpa Gibson's emotional injuries could not be severe and debilitating because they did not receive

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[24] *See, Lennon v. Cuyahoga Cty. Juvenile Ct.*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587 ¶ 23. *Lennon* is highly distinguishable from this case. In *Lennon*, a co-worker merely called the plaintiff a racist on, what appears, one occasion, which is clearly distinguishable from specific factual allegations that a 134-business and its owners practiced racial profiling throughout their history and assault members of a local community. *Id.*

[25] Defendants devote a substantial portion of their brief to *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207 (2011), a case dealing with the Westboro Baptist Church wherein church members protested a soldier's funeral. (See, Defs.' JNOV, p. 35). However, this case has no bearing here. While *Snyder* did involve protests and detestable statements, it did not involve specific factual allegations. Instead, the protesters in *Snyder* made broad statements condemning homosexuality and the Catholic church but did not make any specific factual allegations of the soldier who was being memorialized or the soldier's father. *Snyder* at 458. In this case, Oberlin College, through its employees, made ***specific factual allegations*** against Plaintiffs that were defamatory and were not protected by the First Amendment.

medical treatment for the injuries. But, as Plaintiffs have stated on numerous occasions, this is a clear misstatement of Ohio 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***." *Id.* at 80 (emphasis added). Thus, the simple fact that Plaintiffs did not receive professional medical treatment does not preclude, or even discount, their IIED claims.

Next, Defendants pull some testimony out of context to detract from the severe emotional injuries David and Grandpa Gibson suffered. However, Plaintiffs submitted substantial evidence supporting their emotional injuries such that reasonable minds could (and did) find in favor of Plaintiffs on the IIED claims:

- Lorna Gibson, David's wife, testified that after the protests and defamation, David was "upset," "devastated," and was withdrawn and unable to speak to friends and community members alike. (May 15, 2019 Tr. Trans., pp. 149-50). Further, Lorna testified that David's injuries were not merely psychological but even manifested in physical form through stomach sickness, lack of eating, lack of sleep, and even heart issues. (Id., p. 150).

- Oberlin community member Eddie Holoway testified that Grandpa Gibson was a completely different person as a result of Defendants' conduct. Before the libel, Mr. Holoway testified that Grandpa Gibson was jovial and in very good spirits. (May 16, 2019 Tr. Trans., p. 56). But, after the protests, Mr. Holoway saw Grandpa Gibson as a marginalized person with substantial pain. (Id., p. 60).

- David's son, Steven Gibson, testified that David was extraordinarily upset when he found out about the libel and that his stress has continued since November of 2016. (May 16, 2019 Tr. Trans., pp. 128, 132).

- Perhaps best capturing the degree of emotional distress Defendants' actions have caused David and Grandpa Gibson, Lorna testified as follows regarding Grandpa Gibson after the defamation:

> 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.

(May 15, 2019 Tr. Trans., p. 153).

All that is required to avoid JNOV 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).[26] Considering the testimony of ***numerous*** witnesses and construing the facts most strongly in Plaintiffs' favor, reasonable minds could (and did) find that David and Grandpa Gibson suffered serious emotional distress as a result of Defendants' conduct.

Therefore, Defendants' Motion for JNOV must be denied.

E. Defendants are Not Entitled to JNOV on Plaintiffs' Punitive Damages Verdicts.

1. Libel actual malice was properly submitted to the jury during the punitive phase of trial.

As discussed at length during trial, when a defamation claim involves private persons regarding a matter of public concern, the plaintiff must show actual malice to recover presumed damages and punitive damages. *Gilbert*, 142 Ohio App.3d at 744, 756 N.E.2d 1263. Actual malice for these purposes, which the parties called "libel actual malice," is the same standard taken from *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710 (1964): publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." In its order on the summary judgment motions, this Court determined that Plaintiffs are private persons but that the defamation involved a public concern. (See, April 22, 2019 Order, p. 7). Thus, to

[26] In the JNOV motion, Defendants cite the same cases as the directed verdict motions. These cases continue to be 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. 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, David 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.

receive presumed damages (but not to receive actual damages) and punitive damages, Plaintiffs were required to show libel actual malice.

Defendants seek JNOV, arguing that libel actual malice should not have been submitted in the compensatory and punitive phases. Defendants are wrong for several reasons:

First, in this case, Defendants filed a motion to bifurcate the compensatory and punitive phases of trial pursuant to R.C. § 2315.21(B)(1). As prescribed by the statute, when the Defendants moved for bifurcation, the trial was separated into two phases: the first on compensatory damages and the second on punitive damages. *See,* R.C. § 2315.21(B)(1)(a)-(b). The bifurcation eliminated Plaintiffs' ability to present evidence related to punitive damages during the compensatory phase of trial. *See,* R.C. § 2315.21(B)(1)(a). By bifurcating the trial, Defendants separated libel actual malice into ***two separate issues***. During the compensatory phase, libel actual malice was submitted to the jury for purposes of deciding only presumed damages. Then, during the punitive phase, libel actual malice was submitted to the jury for purposes of deciding punitive damages.

During the compensatory phase, the jury determined that Defendants did not act with libel actual malice but instead found that Defendants acted with negligence. This, in essence, eliminated only Plaintiffs' ability to recover ***presumed*** damages. However, because Plaintiffs submitted substantial evidence of actual damages (See, testimony of Plaintiffs' expert Frank Monaco, May 20, 2019 Tr. Trans., pp. 6-65), the jury awarded Plaintiffs economic and noneconomic damages during the compensatory phase of trial. Then, because it was an issue for punitive damages, libel actual malice was submitted to the jury in the punitive phase, where Plaintiffs submitted substantial additional evidence. Ultimately, during the punitive phase, the jury found that Defendants acted with libel actual malice and awarded Plaintiffs' punitive damages.[27]

[27] In a long footnote (see, Defs.' JNOV, p. 39 n. 40), Defendants claim that "Plaintiffs knew and acted as if they had

Defendants invited the submission of libel actual malice to the jury in both phases by filing the motion to bifurcate. If Defendants did not want two phases of trial, they should not have filed the motion.

Second, Defendants erroneously claim that Section 5, Article I, of the Ohio Constitution, the right to trial by jury, precludes the submission of libel actual malice in both phases of trial, but Defendants are wrong. The text of the provision certainly does not preclude such action as it merely states that "[t]he right of trial by jury shall be inviolate." Defendants did not cite (and Plaintiffs are not aware of) even one Ohio authority stating that the Ohio right to trial by jury prevents the submission of overlapping issues in a bifurcated trial in both phases.[28] This makes sense, as the right preserved by the constitution "was the right to trial by jury as it was recognized by the common law; and within the right thus secured is the right of either party, in an action for the recovery of money only, to demand that the issues of fact therein be tried by a jury." *Dunn v. Kanmacher*, 26 Ohio St. 497, 502-03 (1875). The right as defined contains no limitation based on bifurcated issues at trial.

Third, Defendants' reliance on one federal case, *Greenhaw v. Lubbock Cty. Beverage Assn.*, 721 F.2d 1019, 1025 (5th Cir. 1983),[29] to support their claim that libel actual malice should

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to prove constitutional malice at the liability phase of trial." This is true in a sense: Plaintiffs knew and expected that they were required to prove libel actual malice during the compensatory phase to receive ***presumed damages***. Because Defendants sought bifurcation of the trial, libel actual malice for purposes of punitive damages was not submitted to the jury ***until the punitive phase of trial***.

[28] Defendants, without expressly stating it, are essentially arguing that the decision of the jury during the compensatory phase is preclusive of the issue during the punitive phase. However, in order for issue preclusion to apply under Ohio law, Defendants are required to show that an "identical issue was actually litigated, directly determined, and ***essential to the judgment*** in the prior action." *Price v. Carter Lumber Co.*, 2012-Ohio-6109, 985 N.E.2d 236, ¶ 10 (9th Dist.) [citations omitted]. Importantly, the decision by the jury in the compensatory phase was not a judgment, and, even if it was, it was not essential as Defendants were found liable under a negligence theory for purposes of the defamation claim.

[29] Importantly, *Greenhaw* specifically relied on *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513 (1931) when it stated that the Seventh Amendment includes "the right to have a single issue decided one time by a single jury." *Greenhaw* at 1025. However, *Gasoline Products* stands for no such proposition. Instead, *Gasoline Products* merely held that when a new trial is ordered at the appellate level, the Seventh Amendment does

not have been submitted during both phases of trial, is misplaced:

- *Greenhaw* is a federal case discussing the Seventh Amendment to the United States Constitution. As Defendants' counsel are no doubt aware, the Seventh Amendment ***has not been incorporated to the states*** and has no application to this case. *See, Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment ... to abridge.").[30]

- Further, even if cases interpreting the Seventh Amendment are persuasive authority for Ohio courts (they are not),[31] the *Greenhaw* court is relying on the Reexamination Clause of the Seventh Amendment, which states that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Seventh Amendment to the U.S. Constitution. The Ohio right to trial by jury contains no such clause. *See,* Section 5, Article I, Ohio Constitution. Thus, federal cases interpreting the Reexamination Clause are ***not persuasive authority for Ohio courts.***

- In any event, federal interpretations of the Seventh Amendment ***must give way to Ohio statutory provisions requiring bifurcation of specific issues***. *See, Edelstein v. Kidwell*, 139 Ohio St. 595, 41 N.E.2d 564 (1942) (distinguishing *Gasoline Products* based on Ohio statutory authority). Because Defendants moved for bifurcation, libel actual malice became two separate issues that were required to be submitted to the jury in both the compensatory and punitive phases of trial.

Thus, the submission of libel actual malice during the punitive phase of trial was not error and therefore Defendants' JNOV Motion must be denied.

2. Plaintiffs submitted substantial probative evidence supporting the punitive damages award.

Next, Defendants argue that Plaintiffs failed to provide sufficient evidence of libel actual malice. Defendants' sole argument on this issue is that all evidence of fault allegedly post-dated

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not require a new trial on all issues but only those reversed on appeal. *Gasoline Products* at 498. The case has nothing to do with submitting two issues, like here, to the jury.

[30] *See also, Arrington v. Daimler Chrysler Co.*, 9th Dist. Summit Nos. 22108, 22270, 22271, 22272, 22273, 22274, 22284, 22285, & 22311, 2004-Ohio-7180, ¶ 23 [citations omitted] ("One such unincorporated right is the Seventh Amendment right to a civil jury trial; the Fourteenth Amendment does not assure such a right in state court proceedings.").

[31] Defendants cite to *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 135 (Cupp, J., concurring) for the proposition that cases interpreting the Seventh Amendment "are strongly persuasive" in Ohio courts. However, this idea is taken from a nonbinding concurring opinion and is completely unsupported by any authorities.

publication. However, as discussed in detail above, *see supra* Sec. III(B)(5)(b), Plaintiffs submitted substantial evidence that Defendants acted with knowledge of the falsity of the statements. Indeed, because it was posted in a prominent location in Wilder Hall ***for over a year***, statements after November 10, 2016 are relevant on the issue of actual malice as there was continuous publication of the Resolution until the lawsuit was filed.

Plaintiffs presented the following evidence of libel actual malice:

Trial Testimony May 16, 2019	***90-year-old*** Grandpa Gibson testified that Gibson's Bakery had been doing business with Oberlin College since "before [he] was born." (P17:2-9). No claims of racial profiling or discrimination for that century-long relationship.
EX. 111 [NEW]	On November 16, 2016, while the Student Senate Resolution was posted in Wilder Hall, an Oberlin College alum sent an email that was forwarded to President Krislov and VP Raimondo stating, "***To treat either Mr. Gibson or his business as racist ... seems to us completely inappropriate in multiple ways***."
EX. 161 [NEW]	On December 20, 2016, while the Student Senate Resolution was posted in Wilder Hall, an Oberlin College alum sent President Krislov an email that was forwarded to VP Raimondo stating, "I have known Dave Gibson and his father for more than fifty years. ***They are a family of gentle and fine people***."
EX. 485 [NEW]	On November 11, 2016, during the protests, James Henderson, a long-time resident of Oberlin, sent VP Raimondo an email stating, "My greatest concern is a statement ... that Gibson's bakery and the Gibson family specifically are racists, and that they have a long history of mistreating customers of color. ***That does not sound like the family that I have known for nearly my entire life***[.]"

Trial Testimony May 10, 2019	Chief of Staff Protzman confirmed that ***none of the Oberlin College administrators "thought the Gibsons are racists."*** (P23:19-22)
EX. 458-1 [NEW]	On November 10, 2016, VP Ben Jones sent VP Raimondo a text message relaying that he heard that "the shoplifting was clear and ***there was no racial profiling***."
Trial Testimony May 10, 2019	Chief of Staff Protzman confirmed that ***he "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***[.]" (P19:17-23).
Trial Testimony May 10, 2019	Special Assistant Tita Reed testified that she has not had ***any*** experience of racism with David Gibson. (P75:22-76:6).
Trial Testimony May 10, 2019	President Krislov confirmed that during his tenure with Oberlin College, "no one had ever suggested to [him] that the Gibson family or Gibson's Bakery was racist[.]" (Ex. 460, pp. 5-6).
Trial Testimony May 13, 2019	Former Oberlin College Director of Security Rick McDaniel confirmed that in his 15 years with the college there was no "issue with racial profiling or racial discrimination by the Gibsons." (P8:8-17).
EX. 63	On November 11, 2016, in the middle of the protests, former Oberlin College employee Emily Crawford sent an email to VP Ben Jones that was forwarded to VP Raimondo, stating, "i have talked to 15 townie friends who are [people of color] and they are disgusted and embarrassed by the protest ... 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." Tita Reed responded on November 11, 2016 that the information "***Doesn't change a damned thing for me.***"

Clearly, reasonable minds could conclude that Defendants acted with libel actual malice sufficient to support the award of punitive damages.

3. Because the jury properly awarded punitive damages on Plaintiffs' libel claims, the punitive damages awarded for David and Grandpa Gibson's IIED claims were appropriate.

Defendants next argue that the punitive damages on the IIED claims fail because the

punitive damages on the libel claims fail because the claims are derivative. However, this argument is completely irrelevant because the jury properly awarded punitive damages on the libel claims.

F. Defendants are not entitled to JNOV as to the $4 million in punitive damages awarded for David Gibson's and Grandpa Gibson's IIED claims.

1. Defendants cannot challenge the jury's award of damages by way of a motion JNOV.

Defendants argue the jury's award of punitive damages is $4 million in excess of what ought to have been awarded because the award allegedly improperly "combined or stacked" punitive damages for the libel and IIED claim, even though these claims arose from the same conduct. (Defs.' JNOV, p. 42). The Ninth District Court of Appeals has consistently held that challenges to a jury's award of damages must be done in a motion for new trial under Civ.R. 59. *Magnum Steel & Trading, L.L.C. v. Mink*, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431, ¶ 44. For example, in *Mink*, appellant argued the damage award was inadequate. *Id.* The Court explained " '[s]uch an argument is not appropriate on a motion for [JNOV] because Civ.R. 50(B) provides the means to challenge the jury's verdict, not the jury's award of damages." *Id.*, citing *Jemson v. Falls Village Retirement Community Ltd.*, 9th Dist. No. 20845, 2002-Ohio-4155, ¶ 17. See also *Catalanotto v. Byrd*, 9th Dist. Summit No. 27302, 2015-Ohio-277, ¶ 8 ("Yet, an argument that a jury's damage award is contrary to law 'is not appropriate on a motion for [JNOV] because Civ.R. 50(B) provides the means to challenge the jury's verdict not the jury's award of damages.' (Citation omitted.) * * * " 'Instead, Civ.R. 59 provides litigants with an avenue to challenge damage awards in the form of a motion for a new trial.' " (Citation omitted.)) *Id.* at ¶ 8.

Because Defendants did not present this issue to the Court through the proper mechanism (*i.e.* motion for new trial), the Court should deny their JNOV motion. And even if Defendants have raised this issue in their other post-judgment motion, the Court must consider those issues under

the standards applicable there and not under the JNOV standard.

2. The jury's punitive damages award was not based on the same animus.

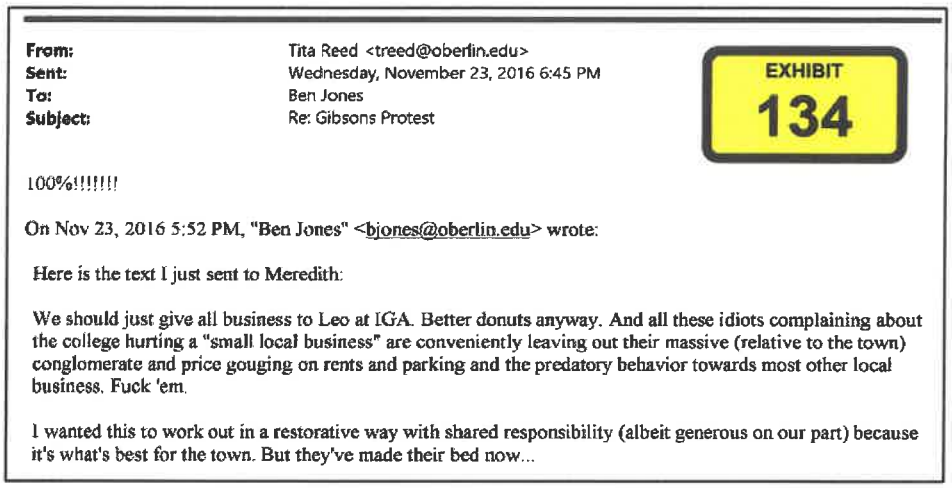
Defendants ask the Court to grant JNOV because David Gibson and Allyn W. Gibson's IIED claims allegedly arose from the same animus and therefore, could not support a separate award of punitive damages. (Defs.' JNOV, p. 42). Defendants ask the Court to reduce the punitive damages award for both Plaintiffs by $4 million. (Id.). In *Digital & Analog Design Corp. v. North Supply Co.*, the Ohio Supreme Court held:

> When a course of events is governed by a single animus, even though a defendant may be liable to compensate plaintiff for the damages occasioned by a number of torts committed in such course of events, a defendant may only be punished once by a single award of punitive damages. Recoveries for multiple claims for punitive damages contained within separately pleaded tort theories, may not be combined, or stacked, when such multiple tort claims arise from the same animus.

44 Ohio St.3d 36, 45, 540 N.E.2d 1358 (1989), at syllabus.

Here, Plaintiffs' IIED claims are not based solely on the conduct that formed the basis of their libel claims. Rather, more than a single animus was involved, which also caused Plaintiffs to separately suffer IIED. Defendants were driven by at least two anima: (1) Plaintiffs confronting of shoplifting Oberlin College students and (2) Plaintiffs' refusal to subvert the criminal justice system on Defendants' command, which was made after the publication of the defamatory statements. As discussed in substantial detail above [*see supra* Sec. III(D)(1)], David and Grandpa Gibson's IIED claims were based on Defendants' attempts to wield their financial power to force Plaintiffs to drop criminal charges, which Plaintiffs had no power to do, in addition to the hostile environment created by Defendants' defamation.

Additionally, Defendants' outrageous conduct included senior level administrators denigrating David 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...

(Plaintiffs' Tr. Exh. 134).

The foregoing evidence demonstrated acts of extreme and outrageous conduct beyond the publication of the defamatory statements at issue. After defaming Plaintiffs, Defendants used their sizable power to both (1) threaten Plaintiffs with having destroyed reputations forever if Plaintiffs did not placate to Defendants' outrageous demand to disrupt criminal proceedings and (2) cut off all financial opportunities for the Plaintiffs, because any reasonable person in Oberlin would know not to cross Oberlin College. As a result, there was evidence at trial which demonstrates a separate animus for the IIED.

Finally, the Ninth District Court of Appeals has declined to follow the *Digital & Analog Design Corp.* case where the evidence did not present a single course of conduct for the jury to award punitive damages. *See Patio Enclosures, Inc. v. Four Seasons Marketing Corp.*, 9th Dist. Summit No. 22458, 2005-Ohio-4933, ¶ 49. In *Patio Enclosures*, the defendant's tortious conduct all related to a single event, the ignoring of its new employee's non-compete and confidentiality agreements with his former employer. *Id.* The Ninth District, applying *Digital & Analog Design Corp.*, held that the evidence of defendant's conduct did not meet the single course of conduct such that only a single punitive damages award was permitted:

> Contrary to Four Seasons' arguments we find that the instant matter involves more than a single animus. The following testimony was presented to the jury: Four Seasons offered Cheney employment even though it knew he had signed a non-compete and confidentiality agreement with PEI, which under the time period of the agreement was still in effect; Four Seasons did not investigate the agreement; it took notes during its initial conversation with Cheney about specific PEI programs and business plans; it actively mislead PEI about its relationship with Cheney; when PEI informed Four Seasons that Cheney was still under an active non-compete and confidentiality agreement with PEI, Four Seasons continued to employ Cheney and again did nothing to investigate the agreement; and it greatly expanded its company owned store operations while Cheney was employed there. Based on the foregoing, we cannot find that the evidence in the instant matter presented only a single course of conduct for the jury to award punitive damages.

Id. Thus, the defendant's tortious conduct was all directly related to the violation of the employment agreements but was still considered to be motivated by multiple anima. Likewise, here, the evidence at trial established a separate animus such as to support a separate award of punitive damages on the claims for libel and IIED. Therefore, the Court should overrule Defendants' JNOV motion as it pertains to the $4 million awarded on the IIED claims.

IV. CONCLUSION

Therefore, for the foregoing reasons, Plaintiffs request that this Court deny Defendants' Motions for JNOV.

DATED: August 28, 2019

Respectfully submitted,

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