IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.

Plaintiffs-Appellees/Cross-Appellants,

-vs.-

OBERLIN COLLEGE, et al.

Defendants-Appellants/Cross-Appellees.

Case No. 19CA011563 & 20CA011632
(Consolidated)

Appeal from Lorain County
Court of Common Pleas,
Case No. 17CV193761

APPELLEES' BRIEF OF PLAINTIFFS/CROSS-APPELLANTS GIBSON BROS., INC., LORNA GIBSON, EXECUTOR OF THE ESTATE OF DAVID R. GIBSON, DECEASED, & ALLYN W. GIBSON

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I. STATEMENT OF FACTS

A. Oberlin's Statement of Facts Creates a False Narrative by Injecting Information and Themes Not Part of the Trial Record. The Actual Evidence is as Follows.

1. Oberlin admitted the students arrested for shoplifting got exactly what they deserved.

During opening statements, Oberlin[1] admitted the three students arrested for shoplifting at Gibson's Bakery on November 9, 2016 "were made to account for their crimes... had their day in court...actually pled guilty...and they got exactly what they deserve" [Tr. Vol. II, p. 130]:

> You will learn in this case the three students who were involved in shoplifting at Gibson's Bakery were made to account for their crimes. They had their day in Court. They actually pled guilty in Court, and the judge who was assigned to that case declared them to be guilty, he convicted them, and they sentenced them, and they got exactly what they deserved.

Immediately upon their arrests, Oberlin knew the three students committed crimes at Gibson's Bakery based on conversations with police officers [Tr. Vol. III, pp. 149-150], but ***did not ask the three students if they disputed the charges*** [Tr. Vol. XIV, p. 32].

2. O.C. administration did not believe the Gibsons had a history of racial profiling.

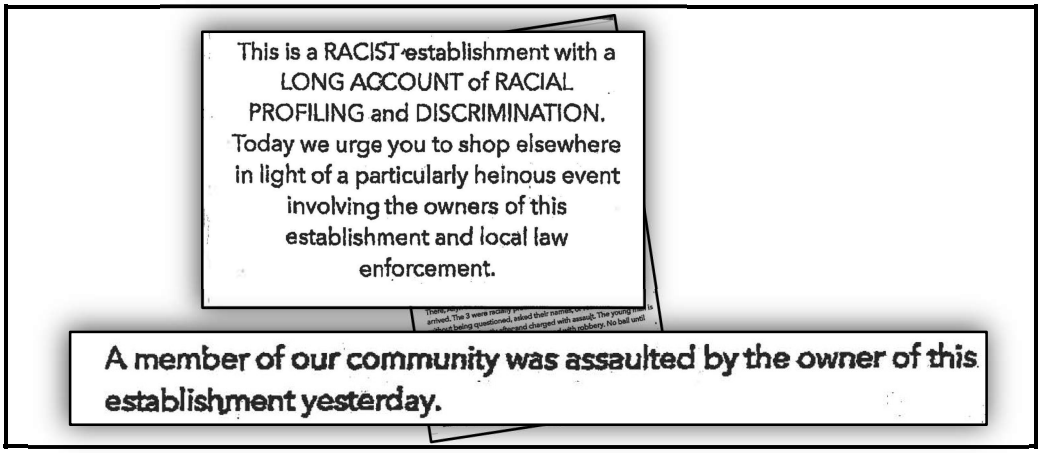
O.C.'s administration did not believe the Gibsons were racists or had a long history of

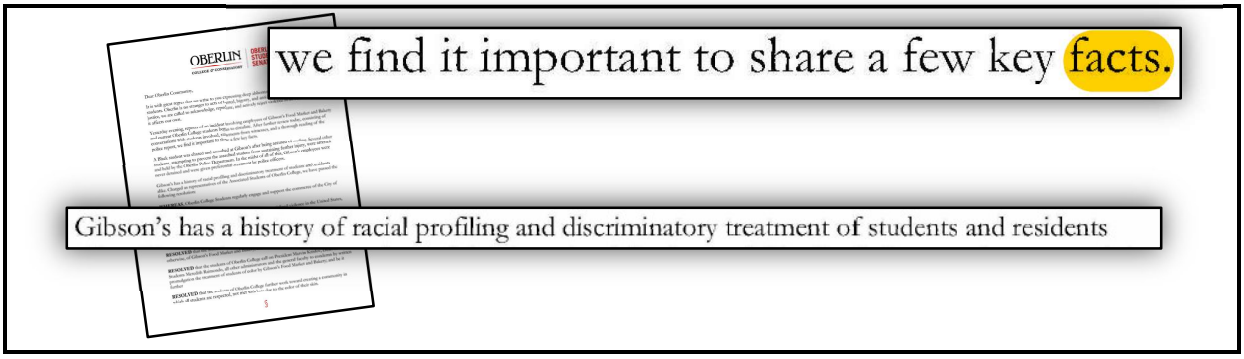
[1] "Oberlin" refers collectively to Defendants-Appellants Oberlin College ("O.C.") and Dean Raimondo ("Raimondo")

racial profiling – O.C. Chief of Staff Ferdinand Protzman [See, Tr. Vol. III, p. 23].[2]

3. Oberlin published a defamatory Flyer and Resolution.

Ignoring facts of the criminal incident, its 100+ year business relationship and internal knowledge of the Gibsons, Oberlin published defamatory Flyers and a defamatory Student Senate Resolution (the "Resolution") on its property, *see, infra* Sec. II(A)(c), that branded the Gibsons as racists with a long account of racial profiling and discrimination [Pl. Tr. Exs. 263 & 35]:





4. Oberlin wrongfully terminated Gibsons' business relationship.

Ignoring the facts of the crime and its 100+ year business relationship, O.C. leveraged its economic might to force a third-party food supplier, Bon Appetit ("B.A."), to stop buying food products from the Gibsons, which caused the Gibsons substantial economic harm [Pl. Tr. Ex. 55].

5. O.C. bullied the Gibsons by demanding special treatment for student shoplifters.

[2] Mr. Protzman was impeached with this quote from his deposition and confirmed the accuracy of the statement later in his testimony. [See, Tr. Vol. III, p. 23-24].

Disregarding the fact that unrestrained student shoplifting crimes would destroy a 134-year-old family business and cause the Gibsons emotional distress by leaving them and their business defenseless against theft crimes, O.C. bullied the Gibsons by demanding that they: (1) cause the pending criminal charges against the students to be dropped; (2) in the future, call O.C. rather than the police when student shoplifters were apprehended; and (3) in the future, provide a "first time pass" and not prosecute O.C. students caught shoplifting [Pl. Tr. Ex. 145; Tr. Vol. VII, p. 69; Tr. Vol. X, p. 172]:

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.

Q. When you were in front of the president, can you tell us your observations, whether he seemed intent on, or very interested in, getting some sort of special treatment for the students?

A. The direction was that what they wanted was essentially for me not to press charges on first-time shoplifters.

6. O.C. would not permit the resumption of business when the Gibsons would not agree to special treatment for student shoplifters.

O.C. threatened and refused to allow the business relationship with third-party Bon Appetit to be resumed unless the Gibsons agreed to give special treatment outside of the criminal justice system to O.C. students committing criminal acts against the Gibsons [Pl. Tr. Ex. 135]:

On Nov 23, 2016 3:06 PM, "Meredith Raimondo" <Meredith.Raimondo@oberlin.edu> wrote:
Hi all,

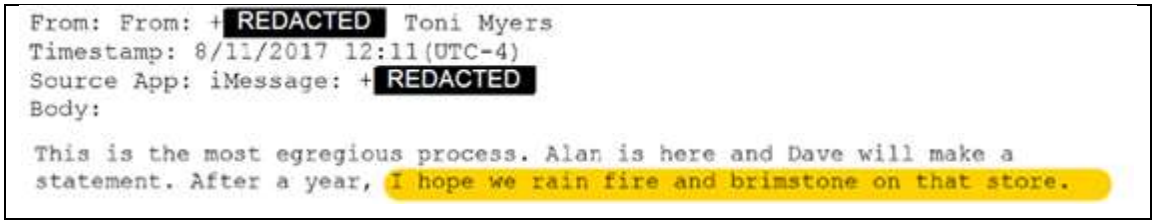
I'm sorry that I am just now able to get to this. I also have very serious reservations about this strategy and would suggest that we not proceed in this fashion. My support for this approach - which I know I voiced strongly - was based on the assumption that some different outcome to the legal process might be possible. Given what we now know, I am not sure why we have to commit to supporting Gibsons institutionally or fixing this situation for them. Had the Gibsons been willing to support a resolution outside of the legal system, I would have supported the College moving forward in this way as part of as a restorative strategy. Since it appears the

7. The three students admitted their crimes and admitted their arrests were not the result of racial profiling.

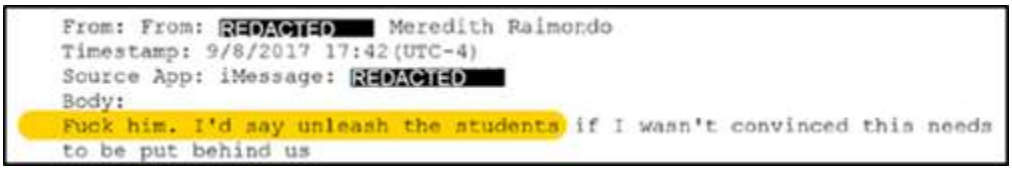
Oberlin knew the students admitted their crimes and their detention, arrest, and prosecution were not the result of racism or racial profiling. [Pl. Tr. Exs. 203-205; Tr. Vol. V, p. 32].

8. O.C. continued the defamation of the Gibsons even after the students took responsibility for their crimes.

Even after the three students admitted they were guilty of their crimes and that their arrests were not the result of racial profiling, O.C. continued the defamation by continuing the posting of the Resolution on O.C. property [Cf. Tr. Vol. IV, p. 55; Pl. Tr. Exs. 203, 204, & 205] then threatened to *rain fire and brimstone* and *unleash the students* on the Gibsons and their supporters:


From: From: +REDACTED Toni Myers
Timestamp: 8/11/2017 12:11(UTC-4)
Source App: iMessage: +REDACTED
Body:
This is the most egregious process. Alan is here and Dave will make a statement. After a year, I hope we rain fire and brimstone on that store.


From: From: REDACTED Ben Jones
Timestamp: 9/8/2017 17:34(UTC-4)
Source App: iMessage: REDACTED
Body:
FUCKING ROGER COPELAND


From: From: REDACTED Meredith Raimondo
Timestamp: 9/8/2017 17:42(UTC-4)
Source App: iMessage: REDACTED
Body:
Fuck him. I'd say unleash the students if I wasn't convinced this needs to be put behind us

II. LAW & ARGUMENT

A. Response to Assignment of Error No. 1: The Trial Court Correctly Denied Oberlin's Motions for Summary Judgment, JNOV, and New Trial.

1. Standard of Review.

The de novo standard applies to summary judgment and JNOV questions, but with new trial issues, de novo applies to questions of law and abuse of discretion applies to questions of fact. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198, 199 (9th Dist.1989) (summary judgment); *Tyrrell v. Conrad Botzum Farmstead*, 9th Dist. Summit No.

29063, 2019-Ohio-1874, ¶ 16 (JNOV); *State v. The Jacts Group, LLC*, 9th Dist. Medina No. 19CA0044-M, 2020-Ohio-1173, ¶ 29 (new trial). The First Amendment does not require a heightened standard of review because the Gibsons are private figures for purposes of defamation analysis. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 181, 512 N.E.2d 979 (1987).

2. Oberlin's conduct was extreme, outrageous, and intolerable in a civilized community.

To sustain a claim for intentional infliction of emotional distress ("IIED"), Oberlin's conduct must be "extreme and outrageous" and "utterly intolerable in a civilized community." *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374-75, 453 N.E.2d 666 (1983) *abrogated on other grounds by Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, ¶¶ 33-34. Oberlin's conduct met and exceeded this standard by demanding that Gibsons agree to become perpetual victims to theft by Oberlin's students through (1) dropping the criminal charges brought by the Lorain County Prosecutor against the three shoplifting students [Pl. Tr. Exs. 135; 145]; (2) giving a first time pass for all College student shoplifters [Tr. Vol. X, p. 172]; and (3) reporting student shoplifters to Oberlin, not the police [Tr. Vol. VII, pp. 68-69].

And when Gibsons failed to submit to Oberlin's demands, then (1) without justification, Oberlin *ordered Bon Appetit to terminate its business relationship with Gibsons* [Pl. Tr. Ex. 55], a particularly devastating outcome as these daily orders were one of Gibsons' largest sources of revenue;(2) Oberlin continued their vitriolic efforts against the Gibsons, by directing "*Fuck 'em*" expletives toward Gibsons and supporters, threatening to "*rain fire and brimstone*" and "*unleash the students*" on the Gibsons and all those who support the Gibsons [Pl. Tr. Exs. 134, 206, 211]; and (3) destroyed the Gibson' reputation through cruel libel. The jury appropriately determined that a civilized society should not tolerate this conduct designed to destroy private business.

Further, this conduct is not merely derivative of the libel claims. While there may be overlap, the totality of the tortious conduct supports all three claims (libel, tortious interference,

and IIED), each of which supports tort liability. *See also, infra* Sec. II(A)(3)-(4).

Finally, Oberlin's cited cases are distinguishable from the outrageous non-derivative conduct at hand. *Reamsnyder v. Jaskolsky*, 10 Ohio St.3d 150, 153, 462 N.E.2d 392 (1984) (insurance agent pressure to settle property damage claim not outrageous); *Snyder v. Phelps*, 562 U.S. 443 (2011) (entirely derivative of protected speech).

3. Raimondo tortiously interfered with the business relationship between B.A. and Gibson's Bakery – O.C. stipulated to joint and several liability. [Tr. Vol. XX, p. 41].

For several years prior to 2016, Gibsons provided daily food products to B.A., a company operating Oberlin's dining halls. [See, Tr. Vol. V, pp. 49, 77-80]. During trial, Oberlin's Chief of Staff Ferdinand Protzman confirmed that Gibsons provided good products at a reasonable price. [See, Tr. Vol. III, pp. 8-9]. Raimondo instructed B.A. to terminate its ongoing business relationship with Gibson's Bakery. [Pl. Tr. Ex. 55].

First, under Ohio law, B.A. is not O.C.'s agent for purposes of its purchases from Gibson's Bakery because their contract did not permit B.A. (alleged agent) to bind Oberlin (alleged principal) to purchases made by B.A. *Willoughby Hills Dev. & Distrib., Inc. v. Testa,* 155 Ohio St.3d 276, 2018-Ohio-4488, 120 N.E.3d 836, ¶¶ 27, 33-34 (adopting *Russell Harp* 9th Dist. case *even where an agent for other purposes*); *Russell Harp of Ohio, Inc. v. Lindley,* 9th Dist. No. 9895, 1981 WL 3979, *2 (May 13, 1981) (same, even where express agent to manage City's garage). Here, the Management Agreement [Tr. Vol. V, pp. 96-97] did not permit B.A. to bind Oberlin to purchases from Gibsons. Instead, "B.A. shall purchase food and supplies in B.A.'s name and shall pay the invoices." Oberlin simply pays B.A. a management fee for only approved purchases. [Pl. Tr. Ex. 367, §§ 1.2, 6.4]. B.A. even pays its own employees. [Id., § 4.7]

Second, there was undisputed substantial trial evidence that B.A. had no authority to bind O.C. Oberlin's then-Director of Dining Services testified that B.A. managed all aspects of the

Gibson's Bakery purchases, including daily orders and all financial transactions. [Tr. Vol. V, pp. 78, 80). David Gibson testified that (a) B.A. directly communicated its daily orders/changes; (b) Gibson's invoiced B.A.; and (c) B.A. paid Gibsons. [Tr. Vol. X, p. 165-166]. Raimondo agreed. [Tr. Vol. V, p. 53-54] [M. Raimondo 30(B)(5) Dep., p. 127]. Oberlin did not elicit any other facts that B.A. had authority to bind Oberlin to its purchases from Gibson's Bakery.

Third, principals become third party/strangers when they act outside the scope of the agency or for an improper purpose, so Oberlin is still liable. *See, e.g. Kuvedina, LLC v. Cognizant Tech. Solutions,* 946 F. Supp. 2d 749, 758 (S.D. 2013); *Parker v. BAC Home Loans Servicing LP,* 831 F. Supp. 2d 88, 92-3 (D.C. Dist. 2011). Here, Oberlin acted outside of any agency as the Management Agreement did not permit Oberlin to require B.A. to terminate business relationships, especially where Oberlin's Director of Dining [Tr. Vol. V, p. 164] and highest management agreed it was not justified [Tr. Vol. III, p. 13]. Oberlin elicited no contradictory evidence.

4. Oberlin were not entitled to judgment as a matter of law on the Gibsons' libel claims.

"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."

Rosenblatt v. Baer, 383 U.S. 75, 93, 86 S.Ct. 669 (1966) (Stewart, J., concurring).

a. Published lies about the Gibsons committing "heinous" "assault" was actionable defamation, not protected opinion.

Oberlin's statements that the owners of Gibson's Bakery, David and then-90-year-old Grandpa Gibson, committed the "heinous" crime of "assault" are verifiable, subjecting Oberlin to defamation liability. *Jorg v. Cincinnati Black United Front*, 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). The trial court correctly determined that the publications' description of a "particularly heinous" "assault" including "choking" by the owner constituted accusation of a

crime (Assault, R.C. 2903.13) which is libelous *per se*. Oberlin's reference to Merriam Webster's does not fare any better, because a "violent physical attack" is no less actionable. A reasonable reader would conclude the defamatory Flyer, read as a whole, reported a violent physical crime.

b. Oberlin's defamatory statements went well beyond branding Gibsons "RACIST" by asserting they had a "LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" and had violently assaulted a minority.

The defamatory Flyer not only stated that Gibsons were "RACIST," it also declared that Gibsons had "*a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION.*" [Pl.' Tr. Ex. 263]. Former Oberlin President Krislov agreed that being called a racist is one of the worst, most damaging things one may be called. [Tr. Vol. XIV, p. 179]. Further, the jury heard about Grandpa Gibson's agonizing fear that he would go to his grave being labeled a racist. [Tr. Vol. X, p. 169].

When private persons and small businesses face false and defamatory statements, the only recourse to repair reputations is the civil justice system. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11, 110 S. Ct. 2695 (1990) (citations omitted). Indeed, the Ohio constitution provides that citizens are responsible for their abuse 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.

i. While branding one a racist, in and of itself, can be defamatory, Oberlin's statements went far beyond calling the Gibsons racists.

Alone, a publication stating that someone is "racist," can constitute actionable defamation because one "cannot think of a scenario in which these words are not pejorative." *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶¶ 26, 30 (branding one a racist is unambiguous); *In Webber v. Ohio Dept. of Pub. Safety*, 10th Dist. No. 17AP-323, 2017-Ohio-9199, 103 N.E.3d 283, ¶ 36 ("being referred to as racist may, at times,

constitute defamation per se."); *Armstrong v. Shirvell*, 596 Fed.Appx. 433, 441 (6th Cir.2015), *citing Milkovich*, 497 U.S. 1 (upholding a defamation verdict because the term "racist" has a "clear, well understood" meaning, thereby making it "capable of being defamatory."). Oberlin went much further by stating that the Gibsons had a long account of racial profiling and discrimination.

ii. Ohio uses a totality-of-the-circumstances test to decide whether a statement is verifiable non-protected speech.

Under Ohio's totality-of-the-circumstances test, Oberlin's statements are actionable statements of verifiable fact, not mere opinion, and thus subject to liability for defamation. *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). The test looks at the (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared," with no one factor dispositive. *Id*. ("Each of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented.").

a. <u>First and Second Factors</u>: Oberlin's statements were not opinions because: (1) Oberlin claimed they based their statements on a "history" and "LONG ACCOUNT" of racial profiling and discrimination and that they were sharing "a few key facts" about the alleged profiling and discrimination; and (2) the truth or falsity of the statements are verifiable.

Oberlin's statements are influential, and statements published by a powerful institution of higher learning, with unlimited resources, undercuts arguments that the statements were mere opinions. *Mauk v. Brundage*, 68 Ohio St. 89, 100, 67 N.E. 152 (1903); *Mehta v. Ohio Univ*., 194 Ohio App.3d 844, 861 (10th Dist.2011) (it is reasonable for a reader to assume that a university's statements are "carefully and deliberately crafted" and that "what is being conveyed in the statements is factual").

Oberlin stated that a "LONG ACCOUNT" of racial profiling and discrimination supported

their statements. A "long account" suggests there is a documented record, and compilation, of a pattern of racial profiling and discrimination events, making the entire statement, and each subpart, verifiable and thus not opinions. *See Lennon*, 2006-Ohio-2587, ¶ 30. "Account" is defined in part in Webster's dictionary as: "a description of facts, conditions or events." https://www.merriam-webster.com/dictionary/account (Last visited August 3, 2020).

Likewise, the defamatory Resolution prefaces its remarks by announcing "we find it important to share a few key facts" before stating that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike." [Pl. Tr. Ex. 35; Ex. C to Raimondo Aff. to Defs. MSJ]. The statement suggests its conclusions stem from verifiable facts, eliminating the opinion argument. The implication of undisclosed facts supporting the statement render it an actionable statement of fact as opposed to protected opinion. *Scott*, 25 Ohio St.3d at 251-252. Moreover, as the trial court pointed out, "history" is "defined in part in Webster's as 'an established record.'" https://www.merriam-webster.com/dictionary/history (Last visited August 3, 2020). The statements suggest that they are based on a lengthy record of fact.

Furthermore, 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. [Pl. Tr. Ex. 269]. That study revealed that 80% of the adults arrested for shoplifting at Gibson's Bakery were Caucasian and only 15% were African American. [Id.].

Also, a history of racial discrimination is verifiable, and to hold otherwise would undermine all disability or employment discrimination laws. *See Williams v. Spitzer Auto World Amherst*, Inc., 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶¶ 14-15. Similarly, claiming someone profiles based on race is verifiable, as claims of racial profiling are brought over the use

of preemptory strikes of prospective jurors. *See Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 676 N.E.2d 872 (1997).

Finally, *Waiver.* Oberlin failed to raise an "innocent construction rule" theory below and have waived it on appeal. *UBS Fin. Services Inc. v. Lacava*, 9th Dist. Summit No. 28147, 2017-Ohio-7916, ¶ 23. The rule is inapplicable because Oberlin failed to show how false allegations of racist conduct or criminal activity are reasonably susceptible to an "innocent" meaning. *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 742-43, 756 N.E.2d 1263 (9th Dist.2001) (requires proof the statement has two meanings, an innocent and a defamatory one).

Under factors one and two, the statements in the Flyer and Resolution are actionable.

b. <u>Third and Fourth Factors</u>: The context surrounding Oberlin's statements weighs in favor of their being actionable statements of verifiable fact because (1) they were part of Oberlin's deliberate effort to damage the Gibsons and (2) there is no license to defame at a protest or boycott.

The jury held Oberlin responsible for defaming the Gibsons, interfering with Gibson's Bakery's business relationships, and intentionally causing emotional harm to David and Grandpa Gibson. Oberlin *was not found liable by the jury for student speech at a protest*.

Oberlin's statements were created for use in a deliberate and calculated campaign directed against specific private citizens. The statements targeted Gibsons' reputation within the Oberlin community, including among potential customers. They were used to convey a specific message (that Gibsons were racists and violently targeted racial minorities) in hopes of driving business away from Gibsons. Oberlin succeeded in doing so, as they have acknowledged achieving a complete smearing of Gibsons name and brand. [Tr. Vol. VI, pp. 128-129; J. Miyake Dep., pp. 342-343, Ex. 25].

Oberlin's theory is that it has a license to defame without regard to how damaging and vicious the lie is as long as the defamatory statements are made in connection with a protest.

However, there is no license to defame in any context. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46, 122 S.Ct. 1389m(2002) ("freedom of speech has its limits; it does not embrace certain categories of speech, including defamation…"); *In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1313 (8th Cir.1985), on reh'g, 797 F.2d 632 (8th Cir.1986) (defamatory speech does not become protected speech just because it was uttered during other protected conduct); *Mehta*, 194 Ohio App.3d at 864 (no defamation immunity even when producing documents in response to public records request).

c. Substantial evidence showed that Oberlin published the Flyer and Resolution.

Oberlin committed only a single paragraph to their publication argument. [Def. App. Br., p. 16]. Oberlin should not be permitted to rely on amicus briefs (which completely ignore the record and misstate applicable law) to make an argument that Oberlin did not "publish" the defamatory statements. (*See* Gibsons' June 29, 2020, Resps. in Opp. to Amici Mtn for Leave, which provide substantive responses to Amici's unsubstantiated and meritless arguments on publication). Oberlin's sparse publication argument should be rejected for several reasons:

First, to satisfy the "publication" element, Gibsons simply needed to show *any* intentional or *negligent act* communicating the defamatory matter to a third party. *Gilbert*, 142 Ohio App.3d at 743, *citing* 3 Restatement of the Law 2d, Torts (1965), Section 577(1).

Gibsons proved that Oberlin intentionally published the Flyer and directly aided others to extend this publication: (1) Raimondo, on behalf of the College, *handed out many copies of the defamatory Flyer* [Tr. Vol. V, pp. 178-79]; (2) Raimondo advised others to make more copies of the defamatory Flyer at the College Conservatory office [Id. at pp. 177-178]; (3) Raimondo published a copy of the Flyer to local newspaper reporter, Jason Hawk, who identified himself as a reporter with the *Oberlin News-Tribune*. [Tr. Vol. III, pp. 99, 104]; (4) Julio Reyes, the Assistant Director of the College's Multicultural Resource Center, who reported to Dean Raimondo, had a

stack of Flyers and distributed them to passersby [Tr. Vol. IV, pp. 15-18]; (5) Raimondo actively directed and orchestrated the publication of the Flyer and protests on a bullhorn [See, Tr. Vol. IV, p. 28; Tr. Vol. III, p. 111; Tr. Vol. V, pp. 178-179, 190; Tr. Vol. VI, pp. 6-7]; (6) Raimondo approved the use of O.C. funds to purchase gloves for the protesters so they would stay warm enough to keep distributing the defamatory Flyers. [Pl. Tr. Ex. 74].

As to the Resolution, Raimondo, the *faculty adviser* to the Student Senate, testified that the Resolution remained posted in Wilder Hall, where Raimondo's office is located, *for more than one year.* [Tr. Vol. IV, p. 55]. It was posted in a very conspicuous location in the highly trafficked Wilder Hall, which is *on O.C. property* and maximally visible to all visitors – "the right place" to achieve maximum exposure to the public. [M. Krislov Dep. Vol. I, pp. 210-211; Tr. Vol. XIV, pp. 198-201]. President Krislov also testified that the College could remove the Resolution [Tr. Vol. XIV, p. 180], yet kept it posted for more than one year, removing it only when the Gibsons filed this lawsuit. [Tr. Vol IV, p. 55]. The Resolution remained posted *even after the three students pled guilty of attempted theft and aggravated trespass for trying to steal from the Gibsons.* [Tr. Vol. IV, p. 55; Pl. Tr. Exs. 203, 204 & 205].

Second, because Oberlin actively defamed the Gibsons and because Oberlin's (Def. Ex. C) policies provide that Oberlin has an active role in the content of messages distributed using College-provided equipment, they are not passive participants. This distinguishes both 47 U.S.C. 230 (protecting only those who merely provide "computer access by multiple users to a computer server") and *Scott v. Hull*, 22 Ohio App.2d 141, 259 N.E.2d 160 (3rd Dist.1970) (there were no allegations that defendants took any active role with the defamation). Additionally, the *Hull* court (and precedent cited therein) acknowledged that if a defendant purchases material then used for defamation (such as materials for making signs) or aids others in the publication, then it is

responsible as a primary publisher. *Id*. at 143, *citing In Tidmore v. Mills*, 33 Ala.App. 243, 32 So.2d 769, cert. denied 249 Ala. 648, 32 So.2d 782 and 53 C.J.S. Libel and Slander § 148, p. 231. *See Hellar v. Bianco*, 111 Cal.App.2d 424, 426, 244 P.2d 757 (Cal.App.1952) ("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."). *See also Fogg v. Boston & L.R. Co.*, 148 Mass. 513, 516-17, 20 N.E. 109 (1889) (defendant deemed to have authorized or ratified defamatory materials prominently posted on defendant's bulletin board for 40 days).

Further, Oberlin's reference to the Restatement is puzzling because the Restatement either (1) 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 (Restatement (Second) of Torts 577 (1977), or (2) does not apply as Gibsons were unable to locate any Ohio case which has adopted or cited Restatement (Second) of Torts 581 (1977), which makes sense because it would conflict with Ohio law providing one can be considered a publisher through one's aiding and abetting another publisher. *See, infra* Sec. II(B)(2)(b).

d. The Gibsons are not public figures or limited purpose public figures.

Because the Gibsons are not general or limited purpose public figures, they are private figures and were only required to show negligence and proof of actual damages on their libel claims. *See Gilbert*, 142 Ohio App.3d at 736 [citations omitted].

First – the Gibsons are not general-purpose public figures. In *Gertz v. Robert Welch, Inc.*, the Supreme Court ruled that a person is not a public figure "[a]bsent *clear* evidence of general fame or notoriety in the community, and *pervasive involvement in the affairs of society*[.]" 418 U.S. 323, 352, 94 S. Ct. 2997 (1974) (emphasis added). For business plaintiffs, 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) (emphasis added). There is no evidence, let alone "clear evidence," showing that the Gibsons had pervasive involvement in the affairs of society, even if the Court narrows its focus to the Oberlin community. *Id*.

Second – the Gibsons are not limited purpose public figures. A person does not become a limited purpose public figure unless that person voluntarily injects or thrusts himself into a particular public controversy. *Gilbert*, 142 Ohio App.3d at 738. The Gibsons are not limited purpose public figures because:

(1) There is no public controversy. Oberlin's claim that there was a public controversy about "perceived racial bias at Gibson's Bakery" is based on inadmissible evidence: (a) thirty-year-old article submitted *after the conclusion of the trial* (the unauthenticated 1990 article from the O.C. student newspaper), (b) un-proffered double hearsay deposition testimony from Tita Reed [T. Reed Dep., pp. 15-20], and (c) un-proffered, unauthenticated hearsay statements in a Gibson's Bakery's employee's private social media account. And, this claim was directly disproven during summary judgment and trial. [Tr. Vol. III, pp. 23, 89, 93-94, 139-140, 143-144; Tr. Vol. IV, pp. 31, 33; Tr. Vol. V, pp. 171-73; Tr. Vol. VI, pp. 11-15, 18, 20-23; Tr. Vol. VII, p. 60].

Further, the idea that the Gibsons were at the center of a decades-long controversy is incredulous considering that the College did business with Gibsons for that entire period of time. [Tr. Vol. VII, p. 17].

(2) The Gibsons did not thrust themselves into a public controversy. The Gibsons have a statutory right to detain shoplifters. *See* R.C. 2935.041(A). Yet, the Gibsons never "publicly defend" this right. The only "evidence" Oberlin cites are unauthenticated social media posts from a non-party employee's *private* social media page. But even if these private posts were admissible

(they are not), Oberlin did *not provide any support* for the proposition that a nonparty can thrust two other individuals and a business into a public controversy, particularly where Oberlin did not identify any member of the public who ever saw the private posts.

(3) There is no nexus between the defamation and the Gibsons' actions. Because there was no public controversy before Oberlin's defamation and the Gibsons did not "thrust" themselves into the public eye, there is no nexus between their actions and the defamation.

(4) Gibson's Bakery and the individual plaintiffs must be analyzed separately. Lastly, Oberlin cannot transform David Gibson and Grandpa Gibson into limited purpose public figures by claiming Gibson's Bakery is a limited purpose public figure. First, Gibson's Bakery is not a limited purpose public figure. But if even if it were, that determination is not dispositive on the individual owners, as recognized by Oberlin's cited cases. In *Total Exposure.com, Ltd. v. Miami Valley Broad. Corp.*, the court held two business owners to be limited purpose public figures based on the *individual owners' actions, including their personal statements and appearances in the media*. 2nd Dist. Montgomery 21062, 2006-Ohio-484, ¶¶ 75-80. In *Kassouf v. City Magazines, Inc.*, an individual business owner was found to be a limited purpose public figure because more than 100 newspaper articles were written *about the individual owner* over a period of several years. 142 Ohio App.3d 413, 422, 755 N.E.2d 976 (11th Dist. 2001). Nothing in the record suggests that David Gibson and Grandpa Gibson took any actions at all to thrust themselves into the public eye.

e. The Gibsons presented substantial evidence showing that Oberlin acted with the requisite degree of fault.

Oberlin does not claim that there was insufficient evidence to prove negligence during the compensatory phase of trial. Thus, Oberlin concedes the Gibsons presented sufficient evidence to prove negligence. And Oberlin's arguments on actual malice are meritless.

i. Because Oberlin demanded and received a bifurcated trial, the Gibsons were permitted to offer additional evidence and arguments on actual malice

during the punitive phase of trial.

In a defamation action involving private persons about a matter of public concern, the plaintiff *does not need* to show evidence of libel actual malice to recover actual compensatory damages. *Gilbert*, 142 Ohio App.3d at 744. Libel actual malice need only be shown to recover *presumed* compensatory damages. *Id.* Libel actual malice must be shown in the punitive phase to recover punitive damages. *Id.* Oberlin wrongly argues that the jury's decision on libel actual malice in the compensatory phase is binding in the punitive phase.

First, the jury's decision in the compensatory phase has no preclusive effect on the punitive phase. Issue preclusion does not apply unless 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]. The decision on libel actual malice during the compensatory phase ***was not essential to the judgment because the Gibsons presented evidence of actual damages (so they did not need to prove presumed damages) and thus were only required to prove Oberlin acted with negligence and because the Gibsons were precluded in this phase from presenting their evidence of punitive damages***. *See, Gilbert*, 142 Ohio App.3d at 744. [*See, infra* Sec. II(C)(2)]. *See also, Root v. Stahl Scott Fetzer Co.*, 8th Dist. No. 104172, 2017-Ohio-8398, 88 N.E.3d 980, ¶¶ 72-73 (overturning a directed verdict on punitive damages during the compensatory phase because the plaintiff did not need to present evidence or arguments of actual malice until the punitive phase).

Second, Oberlin invited this procedure by filing their motion to bifurcate the compensatory and punitive phases of trial under R.C. 2315.21(B)(1). Once bifurcated, ***the Gibsons were statutorily precluded from presenting any evidence on punitive damages in the compensatory phase of trial***. *See* R.C. 2315.21(B)(1)(a).

Once the jury awarded actual damages, the issue of libel actual malice was required to be

submitted to the jury in the punitive phase where the Gibsons submitted substantial additional evidence on libel actual malice, including the following: witness testimony; exhibits of Oberlin ignoring messages from community members, employees, and alumni that Gibsons had no history of racial profiling or discrimination [See, Pl. Tr. Exs. 111, 161, 458-1, 485]; and Oberlin's financial power. [See, Tr. Vol. XXIII, pp. 52-75]. [See also, bifurcation order excluding evidence of Oberlin's financial position in compensatory phase, 4/22/19 J. Entry].

The jury found that Oberlin acted with libel actual malice and awarded the Gibsons punitive damages. Oberlin's Motion to Bifurcate invited, and indeed required, submission of evidence and arguments on actual malice during the punitive phase of trial.

Third, Oberlin erroneously claims 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. To the contrary, it merely states "[t]he right of trial by jury shall be inviolate." Oberlin did not cite (and the Gibsons are unaware 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.

Lastly, the cases cited by Oberlin are not on point. *Bradley v. Mansfield Rapid Transit, Inc.*, 154 Ohio St. 154 (1950) and *Elio v. Akron Transp. Co.*, 147 Ohio St. 363, 370 (1947) are distinguishable on their facts, were decided **decades** before the enactment of R.C. 2315.21, and ***did not deal with the bifurcation of punitive damages.***

ii. The Gibsons submitted substantial evidence showing that Oberlin acted with libel actual malice during the punitive phase of trial.

Even if this Court conducts an "independent review of the record," there was ***substantial*** evidence showing that Oberlin published the Flyer and Resolution "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *New York Times Co.*

v. Sullivan, 376 U.S. 254, 279-80, 84 SCt. 710.[3] The Gibsons identified this evidence in substantial detail in their Cross-Appeal brief and will not repeat all the evidence here. [See, Gibsons Cross-Appeal Br. Sec. III(B)(3)-(5), III(C)(4)]. However, the gist of Oberlin's argument is that the evidence showing malice was not made available until after the publication. This is incorrect:

First, the evidence of actual malice submitted by the Gibsons did not occur after publication because the Resolution remained posted for more than a year. [Tr. Vol. IV, p. 55]. And even if some evidence was post publication, it reflected Oberlin's continuing malice, animosity, and blatant disregard for the truth and the Gibsons' rights.

Second, even if malice should be decided as of November 10 and 11, 2016 (and it should not), there was substantial evidence showing that Oberlin knew the statements in the Flyer and Resolution were false, including: (1) admissions by Chief of Staff Protzman ***that none of the administrators believed the Gibsons had a history of racism or racial profiling*** [See, Tr. Vol. III, p. 23];[4] (2) the fact that O.C. had conducted business with the Gibsons since before World War I, without a single complaint of racial profiling or discrimination prior to November 9, 2016 [Tr. Vol. VII, p. 17; M. Krislov Dep. Vol. I, p. 106];[5] (3) testimony by Oberlin City Police Sergeant Victor Ortiz that he explained the criminal charges to Raimondo on November 9, 2016, meaning Raimondo ***knew Grandpa and David Gibson did not commit an assault*** [Tr. Vol. III, pp. 149-

[3] In their brief, Oberlin claim that both the Flyer and Resolution were drafted by "students." But that fact ***is not in evidence***. Oberlin did not present any testimony or documents on the authorship of the Flyer. Further, while students circulated Resolution through email, the jury could have inferred that Raimondo, as the Student Senate adviser, took part in its drafting.

[4] Mr. Protzman was impeached with this quote from his deposition and confirmed the accuracy of the statement later in his testimony. [See, Tr. Vol. III, p. 23-24].

[5] This section of President Krislov's deposition testimony was played for the jury during trial. [Tr. Vol. III, p. 176]. The excerpts played for the jury can be found at Pl. Tr. Ex. 460. [See, Tr. Vol. XII, pp. 13-14]. President Krislov's deposition was filed with the trial court on March 15, 2019 and is part of the record on appeal.

150]; and (4) several internal communications between O.C. administrators on November 10 and 11, 2016 wherein the administrators are notified that the Gibsons do not have a history of racial profiling or discrimination [see, Pl. Tr. Exs. 458-1; 63]. This information was ***blatantly ignored*** by Oberlin. [See, e.g., Pl. Tr. Ex. 63 (Special Assistant Reed responding that evidence of a lack of a history of racism or racial profiling did not "change a damned thing")].

f. The jury properly determined that Oberlin's defamation proximately caused the Gibsons' defamation damages.

Oberlin's argument that their libelous conduct did not cause the Gibsons' damages [Def. App. Br., pp. 20-21] fails for several reasons:

First, ***Waiver***. Oberlin never raised the argument below concerning isolating damages caused by unprotected vs protected conduct and have thus waived it on appeal. *UBS*, 2017-Ohio-7916, ¶ 23.

Second, Oberlin's argument based on *NAACP v. Claiborne,* 458 U.S. 886, 102 S.Ct.3409 (1982) is misplaced because (1) it did not involve defamation; (2) the Court held that the protected portions of the boycott did not provide shields for other unprotected portions (such as defamation), *Id*. at 912, and (3) it dealt with holding an advocacy group liable based solely on the actions of third-parties, as opposed to the Gibsons proving that Oberlin committed overt acts of defamation.

Third, the jury was instructed to, and did, focus solely on the damages proximately caused by Oberlin's publication of the Flyer and Resolution. The trial court, within the jury instructions, repeatedly referred only to the Flyer and the Resolution. [*See* Tr. Vol. XX, p. 5960, 63-64]. And, at the very beginning of trial, the court instructed the jury that it could not consider verbal statements at the protests. [Tr. Vol. II, p. 78]. Accordingly, the jury's decision was based solely on Oberlin's defamatory and tortious conduct.

Finally, as discussed below, Gibsons proved their economic damages flowed directly from

Oberlin's tortious conduct, including through expert testimony. *See, infra* Sec. II(C)(2).

B. <u>Response to Assignment of Error No. 2:</u> There were no errors or irregularities with the jury instructions or evidentiary rulings during trial.

1. Standard of review.

Jury Instructions. "[A] reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.'" *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 35 [quotation omitted]. And even if an instruction is erroneous, it does not necessarily mislead a jury. *Id.* ¶ 36.

Evidentiary Decisions. Oberlin claims that the trial court incorrectly excluded evidence during trial. Evidentiary decisions made during trial are reviewed for **<u>abuse of discretion</u>**. *Rigby v. Lake County*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

2. The libel instructions were correct and accurate statements of Ohio law.

a. The court's instruction on "publication" was proper and Oberlin's proposed "deliverer" instruction does not accurately describe Ohio law.

The trial court correctly rejected Oberlin's proposed instruction on "mere distributor liability" because it misstates Ohio law and would not apply to this case because Oberlin were not merely passive conduits for the defamatory statements but were active defamers. (*See, supra* Sec. II(A)(4)(c)). Oberlin's "reason to know" instruction conflicts with the fault standard to be applied to a defamation claim brought by a private person about a public concern. (*See, supra* Sec. II(A)(4)(d)).

b. The Court's aiding and abetting instruction is a correct statement of Ohio law.

First, even if the aiding and abetting instruction were incorrect (it was not), any error was harmless because the Gibsons submitted substantial evidence proving Oberlin did more than "aid and abet"; they *directly distributed* copies of the Flyer. [Tr. Vol. III, p. 104; Tr. Vol. IV, pp. 15-16; Tr. Vol. V, pp. 177-79].

Second, Oberlin's challenge to the definition of aiding and abetting is meritless because (1) Oberlin agreed that the instructions should have had a definition of aiding and abetting, *see Coyne v. Stapleton*, 12th Dist. Clermont No. CA2006-10-080, 2007-Ohio-6170, ¶ 27; [*See also* Tr. Vol. XX, p. 16], and (2) Oberlin waived this argument by not showing how *Black's Law Dictionary*'s definition was incorrect (*See*, id., p. 42).

Third, Oberlin contends that because Ohio does not recognize *an independent cause of action* for aiding and abetting liability, *DeVries Dairy, LLC v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 974 N.E.2d 1194, there is no aiding and abetting in the publication of defamation. However, ***Ohio recognizes that aiding and abetting defamation establishes the publication element***. *Gosden v. Louis*, 142 Ohio App.3d 195, 687 N.E.2d 481 (9th Dist. 1996) ("Any act by which the defamatory matter is communicated to a third party constitutes publication.") (citations omitted); *Cooke v. United Dairy Farmers, Inc.*, 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25 ("all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication", including "one who requests, procures, or aids and abets another to publish defamatory matter[.]"); *Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶ 104 (same). Oberlin even submitted their own aiding and abetting instruction (Def. Pr. Jury Instructions June 4, 2019, p. 11).

c. Oberlin waived their objection by failing to properly object to the negligence instruction, but in any event, the instruction was proper when taken as a whole.

Oberlin's complaints about the negligence instruction can be rejected for several reasons:

First, Oberlin's argument about the negligence definition for libel is compromised because they ***proposed the exact same instruction in their proposed jury instructions***. (Def. Am. Pr. Jury Instructions, June 4, 2019).

Second, Oberlin proposed this language because, taken as a whole, the jury instruction was

proper, requiring plaintiff to prove fault in a defamation case by clear and convincing evidence, which is what the trial court instructed. *Gosden*, 116 Ohio App.3d at 213. Oberlin argued that the court had to use the exact words identified by *Lansdowne*, but ignore that the jury instructions, as a whole, encompass the ordinary negligence standard. *See* OJI-CV 401.01(1). The court instructed the jury that it "must also find by clear and convincing evidence that, in publishing the statement, the defendant acted with negligence," meaning that there must be a (1) false statement and (2) Oberlin *lacked reasonable care in publishing the false statement*. [Tr. Vol. XX, p. 60]. The jury instructions included Oberlin's requested language on the elements of libel and negligence.

Finally, Oberlin also fails to show prejudice, which requires them to prove the court's alleged failure to give their proposed instruction probably changed the outcome. *Cromer*, 142 Ohio St.3d 257, ¶ 35. For all these reasons, Oberlin has not met and cannot meet this high standard.

3. The trial court did not abuse its discretion when it prevented Oberlin from presenting backdoor hearsay evidence that supported their groundless truth defense.

A review of the evidence excluded shows that the trial court did not **abuse its discretion** when making evidentiary decisions during trial.

First, Waiver. Oberlin complains that the Gibsons were permitted to introduce evidence regarding their lack of a history of racial profiling and discrimination while Oberlin was prevented from presenting contrary evidence. [Def. App. Br., pp. 9-10]. This is false. During trial, numerous persons of color testified based on their **personal knowledge** that the Gibsons do not have a history of racial profiling or discrimination. [Tr. Vol. III, pp. 89, 93-94, 139-140, 143-144; Tr. Vol. IV, pp. 31, 33; Tr. Vol. V, pp. 171-73; Tr. Vol. VI, pp. 11-15, 18, 20-23; Tr. Vol. VII, p. 60].

On the other hand, Oberlin ***did not call a single witness disclosed during discovery to testify on personal knowledge that the Gibsons have a history of racial profiling or discrimination***. Importantly, counsel for Oberlin **admitted** they had witnesses that could come in

and testify, but they made the strategic decision not to call those witnesses:

THE COURT: Just so the record is clear, when you say "witnesses," the defense was not planning on calling any of the witnesses that had personal knowledge that either the Gibsons were racist or weren't racist. You were going to introduce this evidence through other witnesses, specifically staff from Oberlin College, correct?

MS. CROCKER: Correct, Your Honor.

***

THE COURT: You identified those people. You have some of the names of those people --

MR. HOLMAN: Yes.

THE COURT: -- who thought that the Gibsons were racist. Right?

MR. HOLMAN: That is --

THE COURT: You are not calling those people as witnesses in this trial?

MR. HOLMAN: That is correct.

[Trial Trans. Vol. XIII, pp. 10-11]. While the Gibsons have serious doubts about the existence and veracity of these witnesses, Oberlin made the **strategic decision** not to call them at trial. Faced with this, the trial court properly excluded the hearsay evidence.

Second, Hearsay Exception. Further, in libel cases, truth is always a complete defense. *See, Fuchs v. Scripps Howard Broadcasting Co.*, 170 Ohio App.3d 679, 868 N.E.2d 1024, ¶ 48 (1st Dist.2006). In their Amended Answer, Oberlin explicitly identified truth as an affirmative defense. [Def. Am. Answer, p. 25]. Instead of calling witnesses that would have been subject to cross-examination, Oberlin attempted to backdoor this evidence through their administrators, including President Krislov and Associate Dean Chris Jenkins, by having them testify on what **unnamed third parties allegedly told them**. While Oberlin claims it wanted to present this

evidence for "effect on the listener," the trial court quickly realized that Oberlin was attempting to present hearsay evidence on their truth defense. [Tr. Vol. XIII, p. 8].

Even the example provided by Oberlin highlights the falsity of their narrative. Oberlin complains that the Gibsons were permitted to introduce email communications from Special Assistant Reed while she was not permitted provide hearsay testimony on stories that were allegedly relayed to her during trial. [Def. App. Br., p. 10]. However, Oberlin ***did not call Reed as a witness at trial***. The Gibsons called her as a witness on cross-examination during their case in chief. [Tr. Vol. III, p. 70]. As is customary practice in Ohio, Oberlin did not conduct a direct examination of Reed after her cross-examination during the Gibsons' case-in-chief. *See, Evets Electric, Inc. v. Ohio Edison Co.* 11th Dist. No. 89-T-4289, 1991 WL 274243, *6 (Dec. 20, 1991). Instead, Oberlin were required to call Reed on direct examination during their case-in-chief, but again, ***they made the strategic decision not to call her as a witness***.

Third, Hearsay Exclusion. President Krislov testified about his observations of one of the students arrested for shoplifting at Gibson's Bakery, then attempted to testify on ***what the shoplifter told him about his arrest***. [Tr. Vol. XIV, p. 103]. After Gibsons objected, the trial court only precluded Krislov from testifying on ***what he heard from the shoplifter.*** [*Id.*, pp. 104-105]. Evid.R. 801(C). Further, Oberlin ***agreed to the limitation of the testimony during the sidebar with the trial court and waived any arguments on this issue.*** [*Id.*].[6]

Fourth, Waiver. Oberlin complains the trial court did not exclude evidence of the harm done to the Gibsons even though the court ruled that the spoken statements at the protests were

[6] Oberlin also claim that the trial court permitted the Gibsons to introduce evidence on the November 9, 2016 shoplifting incident. [See, Def. App. Br., p. 25]. But they cite portions of the trial record when the parties discussed the introduction of an exhibit discussing issues that predated the November 9, 2016 shoplifting incident and had nothing to do with Gibson's Bakery. The argument is therefore irrelevant.

protected opinions. [Def. App. Br., p. 10]. Oberlin then provides a string cite of allegedly improper testimony that was elicited at trial. [Id.]. However, for each instance cited, Oberlin's counsel ***failed to object to the testimony***. [See, Tr. Vol. VI, pp. 104-106, 136, 149-153; Tr. Vol. VII, pp. 28, 112-113; Tr. Vol. IX, pp. 37-38, 49]. By failing to object, Oberlin **waived this argument on appeal**. *Bolen v. Mohan*, 2017-Ohio-7911, 98 N.E.3d 956, ¶ 12 (9th Dist.).[7]

Fifth, Harmless Error. Oberlin complains that the trial court did not allow the parties to introduce testimony on the shoplifting incident. This was not an issue at trial and there was no reason to relitigate it because Oberlin's lead trial counsel said in opening statements that the students "***were made to account for their crimes*** *...* ***and they got exactly what they deserved***." [Tr. Vol. II, p. 130]. Importantly, Oberlin ***did not call the students as witnesses at trial***. Further, the trial court precluded some of the testimony and evidence because it had the discretion to prevent a "trial within a trial" where the parties were arguing the legitimacy of the criminal convictions, which was already established in the criminal cases, instead of the facts of this case. *See State v. Warren*, 11th Dist. Trumbull 2010-T-0027, 2011-Ohio-4886, ¶ 43 (Ohio courts look very unfavorably on the introduction of evidence that will create a "trial within a trial" because "certain proffered evidence might unnecessarily waste time and/or potentially confuse the jury.").

C. Response to Assignment of Error No. 3: to the Extent they Apply to the Facts of this Case, the Trial Court Correctly Applied the Punitive and Noneconomic Damages Caps. Further, the Enhancement on the Gibsons' Attorneys' Fees Award was Proper.

1. Standard of review – abuse of discretion (remittitur and attorney fee enhancement) and de novo (statutory construction of punitive and compensatory damages caps).

2. Credible proof supporting the verdicts – including from two experts – abounds. The jury's award cannot be remitted on appeal.

Oberlin's request for remittitur would require this Court to ignore the credible proof

[7] Oberlin then complain that the trial court failed to give an instruction that the words spoken at the protest were protected opinion. This is another false narrative as the trial court gave this exact instruction at the very beginning of trial. [Tr. Vol. II, p. 78].

presented to the jury. Remittitur is improper when the verdict is "supported by credible proof." *Petta v. Clarke*, 9th Dist. Lorain No. 96CA006327, 1997 WL 33295, *6 (Jan. 15, 1997) (the court cannot "substitute its judgment for that of the trier of fact").

The Gibsons supported their damages with expert testimony, financial records, and their own testimony. [Tr. Vol. IX, pp.13-14, 48-52, 54-60]. Frank Monaco (a well-recognized expert in the accounting field with over 35 years' experience as a CPA) explained each area of economic harm, including lost profits from Gibson's Bakery and losses on apartment buildings. Monaco explained why his conclusion of economic damages in excess of $5,000,000 was conservative. [Id., pp. 26, 30, 33, 35-36, 43-44, 48, 63, 70-71, 75]. Likewise, Dr. Deborah Owens (longtime professor and interim Chair of the Marketing Department at the University of Akron) testified about the severely damaging long-term impact of defamatory statements. [Tr. Vol. VII, pp. 138, 145-151]. When a jury verdict is based on credible expert testimony, the jury is free to believe the evidence and award damages consistent with the evidence. *See, e.g. Fraysure v. A-Best Products Co.*, 8th Dist. Cuyahoga No. 83017, 2003-Ohio-6882, ¶ 27.

The Gibsons submitted evidence proving their damages flowed from Oberlin's tortious conduct. For example, Monaco showed how dramatically revenues fell following publication of the Flyer and Resolution. [Tr. Vol. IX pp. 48-52]. Monaco used well-established lost profit methodologies that Oberlin's own expert acknowledged. [Id. at p. 50; Tr. Vol. X, p. 122].

Oberlin does not contend that the verdict resulted from passion or prejudice, and any remittitur would erroneously require a substitution of the court's judgment for that of the jury. Remittitur is improper when the amount of the alleged excess damages is speculative and can be reached only by substituting the judgment of the court for that of the jury. *Uhlmansiek v. Salvation Army*, 159 Ohio App.3d 623, 824 N.E.2d 1053, ¶ 16 (1st Dist.2005).

Lastly, the verdict has already been remitted by 43% through damages caps.

3. Noneconomic damages are capped per claim, not per claimant.

Next, Oberlin claims that the trial incorrectly applied the cap on noneconomic damages found in R.C. 2315.18. They are wrong. Under R.C. 2315.18(B)(2), each plaintiff has a right to receive up to $250,000.00 or three times the economic damages up to $350,000.00 (whichever is greater) for ***each tort action.*** *See* R.C. 2315.18(B)(2). "Tort action" is defined as "a civil action for damages for injury or loss to person or property." R.C. 2315.18(A)(7).

Considering Ohio's liberal policy on joinder of claims in civil actions, which allows a plaintiff to bring "***as many claims... as he has against an opposing party***", Civ.R. 18(A), a plaintiff may join numerous different claims covering various issues into a single case. *See, id.* Because each case could include various issues, a "tort action" under R.C. 2315.18(A)(7) cannot mean an entire case. Instead, "tort action" or "civil action" means ***each individual claim for relief.*** *See Black's Law Dictionary* (11th Ed. 2019) (defining "civil action" as "an action brought to enforce, redress, or protect a private or civil right.").

4. To the extent R.C. 2315.21 is applicable to the facts of this case, punitive damages are capped at two-times the amount of compensatory damages awarded by the jury.[8]

Oberlin next argues that the trial court should have capped punitive damages at two times the capped compensatory damages. But again, Oberlin is wrong.

First, the statutory language is clear. Under R.C. 2315.21(B)(2), "the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff[.]" This statutory provision does not discuss, describe, or incorporate the noneconomic

[8] In their Cross-Appeal brief, the Gibsons challenged the constitutionality of the punitive damages caps on an as applied basis. For purposes of this brief, the Gibsons assume that R.C. 2315.21 applies to this case without waiver of the arguments raised in their Cross-Appeal.

damages caps found in R.C. 2315.18. Then, when the court applies the punitive damages cap, the statute expressly instructs the court to apply the cap according to the compensatory damages ***awarded by the jury*** under R.C. 2315.21(B)(2). *See* R.C. 2315.21(D)(2)(a) [emphasis added] ("The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages ***awarded to the plaintiff****... **as determined pursuant to division (B)(2)**... **of this section***.").

Second, Oberlin's reliance on the word "recoverable" in R.C. 2315.21(B)(2) is entirely misplaced. Considering this exact issue, the Tenth District determined that "recoverable" does not mean capped noneconomic damages:

> Both R.C. 2315.21(B)(2) and (3) direct the trier of fact to make factual findings that specify the total compensatory damages to be awarded to the plaintiff from each defendant ... [and] make no reference to statutory caps on damage awards, and R.C. 2315.18(F)(2) expressly precludes the trial court from informing the jury of the existence of statutory caps. The court applies statutory caps on compensatory damages only after the jury has rendered its verdict and made an award of compensatory damages in the case. See R.C. 2315.18(E)(1). ***Accordingly, we conclude the total compensatory damages referenced in R.C. 2315.21(B)(2) are the uncapped compensatory damages the jury awarded***.

Faieta v. World Harvest Church, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959, ¶ 90 [emphasis added].

Thus, to the extent it applies, the trial court correctly capped punitive damages at two-times the amount of compensatory damages awarded by the jury.

5. The enhancement on the award of attorneys' fees was proper.

Lastly, the 50% enhancement of the attorneys' fees award was proper. Under *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 2020-Ohio-1056, --- N.E.3d ---, ¶ 20, the "trial court has discretion to modify the presumptive calculation of attorney fees – the reasonable hourly rate multiplied by the number of hours worked – but any modification must be accompanied by a rationale justifying the modification." When the trial court issued its decision on attorneys'

fees, the *Phoenix* case was before the Ohio Supreme Court. In its decision and in contemplation of the issues before the Ohio Supreme Court in *Phoenix*, the trial court ***specifically found that factors not subsumed in the lodestar calculation necessitated a 50% enhancement of the lodestar calculation.*** (See, 7/17/19 J. Entry, pp. 5-6). Thus, the trial court's decision is directly in line with the holding in *Phoenix* and not an abuse of discretion.

III. CONCLUSION

Therefore, the Court should affirm the verdicts and judgments below.

Respectfully submitted,
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PROOF OF SERVICE

A copy of the foregoing was served on August 5, 2020 by electronic means on the following: Benjamin C. Sasse, Irene Keyse-Walker, Tucker Ellis LLP, benjamin.sasse@tuckerellis.com, ikeyse-walker@tuckerellis.com, Seth Berlin, Lee Levine, Joseph Slaughter, Ballard Spahr LLP, berlins@ballardspahr.com, levinel@ballardspahr.com, slaughterj@ballardspahr.com; Ronald D. Holman, II , Julie A. Crocker, Taft Stettinius & Hollister LLP, rholman@taftlaw.com, jcrocker@taftlaw.com; Richard D. Panza, Matthew W. Nakon, Rachelle Kuznicki Zidar, Wickens, Herzer, Panza, Cook & Batista Co., RPanza@WickensLaw.com, MNakon@WickensLaw.com, RZidar@WickensLaw.com.

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APPENDIX

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 4/22/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JEANANNE M AYOUB
Plaintiff's Attorney (330)455-6112

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS OBERLIN COLLEGE AND MEREDITH RAIMONDO'S MOTIONS FOR SUMMARY JUDGMENT

This matter came to be heard upon Defendants Oberlin College and Meredith Raimondo's Motions for Summary Judgment; Plaintiffs Gibson Brothers Inc., David R. Gibson, and Allyn W. Gibson's Combined Response in Opposition; and Defendants' Combined Reply Brief. After considering the above filings, their attached or referenced exhibits, and for the reasons that follow, Defendants' Motions for Summary Judgment are granted in part and denied in part.

I. Factual Background

Though the Court is not required to make specific findings of fact in ruling on Defendants' Motions for Summary Judgment, the Court believes that the factual landscape is an important foundation to the analysis herein. *See* Ohio Civ. R. 52.

On the afternoon of November 9, 2016, an incident took place involving three African-American Oberlin College Students – Jonathan Aladin, Cecelia Whettstone, and Endia Lawrence, and Allyn D. Gibson – an employee of Plaintiff Gibson Bros. Inc., the entity that operates Gibson's Food Market and Bakery ("Gibson's"). Allyn D. Gibson suspected that Mr. Aladin was attempting to steal wine from Gibson's while purchasing other wine with fake identification. After confronting Mr. Aladin in the store, Mr. Gibson pursued Mr. Aladin out of the store into nearby Tappan Square, and at some point, engaged in a physical altercation with Mr. Aladin. The details of the physical altercation are in dispute, but as a result of the physical altercation, Mr. Gibson detained Mr. Aladin until Oberlin Police officers arrived on scene.

The three students were the only individuals arrested. On August 11, 2017, Mr. Aladin pled to attempted theft, aggravated trespass, and underage consumption in Lorain County Common Pleas Case No. 17CR096081. On the same date, Ms. Lawrence and Ms. Whettstone both pled to attempted theft and aggravated trespass in Lorain County Court of Common Pleas Case Nos. 17CR096083 and 17CR096082 respectively.

On the evening of November 9, 2016, efforts were made to organize a protest outside Gibson's Food Market and Bakery the following day. Members of Oberlin College Staff and Administration were made aware of these efforts, and Dean of Students and named Defendant, Meredith Raimondo communicated with other faculty and staff members about having a meeting on November 10, 2016 in advance of the scheduled protests. Some of the individuals included in that communication were present at the protests. The morning of November 10, 2016, Oberlin College community affairs liaison, Tita Reed, notified the Oberlin Police Department and other local businesses of the coming protests.

The protests began on November 10, 2016 at approximately 11:00 AM and proceeded for approximately two days. Present at the protests were members of the media and general public, police officers, and an estimated crowd of a few hundred people that included Oberlin College students as well as some members of Oberlin College's faculty, staff, and administration. Included among those present was Dean Meredith Raimondo, a party to this lawsuit.

During the protest, protesters held signs, chanted, and distributed a flyer that stated in part that Gibson's is "a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Some of the specific facts regarding distribution of the flyer are in dispute, but deposition testimony was presented indicating protesters and Oberlin College staff distributed copies of the flyer and/or utilized college copy machines to make additional copies of the flyer. Also during the protests, Meredith Raimondo handed a copy of the flyer to Jason Hawk, a reporter from the Oberlin News Tribune.

On November 10, 2016 members of the Oberlin Student Senate released a written resolution that stated in part that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike [...]." The resolution called upon Oberlin College students to stop supporting Gibson's Food Market and Bakery. It also called upon then college President Marvin Krislov and Dean of Students Meredith Raimondo to "condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery [...]." Following its release, the resolution was posted in Wilder Hall on Oberlin College's Campus for a period of at least one year.

On November 11, 2016, Marvin Krislov and Meredith Raimondo sent a joint statement via email to all Oberlin College students that outlined the administration's plan to address the events of November 9, 2016.

On November 12, 2016 the then-department head for Oberlin College Department of Africana Studies published a Facebook Post on the department's Facebook page that read: "Very Very proud of our students! Gibson's has been bad for decades, their dislike for Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"

From November 14, 2016 through January 30, 2017 Oberlin College suspended all business with Gibson's. This included a prohibition of purchasing Gibson's items with any college funds, and prohibited business between Gibson's and Oberlin College Dining Services or Bon Appetit Management Company, a separate food service provider for Oberlin College.

On January 30, 2017, Oberlin College resumed business with Gibson's until the instant lawsuit was filed on November 7, 2017.

Plaintiffs eight (8) count complaint asserted the following causes of action against Oberlin College and Meredith Raimondo, the College's Vice President and Dean of Students:

Count 1: Libel

Count 2: Slander

Count 3: Tortious Interference with Business Relationships

Count 4: Tortious Interference with Contracts

Count 5: Deceptive Trade Practices

Count 6: Intentional Infliction of Emotional Distress

Count 7: Negligent Hiring, Retention, and Supervision

Count 8: Trespass

After voluminous discovery, Defendants filed Motions for Summary Judgment seeking judgment in their favor on all the above claims.[1]

[1] Defendant Meredith Raimondo separately filed a Motion for Summary Judgment that shares exhibits with Oberlin College's motion. In fact, though filed separately, Oberlin College's motion actually incorporates Raimondo's motion by reference. The arguments of both Defendants' motions are addressed herein.

II. Summary Judgment Standard

In *Ponder v. Culp*, 2017-Ohio-168, ¶¶ 9-10 (Ohio Ct. App. 9th Dist.), the Ninth District Court of Appeals set forth the standard in ruling on motions for summary judgment:

> Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party.
>
> Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial.
>
> (Internal citations omitted).

Additionally, Civ.R. 56(C) provides that the court may only consider pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact timely filed in the action.

III. Application of Law

A. Count One: Libel

A defamation claim is comprised of five elements: "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory *per se* [...] or caused special harm to the plaintiff." *See Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 735 (Ohio Ct. App. 9th Dist. 2001).

When ruling on a motion for summary judgment in a defamation action, "[...] the court must apply the standard of clear and convincing evidence as to the element of fault [...] but the standard of proof for all of the other elements of a private plaintiff's defamation claim is preponderance of the evidence." *See Id. at* 734–35 (*internal citations omitted).*

Plaintiffs offer four (4) allegedly libelous statements – 1) a protest flyer handed out at the protests outside Gibson's Bakery in November of 2016; 2) a November 11, 2016 Oberlin College Student Senate Resolution addressing the incidents of November 9, 2016, 3) a November 11, 2016 email responding to the Student Senate Resolution sent by then-Oberlin College President, Marvin Krislov and Vice President and Dean of Students, Meredith Raimondo; and 4) a November 12, 2016 Facebook Post published by then-Oberlin College Africana Studies Department Chair on the Africana Studies Department's Facebook page.

1. **Plaintiffs' Status under Ohio Defamation Law**

As part of the summary judgment analysis, Court must determine Plaintiffs' status under Ohio Defamation Law. Plaintiffs' status is a question of law for the Court's determination. *See Id.* at 735 (*internal citations omitted).*

Plaintiffs have participated in a local bakery business located in Oberlin, Ohio for over 100 years. Plaintiffs have not achieved the level of pervasive fame, notoriety, power, and/or influence required to find they are general purpose public figures. *See Gilbert*, at 736 ("In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."); *see also Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 122 Ohio App.3d 499, 508 (Ohio Ct. App. 1st Dist. 1997) ("A general purpose public figure is one who occupies a position 'of such persuasive power and influence' and 'pervasive fame or notoriety' in the community that he assumes 'special prominence in the resolution of public questions' and 'in the affairs of society.'").

Likewise, Plaintiffs are also not limited-purpose public figures. If a plaintiff voluntarily injects themselves or is drawn into a particular public controversy, they become a limited-purpose public figure for a limited range of issues. *See Gilbert*, at 738 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) and citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.")).

Defendants argue Plaintiffs became limited-purpose public figures when Allyn D. Gibson – a non-party employee of Plaintiff Gibson Bros., Inc. and relative of the individual Plaintiffs Allyn W. Gibson and David R. Gibson – publically pursued an individual he believed committed a theft offense while Gibson was working at the family's store. The pursuit resulted in a physical altercation in the town square involving Allyn D. Gibson and the alleged shoplifter(s) on November 9, 2016. Defendants argue Allyn D. Gibson acted on behalf of *all Plaintiffs* and thereby voluntarily injected all of them into a public

controversy. Plaintiffs argue they are not limited-purpose public figures because they believe the Defendants' actions created or facilitated the public controversy.

In deciding if an individual is a limited-purpose public figure, the Ninth District Court of Appeals considers a plaintiff's *voluntary* participation in the controversy and whether they have obtained general notoriety in the community based on that participation. *See Gilbert*, at 738-39; *see also Young v. Morning Journal*, 129 Ohio App.3d 99, 103 (Ohio Ct. App. 9th Dist.). Allyn D. Gibson, an employee of the plaintiffs, reasonably believed that a theft offense had been committed within the store. He pursued the alleged offender in order to thwart a criminal offense. Plaintiffs, through the act of their employee, did not voluntarily inject themselves into the public controversy that arose out of the events of November 9, 2016. Accordingly, the Court finds that they are not limited-purpose public figures.

2. The Protest Flyer

a. There are issues of material fact regarding whether Defendants published the flyer.

Defendants argue that Plaintiffs have presented no evidence that either Oberlin College or Meredith Raimondo published the flyer. Under Ohio law, publication constitutes "[a]ny act by which the defamatory matter is communicated to a third party [...]." *Gilbert*, at 743 (quoting *Hecht v. Levin*, 66 Ohio St.3d 458, 460 (Ohio 1993)).

"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 or abets, another to publish defamatory matter is liable as well as the publisher." *Cooke v. United Dairy Farmers, Inc.*, 2003-Ohio-3118, ¶ 25 (Ohio Ct. App. 10th Dist.) (citing *Scott v. Hull* (1970), 22 Ohio App.2d 141, 144, 259 N.E.2d 160 and 53 Corpus Juris Secundum 231, Libel and Slander, Section 148). "Thus, liability to respond in damages for the publication of defamation must be predicated on a positive act." *Id.* "Nonfeasance, on the other hand, is not a predicate for liability. Mere knowledge of the acts of another is insufficient to support liability." *Id.*

Here, it is undisputed that Meredith Raimondo presented at least one individual, Jason Hawk, with a copy of the protest flyer. The remaining evidence surrounding the distribution of the flyer, and the explanations for doing so, are in dispute. But Plaintiffs have presented testimony from individuals who say they observed Raimondo and other Oberlin College employees handing out flyers at the protest. Further, Plaintiffs offered evidence that Defendants permitted the protesters to make copies of the flyer on the Oberlin College Conservatory's Office's copy machine during the protests and provided protesters with refreshments and gloves for use during the protests. Weighing all of this

evidence in Plaintiffs' favor, the Court finds there are genuine issues of material fact regarding whether Defendants published the flyer.

b. There are issues of material fact regarding the falsity of the statements in the flyer.

Defendants briefly allege that they are entitled to summary judgment on account of the flyer restating a matter of public knowledge that Plaintiffs cannot prove to be false. More succinctly stated, when allegedly defamatory statements made about a private individual involve a matter of public concern, the plaintiff bears the burden of proving the falsity of the statements by preponderance of the evidence. *See Gilbert*, at 740 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)).

In this case, the allegations of racial profiling with a long account of discrimination are matters of public concern. But in support of their argument, Defendants only pointed to Exhibits GG and LL of Allyn D. Gibson's deposition and a single Yelp review. This evidence is insufficient to meet Defendants' initial burden of pointing to evidence tending to show there are no issues of material fact regarding the falsity of the statements in the flyer. Even if Defendants had met their burden, Plaintiffs offered witness testimony disputing the allegations that they are a "racist establishment with a long account of racial profiling and discrimination", and that evidence would be sufficient to create an issue of material fact.

c. The protest flyer statements are not protected opinions

Defendants argue that Plaintiffs cannot rely on the contents of the protest flyer as evidence of their libel claim because the flyer statements are protected opinions. The Court disagrees.

A "totality of the circumstances" approach is utilized to determine whether a statement is opinion or fact. *See Scott v. News-Herald*, 25 Ohio St.3d 243, 251 (1986). Ohio courts are to analyze the following four (4) factors to determine whether a statement is opinion or fact:

- The specific language used;
- Whether the statement in question is verifiable;
- The general context of the statement; and
- The broader context in which the statement appeared. Id

The required "perspective" for analysis of these factors is that of a "reasonable reader." A court should not isolate a specific statement if, only by doing so, such isolation causes

a statement of opinion to appear factual. *See McKimm v. Ohio Election Comm'n*, 89 Ohio St.3d 139, 145 (2000) (internal citation omitted). The four-pronged analysis does not constitute a "bright-line test. Each of the four factors should be addressed and the weight to be given to any one will vary depending on the circumstances presented." *Sturdevant v. Likley*, 2013-Ohio-987, ¶¶ 8-9 (Ohio Ct. App. 9th Dist.) (*citing Scott*).

Concluding that a statement is an opinion does not automatically make it non-actionable. Expressions of opinion may often imply an assertion of objective fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 2706 (1990) (overruled by *Scott* on other grounds). If a reader could reasonably conclude that the communication is stating a fact that could be verified, the communication will not be considered an opinion, especially if it is sufficiently derogatory to hurt the subject's reputation. In addition, a communication that is presented in the form of an opinion may be considered defamatory if it implies that the opinion is based on defamatory facts that have not been disclosed. *See Id.* at 2705-06 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").

FACTOR ONE: SPECIFIC LANGUAGE:

The specific language of the protest flyer was:

> DON'T BUY. This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION. Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement. PLEASE STAND WITH US. A member of our community was assaulted by the owner of this establishment yesterday. A nineteen y/o young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S. Main.

The flyer begins with the following statement and the following words in all capital letters: "DON'T BUY. This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION." To the average reader, this is the headline of the flyer. The specific language that "[Gibson's] is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" is pejorative. The specific language factor weighs in favor of actionability. *See Lennon v. Cuyahoga Cty. Juvenile Court*, 2006 WL 1428920 at ¶ 30 (Ohio Ct. App. 8th Dist. 2006) ("One co-worker told another co-worker that appellant was a racist [...] we cannot think of a scenario in which these words are not pejorative.").

The flyer also states that the owner was involved in a "particularly heinous event, when a member of our community was assaulted by the owner of this establishment." The flyer goes on to describe the assault to include the choking of another person until the assailant was forced to let go. Assault is a crime (O.R.C. 2903.13) and thus the flyer asserts that the owner of Gibson's committed a crime by choking the victim. Written words accusing a person of committing any crime are libelous *per se. Akron–Canton Waste Oil v. Safety–Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601, 611 N.E.2d 955, 962, citing *State v. Smily* (1881), 37 Ohio St. 30.

The flyer continues with: "After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene." Thus, the flyer indicates that after the initial assault of choking by Allyn, a second assault occurred when Allyn tackled the young man and restrained him until the police arrived. The three (the alleged student thief and two acquaintances) were racially profiled on the scene. The flyer does not specifically exclude Allyn from participation in the racial profiling. Although the reasonable reader could infer that the police were also involved in the racial profiling, the accusation in the flyer against Gibson's includes "...a long account of racial profiling."

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

With respect to factor two: the Supreme Court of Ohio in *Scott* stated that "[i]f an author represents that he has private, first-hand knowledge which substantiates the opinion he expresses, the expression of opinion becomes as damaging as an assertion of fact." *Scott*, at 251-252. The Supreme Court of Ohio also stated in *Scott* that "[w]here the statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." *Id.* at 252. Stated differently, the method of verification must be plausible.

In analyzing the statement "with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION," "account" is defined in part in Webster's dictionary as: "a

description of facts, conditions or events." A noted synonym for account is the word history: defined in part in Webster's as "an established record." Here, the accusation that Gibson's has a "*long account* of racial profiling and discrimination" goes beyond implication and directly tells the reasonable reader that the author's previous statement that "[Gibson's] is a racist establishment" is supported by a lengthy and potentially documented record of racial profiling and discrimination. To the average reader, the statement of a LONG ACCOUNT OF RACIAL PROFILING AND DISCRIMINATION suggests that the publisher has knowledge of a documented past history of such activity. The "LONG ACCOUNT" language implies to the reasonable reader that the publisher's statement is based on defamatory facts that have not been disclosed. *See Id.* at 251-52. The implication of the undisclosed facts supporting the statements of the flyer make them as damaging as an assertion of fact. *See Scott*, at 251-52.

A letter from the Defendants also supports verifiability. On November 11, 2016, and in response to the events at Gibson's Bakery on November 9, 2016, Marvin Krislov, then-President of Oberlin College and Meredith Raimondo, Dean of Students, issued a joint statement. In the context of the alleged racially charged incident, they said: "We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident." The Defendants indicate a willingness to "commit every resource" to determine "if this [racial discrimination] by the plaintiffs is "a pattern and not an isolated incident." The Defendants' willingness to commit resources is probative of their belief that a pattern of racial discrimination by the Plaintiffs is in fact verifiable. In this Court's view, a "pattern of racial discrimination" and "a long account of racial discrimination" are synonymous and plausibly verifiable.

The statements alleging criminal conduct (criminal assault) by the owner of Gibson's (Plaintiffs) are verifiable. *See Scott*, at 252 (A statement that an individual committed perjury is "[...] certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing."); *see Condit v. Clermont Cty. Review*, 110 Ohio App.3d 755, 761 (Ohio Ct. App. 12th Dist. 1996) ("A classic example of a statement with a well-defined meaning is an accusation of a crime because such statements are laden with factual content that may support an action for defamation.");

FACTOR THREE: THE GENERAL CONTEXT

General context involves an analysis of the larger objective and subjective context of the statement. Objective cautionary terms, or "language of apparency" places a reader on notice that what is being read is the opinion of the writer. Terms such as "in my opinion" or "I think" are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse. *See Scott*, at 252.

Nowhere in the flyer is there any language of apparency. The only term that could be construed as opinion is the term racist and heinous. However as previously discussed, racist was used in conjunction with "a long account of racial profiling and discrimination."

In analyzing a statement's context, the Court must also consider the gist and general tone of the statement. The general tone of the statement is that Plaintiffs are racists and that they have a long account of racial profiling and discrimination. That statement is followed by a perceived factual account of an incident that is intended to support the previous statement. The account includes statements that an owner of this business assaulted a member of the Oberlin College Community and supports it with the following statements:

> A nineteen year old young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S. Main.

The general context of this flyer is that the Plaintiffs are racists with a long account of racial profiling and discrimination, and the events that happened yesterday substantiate the general context of the statement.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (citing *Natl. Assn. of Letter Carriers, supra,* 418 U.S. at 286, 94 S.Ct. at 2782).

The previously discussed statements appeared in a written flyer. The purpose of the flyer was to inform people and to persuade them into action. The information conveyed was that the plaintiff business owners were racist with a long account of racial profiling and discrimination. The action sought was unity in the form of a boycott of the business; "DON'T BUY...shop elsewhere...STAND WITH US." Because this flyer

sought to inform and rally the reader to act, this Court finds that the reasonable reader would be less inclined to believe that the statements were opinions rather than fact.

This Court, having construed the evidence in a light most favorable to the non-moving party, has analyzed the flyer utilizing the four factors as required by *Scott, supra*. The result of the Court's analysis is that many factors weigh in favor of actionability. Based on a totality of the circumstances and construing the evidence in the light most favorable to Plaintiffs, the non-moving party, it is this Court's view that the statements made in the flyer are not constitutionally protected opinion.

3. **The Student Senate Resolution**

   a. **There are issues of fact regarding the falsity of the Student Senate Resolution**

Defendants challenge Plaintiffs ability to prove the falsity of the statements in the resolution. Where a plaintiff is a private individual and the matter is of public concern, the plaintiff bears the burden of proving the falsity of the statements by preponderance of the evidence. *See Gilbert*, at 740 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)). Here, though Plaintiffs are private figures, the nature of the controversy – allegations of racial profiling and discrimination – are matters of public concern, and Plaintiffs must therefore prove the falsity of the purported statements by preponderance of the evidence. The relevant portions of the senate resolution include:

> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by police officers.
>
> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike."

***

> Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible [...].

Defendants believe Plaintiffs cannot prove the statements are false because the statements are consistent with selected witness statements provided by individuals that witnessed the events of November 9, 2016. In response, Plaintiffs have submitted statistics and deposition testimony from several witnesses they believe prove the statements are false. Weighing the evidence in Plaintiffs' favor, there is an issue of material fact with regard to the falsity of the statements.

b. There are issues of fact regarding whether Defendants published the Student Senate Resolution.

Proof of publication of defamatory matter is also an essential element to defamation that must be proven by clear and convincing evidence. Publication is "communication intentionally or by a negligent act to one other than the person defamed." *Gilbert*, at 743. Raimondo separately argues that Plaintiffs cannot show she created or published the resolution. But as described in the preceding paragraph, Plaintiffs have shown circumstantial evidence of Defendants' participation in the creation, circulation, and public posting of the resolution in Wilder Hall, a prominent central hub of student activity on Oberlin College's Campus for a significant period of time. (See Plaintiffs' Opp., p. 53; citing Krislov Vol. I, Ex. 10). Weighing this evidence in Plaintiffs' favor, there is an issue of material fact regarding whether Defendants published the resolution.

c. The Student Resolution Statements are not protected opinions

Defendants argue that Plaintiffs cannot rely on the contents of the Student Senate Resolution as evidence of their libel claim because the statements are protected opinions. The Court disagrees.

The Court will engage in a "totality of the circumstances" approach to analyze the following four (4) factors and determine whether or not the statement is an opinion or fact. *See Scott v. News-Herald*, 25 Ohio St.3d 243 (1986). (Though Defendants did not specifically analyze the November 10, 2016 Oberlin College Student Senate Resolution under the applicable framework, they did allege generally that it was a protected opinion. The resolution is therefore subject to the same analysis).

FACTOR ONE: SPECIFIC LANGUAGE:

The specific language of the resolution states:

> Dear Oberlin Community,
>
> It is with great regret that we write you expressing deep abhorrence towards violence against students. Oberlin is no stranger to acts of hatred, bigotry, and anti-Black violence. As stewards of justice, we are called to acknowledge, repudiate, and actively reject violence in all forms, especially as it affects our own.
>
> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College Students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by officers.
>
> 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:
>
> WHEREAS, Oberlin College Students regularly engage and support the commerce of the City of Oberlin; and
>
> WHEREAS, Oberlin College Students stand boldly against racialized violence in the United States, abroad, and in our own community; and
>
> WHEREAS, Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible; therefore be it

RESOLVED that the Students of Oberlin College immediately cease all support, financial and otherwise, of Gibson's Food Market and Bakery; and be it further

RESOLVED that the students of Oberlin College call on President Marvin Krislov, Dean of Students Meredith Raimondo, all other administrators and the general faculty to condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery; and be it further

RESOLVED that the students of Oberlin College further work toward creating a community in which all students are respected, not met with hate due to the color of their skin.

Here, the specific language used includes a statements that "A Black student was chased and assaulted at Gibson's after being accused of stealing [...] Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike [...] Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible", an inference that Plaintiffs engaged in "racialized violence", and an implication that students are "met with hate due to the color of the skin" at Gibson's bakery.

Much like the protest flyer, the resolution statement alleges criminal conduct of assault by Plaintiffs. Written words accusing a person of committing any crime are libelous *per se*. *See Akron–Canton Waste Oil, supra,* at 601 (citing *State v. Smily* (1881), 37 Ohio St. 30.). The accusations of racism, racialized violence, and a history of discrimination along with the implication that students of color are met with hate are pejorative. *See Lennon, supra.* These statements are placed in paragraphs after the introduction of the resolution. A reasonable reader would conclude that the pejorative statements and allegations of criminal conduct come after the Student Senate conducted a "further review" of the incident.

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

The statement that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike" implies that the authors have additional information supporting their accusation. As previously discussed the word "history" is defined and implies a proven record of such conduct. Furthermore, these statements follow the introduction of the resolution. A reasonable reader would conclude that the pejorative statements and allegations of criminal conduct come after the Student Senate

conducted a "further review" of the incident. This review included speaking with the students involved, reviewing witness statements, and reading the police report. As a result a few key facts will be shared with the reader. Here, the author represents that he/she has private, first-hand knowledge which substantiates the opinion expressed, specifically racial profiling and hate toward people of color. As a result, the expression of opinion becomes as damaging as an assertion of fact." *Scott*, at 251-252.

In addition, a letter from the Defendants supports verifiability. See this Court's reference to the November 11, 2016 joint statement of Marvin Krislov, President of Oberlin College and Meredith Raimondo, Dean of Students, contained in the verifiability analysis of the flyer.

FACTOR THREE: THE GENERAL CONTEXT

The general context was a formal senate resolution that was drafted and adopted by the Student Senate and then electronically sent to the school president, dean of students, and the entire student body. The purpose of the statement was to be persuasive – to convince college leadership and the student body to join them in ceasing all support of Plaintiffs' business because Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike; Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible; because Gibson criminally assaulted a black member of our community; and because students are met with hate at Gibson's due to the color of their skin.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have [...] widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra,* at 979.

As discussed, these statements were contained in a formal Student Senate resolution following "further review" by the Student Senate of the incident in question. This was not an opinion piece by the student newspaper. This was a "declaration" demanding a call to action and alleging first-hand knowledge of facts to support their actionable pejorative statements toward the Plaintiffs.

This Court, having construed the evidence in a light most favorable to the non-moving party, has analyzed statements in the senate resolution utilizing the four factors as required by *Scott, supra*. The result of the Court's analysis is that many factors weigh in

favor of actionability. Based on a totality of the circumstances and construing the evidence in the light most favorable to the non-moving party, it is this Court's view that the statements made in the Student Senate resolution are not constitutionally protected opinions.

4. **Marvin Krislov and Meredith Raimondo's November 11, 2016 joint statement**

    a. **There are no issues of material fact regarding whether the joint statement contains false statements**

On November 11, 2016 and in response to the events at Gibson's Bakery on November 9, 2016, then college president, Marvin Krislov and Meredith Raimondo, dean of students, issued a joint statement. The statement was issued in both their names on November 11, 2016, sent to students and staff from the College Communications Department email address, and was also published in the *Oberlin Review* – a student run Oberlin College newspaper. The entirety of the statement reads:

> Dear Students,
>
> This has been a difficult few days for our community, not simply because of the events at Gibson's Bakery, but because of the fears and concerns that many are feeling in response to the outcome of the presidential election. We write foremost to acknowledge the pain and sadness that many of you are experiencing. We want you to know that the administration, faculty, and staff are here to support you as we work through this moment together.
>
> Regarding the incident at Gibson's, we are deeply troubled because we have heard from students that there is more to the story than what has been generally reported. We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident. We are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments.
>
> Accordingly, we have taken the following steps: 1) Dean Meredith Raimondo and her team have worked to support students and families affected by these events, and will continue to do so. 2) Tita Reed, Special Assistant for Government and Community Relations, has reached out to

Mr. Gibson to engage in dialogue that will ensure that our broader community can work and learn together in an environment of mutual respect free of discrimination. We will continue to work on these matters in the coming days to make sure that our students, staff, and faculty can feel safe and secure throughout our town.

We are grateful for the determination of our students and for the leadership demonstrated by Student Senate. Thanks to all who have contacted us with suggestions and concerns.

Marvin Krislov
President

Meredith Raimondo
Vice President and Dean of Students

Defendants argue that Raimondo and Krislov's Joint Statement was not defamatory because it contains, at most, implied statements that Plaintiffs are racists and/or engaged in discrimination, and Ohio does not recognize actionable defamation based on implied statements. In support, Defendants cite *Krems v. Univ. Hosp. of Cleveland*, 133 Ohio App.3d 6, 12 (Ohio Ct. App. 8th Dist. 1999). While *Krems* does state "Ohio does not recognize libel through implied statements", the Court in *Krems* cited *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App.3d 359, 588 N.E.2d 280 as support for that holding. But *Ashcroft* actually makes no mention of implied statements. Instead, the *Ashcroft* Court found that unspecific allegations based on "rumors by way of the grapevine" were insufficient to survive summary judgment. *See Ashcroft*, at 365.

Plaintiffs take issue with two statements in the joint statement. The first is the statement "[w]e are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments." Plaintiffs view this statements as an implication that they are racist. But this statement outlines Krislov and Raimondo's expectations of *all* community businesses and friends. The fact that it was released in the context of the days following the protests does not make it apply only to Plaintiffs.

The second statement is "[w]e are grateful for the determination of our students and for the leadership demonstrated by Student Senate." Plaintiffs see this statement as an implied endorsement of the statements in the Student Senate Resolution. Plaintiffs read the joint statement in conjunction with the resolution, but the average reader may not even know the resolution existed. Krislov and Raimondo's vague, general

applauding of the Student Senate is not a false statement, and the resolution cannot make the otherwise non-defamatory joint statement defamatory.

Even weighing the evidence in Plaintiffs' favor, the Court finds the joint statement is not defamatory.

5. The Statements in the Department of Africana Studies Facebook Post are Protected Opinions

Defendants have challenged Plaintiffs ability to utilize a Facebook post published by a faculty member on the Department of Africana Studies's Facebook Page because it is a protected opinion. The Court agrees.

The Court will engage in a "totality of the circumstances" approach and analyze the following four (4) factor to determine whether or not the statement is an opinion or fact: *See Scott v. News-Herald*, 25 Ohio St.3d 243, 251 (1986).

FACTOR ONE: SPECIFIC LANGUAGE:

The post was published online November 12, 2016 and the specific language was: "Very Very proud of our students! Gibson's has been bad for decades, their dislike for Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"

The specific language about being "bad for decades" and the "food is rotten" weigh toward opinion speech. The only questionable language is the portions stating that Plaintiffs dislike black people and profile black students. These statement are pejorative.

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

Unlike the flyer or the student resolution, the Facebook post would not lead the reasonable reader to conclude that the author had first-hand actual knowledge of facts, or undisclosed facts to support the opinion. There is no reference to a "long account" or "history" of racial profiling. There is no allegation of criminal conduct and the term racist is not used. The statement does indicate that the Plaintiffs "dislike" black people. The statement that the Plaintiffs "profile black students" may be verifiable. See this Court's reference to the November 11, 2016 joint statement of Marvin Krislov, President of Oberlin College and Meredith Raimondo, Dean of Students, contained in the verifiability analysis of the flyer.

FACTOR THREE: THE GENERAL CONTEXT

General context involves an analysis of the larger objective and subjective context of the statement. This Facebook post appeared on November 12, 2016, after the flyer and protest, the senate resolution, and a day after the joint statement by Marvin Krislov and Meredith Raimondo. The context of the post can generally be construed as a stamp of approval regarding the previous activity.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have [...] widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra,* at 979 (internal citation omitted).

These statements appeared in a Facebook post. Under current social conventions, a statement on Facebook generally signals to the reasonable reader that it is the author's opinion rather than a fact.

All of the factors and totality of the circumstances weigh in favor of finding that the Facebook Post is an opinion. The specific language is vague and hyperbolic. The allegation that Gibson's "profile[s] Black students" is certainly pejorative, but the entirety of the post includes the hyperbolic and vague claim that the food is "rotten" and the protest or rallying cry language of "NO MORE" would lead a the reasonable reader to believe they were reading the author's subjective opinion. The general and broader context are indicative that the post is a statement of opinion.

Even weighing all of this evidence in Plaintiffs' favor, the totality of the circumstances weighs in favor of finding the statements in the Facebook post are protected opinions.

6. Clear and Convincing Evidence of Fault:

In a private-figure defamation action such as this, the plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180-181 (Ohio 1987). Clear and convincing evidence is that which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Id.* at 180-181 (citing *Cross v. Ledford*, 161 Ohio St. 469 (Ohio 1954)).

This Court has concluded that the flyer and student resolution contained actionable defamatory statements made about Plaintiffs. Specifically that the Plaintiffs are racists,

that the Plaintiffs have a long account and a history of racial profiling and discrimination; and statements that the Plaintiffs committed crimes of assault.

A question of fact exists as to whether or not the defendants acted reasonably in attempting to discover the truth or falsity or defamatory character of their publications. Defendants failed to offer any evidence that they considered the law of protection of property before they alleged that the owner of plaintiffs' business committed the crime of assault. With respect to the statements that the plaintiffs are racists and that they have a long account and a history of racial profiling and discrimination, the November 11, 2016 from President and Dean of Students sets forth their commitment "to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident." Perhaps this is something they should have done prior to publishing the defamatory statements concerning the plaintiffs.

B. Count Two: Slander

Plaintiffs slander claim is based on chants of "[expletive] the Gibsons" and "Gibson's is racist" directed at Plaintiffs and their employees during the protests, and statements allegedly made about Plaintiffs by Oberlin College Tour Guides during new student tours. Because the chants are protected opinions and the hearsay evidence relating to the alleged tour guide statements is too tenuous to sustain a claim for slander, Defendants are entitled to judgment as a matter of law as to Count 2 of Plaintiffs' Complaint.

1. The Protest Chants are Opinions

The protest chants directed at Plaintiffs included statements like "[expletive] the Gibsons" and "Gibson's is racist." Applying the *Scott* factors and considering the totality of the circumstances, the chants are protected opinions. The content is pejorative and weighs in favor of actionable defamation. Verifiability weighs in favor of finding the statements are opinions. The key distinction between the statements in the flyer and the resolution is that the former contained implications of additional information or factual support for the statements. Here, there is no such implication tending to make the statements sound more verifiable. Likewise, the context and tone of the chants are more likely to be perceived by the average listener to be expressions of opinion. Even when weighing the above evidence in Plaintiffs' favor, there are no issues of fact regarding whether the protest chants are protected opinions.

2. The Alleged Statements of Tour Guides are Insufficient to maintain a claim for slander

Plaintiffs likewise cannot rely on the alleged statements of unidentified tour guides as evidence of its defamation claims against Defendants. The hearsay evidence

surrounding these statements is insufficient, and the attempt to tie these statements to Defendants is too tenuous. Even if there were additional details or evidence related to these statements, they are likely protected opinions for the same reasons that the protest chants and Facebook post are protected opinions.

The only evidence of these statements is the testimony of Oberlin College employee, Ferdinand Protzman. Mr. Protzman also testified that he recalled hearing from unknown persons that unidentified student tour guides had told incoming or prospective students on Oberlin College tours not to shop at Gibson's and/or that Gibson's racially profiled and discriminated against minorities. Mr. Protzman states that he heard this might have happened two to three times, and that Oberlin College Senior Staff took action to prevent it from happening in the future. (Protzman Dep. pp. 232, lines 11-13; 233, lines 4-10). Mr. Protzman also testified in his deposition that tour guides are paid by Oberlin College and receive minimal training that includes suggested routes and talking points (Protzman Dep. pp. 228, lines 5-17; 230-231). This evidence standing alone is insufficient to maintain a claim for slander.

Plaintiffs also cannot avoid summary judgment on their slander claims by simply stating that "Plaintiffs are by no means saying that [the statements of protesters and tour guides] are the only statements which form the basis of Plaintiffs' slander claim." Pltf. Opposition, p. 90. Summary judgment is a burden-shifting framework, and Defendants have met their burden of pointing to evidentiary materials showing there is not an issue of material fact with regard to Plaintiffs' slander claim. By only presenting evidence related to the protected protest chants and unspecific, rumored tour guide statements, Plaintiffs have failed to meet their reciprocal burden.

After weighing the evidence in Plaintiffs' favor, there are no genuine issues of material fact with regard to Plaintiffs' slander claims. Defendants are entitled to judgment as a matter of law as to Count Two of Plaintiffs' Complaint.

C. Counts Three and Four: Tortious Interference with Contract and/or Business Relationships

The elements of tortious interference with contract are "1) the existence of a contract, 2) the wrongdoer's knowledge of the contract, 3) the wrongdoer's intentional procurement of the contract's breach, 4) the lack of justification, and 5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 1999-Ohio-260 (Ohio 1999). Tortious interference with a business relationship occurs when a wrongdoer's interference, rather than procuring a contract breach, causes a third party to not enter into or continue a business relationship. *See Deems v. Ecowater Sys., Inc.*, 2013-Ohio-2431 at ¶ 26 (Ohio Ct. App. 9th Dist.) (internal citations omitted). Defendants argue there are no issues of material fact with regard to the first, second, and fourth elements.

The Existence of a Contract and/or Business Relationship

Defendants first argue the lack of a written contract between Bon Appetit and Plaintiffs is fatal to Plaintiffs' claim. But at least one Ohio court has held that an action for tortious interference can be maintained on a valid oral contract. *See Martin v. Jones*, 2015-Ohio-3168, ¶ 64 (Ohio Ct. App. 4th Dist.). As evidence of a contract between Bon Appetit and Plaintiffs, Plaintiffs presented witness testimony and affidavits showing that Gibson's Bakery had an annual "standing order" of items it wished to receive from Plaintiffs on a daily basis throughout the year, and that they were utilized by Bon Appetit as a vendor or provider of goods for decades. Weighing the evidence in Plaintiffs' favor, there is an issue of material fact regarding the existence of a contract between Bon Appetit and Plaintiffs.

Alternatively, Defendants argue they cannot be liable because they would be a party to any contract or business relationship with Plaintiffs by means of Bon Appetit being an agent of Oberlin College. *See Boyd v. Archdiocese of Cincinnati*, 2015-Ohio-1394, ¶ 31 (Ohio Ct. App. 2nd Dist.) (citing *Dorricott v. Fairhill Ctr. for Aging*, 2 F.Supp.2d 982, 989–990 (N.D.Ohio 1998), and *Miller v. Wikel Mfg. Co., Inc.*, 46 Ohio St.3d 76, 79, 545 N.E.2d 76 (1989) (The wrongdoer in a tortious interference with contract or business relationship claim cannot be a party or agent of the party to the contract or business relationship.) But under Ohio law, the existence of an agency relationship is a question of fact. *See Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 661 (6th Cir. 2005).

Here, the parties' respective interpretations of the agreement and relationships between Plaintiffs, Bon Appetit and Oberlin College reflect the existence of issues of material fact.

Defendants' Knowledge of the Contract and/or Business Relationship

There is likewise an issue of material fact as to whether Defendants knew about the purported contract and/or business relationship between Plaintiffs and Defendants. Defendants claim that "no one at Oberlin College ha[d] knowledge of any such contract" with Plaintiffs. But Plaintiffs presented evidence that Meredith Raimondo and Marvin Krislov knew enough about the relationship between Bon Appetit and Gibsons to order Bon Appetit to cease engaging all business with Plaintiffs. Weighing Defendants' actions, the longevity of the purported contract and/or business relationship, and the evidence in Plaintiffs' favor, there is at least an issue of material fact as to whether Defendants had knowledge of a contract and/or business relationship between Bon Appetit and Plaintiffs.

Lack of Justification

Ohio law imposes the burden of proving 'lack of privilege' or 'improper interference' on the plaintiff. *See Kenty v. Transamerica Premium Ins.*, 72 Ohio St.3d 415, 417, 650 N.E.2d 863, 866 (1995). In determining whether Defendants' purported interference lacks justification – or was done without privilege – the Court must apply the following factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

Deems v. Ecowater Sys., Inc., 2016-Ohio-5022, ¶ 27 (Ohio Ct. App. 9th Dist.).

Applying the above factors to this case is extremely difficult because of the amount of factual disputes that riddle each factor. Both Plaintiffs and Defendants summarize and describe Defendants' conduct and motive in completely opposite ways. They also describe Plaintiffs' interests and the social interests at stake in completely opposite ways. Given this disputed factual landscape, there are clearly issues of material fact that make it impossible to find as a matter of law at this juncture that Defendants were justified in their purported interference with Plaintiffs' contract and/or business relationship.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' tortious interference claims. Therefore Defendants' Motion for Summary Judgment on Counts Three and Four of Plaintiffs' Complaint is denied.

D. Count Five: Deceptive Trade Practices

Plaintiffs' Ohio Deceptive Trade Practices Act claim is a separate cause of action based on the same statements at issue in Plaintiffs' defamation claims. Specifically, Plaintiffs allege a violation of Ohio Revised Code § 4165.02(A)(10) which states: (A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following: [...] 10) Disparages the goods, services, or business of another by false representation of fact.

Though the elements are similar, Ohio Courts have made important distinctions between the two causes of action. For example, in *Blue Cross & Blue Shield of Ohio v.*

Schmidt, 1996 WL 71006 at *3 (Ohio Ct. App. 6th Dist. 1996) (unreported), the Court stated "[a] deceptive trade practices claim is a separate tort from defamation. When the *integrity or credit* of a business has been impugned, a claim may be asserted under a defamation theory; when the *quality* of goods or services has been demeaned, a commercial disparagement claim may be asserted." *See also Fairfield Mach. Co., Inc. v. Aetna Cas. and Sur. Co.*, 2001 WL 1665624 at *6, 2001-Ohio-3407 (Ohio Ct. App. 7th Dist. 2001) (citing and quoting *Blue Cross* in making the same distinction in a different factual context).

Further, protected opinions are not actionable under the Deceptive Trade Practices Act. *See White Mule Co. v. ATC Leasing Co., LLC*, 540 F.Supp.2d 869, 895 (N.D. Ohio 2008) (Applying *Scott* factors to determine if statement supporting Deceptive Trade Practices Act claim was an actionable false assertion of fact or a protected statement of opinion).

Here, all of the purportedly defamatory statements except for one speak to Plaintiffs' integrity, rather than the quality of their goods, services, or business. The exception is the Department of Africana Studies Facebook Post that included the statement "[t]heir food is rotten [...]". But the Court previously held this statement was a protected opinion, and the same analysis precludes Plaintiffs from relying on it as evidence of a violation of the Deceptive Trade Practices Act. *See White Mule Co., supra* at 895.

After weighing the evidence in Plaintiffs' favor, there are no genuine issues of material fact with regard to Plaintiffs' Deceptive Trade Practices Act claims. Therefore Defendants' Motion for Summary Judgment on Count Five of Plaintiffs' Complaint is granted.

E. Count Six: Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress ("IIED") is comprised of the following elements:

> (1) [t]he defendant intended to cause emotional distress, or knew or should have known his actions would result in serious emotional distress, (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community, (3) the defendant's actions proximately caused psychic injury to the plaintiff, and (4) the plaintiff suffered serious mental anguish of the nature no reasonable [person] could be expected to endure.
>
> *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, ¶ 28 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

In their respective briefs, the parties dispute the applicability of *Yeager v. Local Union 10, Teamsters, Chauffers, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369 (1983) and *Vail v. The Plain Dealer Publ'g Co.*, 1995-Ohio-187, 72 Ohio St.3d 279 (Ohio 1995).

Plaintiffs believe *Yeager* establishes that IIED claims are not contingent upon the survival of related defamation claims and that the holding in *Vail* should not apply. In *Yaeger*, the Supreme Court of Ohio affirmed an appellate court's decision granting summary judgment on a defamation claim, but reversed and remanded the court's simultaneous award of summary judgment on a claim for IIED. *Yeager*, at 375-76. But the key distinction in *Yeager* is that the IIED claim survived because it arose out of different events than the defamation claim. Specifically, the Court held: "[w]e reverse the court of appeals in part and remand the cause to the trial court for further proceedings on the cause of action for intentional infliction of emotional distress *arising from the alleged incident in appellant's office on March 31, 1978.*" *Id.* at 370, 375-76 (Earlier, in the *Yeager* opinion, the Court had identified that the statements at issue in the defamation claim happened at a separate incident on June 5, 1979.).

Defendants argue that *Vail* requires dismissal of IIED claims where the statements underlying the IIED claims do not constitute actionable defamation. In *Vail*, the Court reasoned that where the only statements supporting defamation and IIED claims were determined to be protected opinions, summary judgment on both claims was appropriate. *See Vail*, at 283. But *Vail* is also distinguishable to this case because this Court has only found that *some* of the statements underlying Plaintiffs' defamation claims are protected opinions. Because Defendants have not been awarded judgment as a matter of law on Plaintiffs' defamation claims, *Vail* does not require summary judgment on Plaintiffs' IIED claim.

Whether Plaintiffs can prove each of the elements of their IIED claim at trial depends on resolution of questions of fact. But at this juncture all of the evidence presented regarding Defendants' conduct and Plaintiffs resulting damages has to be weighed in Plaintiffs' favor.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' intentional infliction of emotional distress claims. Therefore Defendants' Motion for Summary Judgment on Count Six of Plaintiffs' Complaint is denied.

F. Count Seven: Negligent Hiring, Retention, Supervision

To prove a claim of negligent hiring and retention, Plaintiffs must show "(1) [t]he existence of an employment relationship; (2) the employee's incompetence; (3) the

employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the Plaintiffs' injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of Plaintiffs' injuries." *Zanni v. Stelzer*, 2007-Ohio-6215, ¶ 8 (Ohio Ct. App. 9th Dist.) (internal citations omitted). Additionally, Plaintiffs must prove that the employee's actions were reasonably foreseeable to Defendants – i.e. Oberlin College knew or should have known of the employee's "propensity to engage in similar criminal, tortious, or dangerous conduct." *See Jevack v. McNaughton,* 2007-Ohio-2441, ¶ 21 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

As an initial matter, Defendants have argued that there are no issues of material fact regarding Plaintiffs' claim for negligent hiring, retention, and supervision against Meredith Raimondo because she is not "an employer". This was not disputed by Plaintiffs, who focused their briefing on the claim against Oberlin College for negligent hiring, retention, and supervision of its employees – including Meredith Raimondo, Tita Reed, and Julio Reyes. Because it is undisputed that Meredith Raimondo is not an employer, Defendants are entitled to summary judgment on Count Seven as it relates to Meredith Raimondo only.

Applying the above elements to Oberlin College, Plaintiffs have met their burden of establishing there are issues of material fact that preclude summary judgment for Oberlin College on Count Seven of Plaintiffs' Complaint.

Defendants only challenge and analyze the third element – Oberlin College's actual or constructive knowledge of their employees' incompetence. In support, Defendants point to Plaintiffs' deposition testimony wherein Plaintiffs indicated they had no knowledge of Dean Raimondo's background before she was employed at Oberlin College. Defendants argue that Plaintiffs have not shown any evidence of any incident involving any of Defendants' employees prior to November 10, 2016 that would put Defendants on notice that the acts complained of were reasonably foreseeable.

Defendants see the actions subsequent to November 10, 2016 as one action. But Plaintiffs pointed to pending lawsuits that contain allegations related to Raimondo's competence. Further, Plaintiffs have alleged and presented evidence showing that a number of separate actions were taken by Meredith Raimondo, Oberlin College, and/or Oberlin College employees subsequent to November 9, 2016. While it may be that the majority of evidence post-dates November 10, 2016, weighing the evidence in Plaintiffs' favor at this juncture, there is sufficient evidence to create an issue of material fact regarding whether Oberlin College employees were incompetent and whether Oberlin College had actual or constructive knowledge of that incompetence.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' negligent hiring, retention, and supervision claims. Therefore

Defendants' Motion for Summary Judgment on Count Seven of Plaintiffs' Complaint is denied.

G. Count Eight: Civil Trespass

Plaintiffs' trespass claim involves a parking lot adjacent to Gibson Bros. Inc. that was the site of the protests. Plaintiffs' complaint summarizes the trespass as "[a]ll of Defendants actions on the parking lot since Plaintiff acquired rights to use [the parking lot]" which includes "permitting faculty, administrators, and students to park in the lot even though they are not permitted to do so and by parking large construction equipment on the lot in such a manner to block the entrance to the lot", and that these actions were "approved and ratified" by the Oberlin College and "calculated to facilitate or promote the business, interests, and agenda of Oberlin College." Pltfs. Compl. ¶¶ 163-64.

To prove a trespass claim, Plaintiffs must show that: (1) they had a possessory interest in the property; and (2) the offending party entered the property without consent or proper authorization or authority. *Bell v. Joecken*, 2002-Ohio-1644, 2002 WL 533399, *2 (Ohio Ct. App. 9th Dist.); *see also City of Kent v. Hermann*, 1996 WL 210780 at *2 (Ohio Ct. App. 11th Dist. Mar. 8, 1996) (Describing trespass as "an invasion of [...] possessory interest [...] not an invasion of title" and that property owners sacrifice their possessory interest to tenants).

With regard to the first element, Plaintiffs have established through deposition testimony that there is an issue of fact as to whether they have a possessory interest in the parking lot. It is undisputed that Off Street Parking, Inc. – a non-party entity – is the owner of the parking lot. But Plaintiffs have asserted that they and other businesses have been granted usage of the parking lot as tenants, thereby giving them a possessory interest in the parking lot. Plaintiffs maintain that they utilize the parking lot year round in conjunction with other tenants. Importantly, Ohio law does not require Plainitiffs' possessory interest to be exclusive. *See Northfield Park Assocs. V. Ne. Ohio Harness*, 36 Ohio App.3d 14, 18 (Ohio 1987) (Where various lessees of a racing track had the right to operate a track during specific times of the year, only the lessee with permission to use the track during the time of the alleged trespass had the right to bring a trespass action because it was the only tenant with a possessory interest at that specific time).

To survive summary judgment Plaintiffs must also present evidence showing there is an issue of material fact as to whether Defendants intentionally entered their land or caused another thing or person to do so. *See Bonkoski v. Lorain Cty.*, 2018-Ohio-2540, ¶ 14 (Ohio Ct. App. 9th Dist.); *see also Biomedical Innovations Inc. v. McLaughlin*, 103 Ohio App.3d 122, 127 (Ohio Ct. App. 10th Dist. 1995) ("Generally, a person is not liable for trespass unless it is committed by that person or by a third person on his orders.").

In support, Plaintiffs cite the deposition testimony of David Gibson during the Gibson Bros. Inc. 30(b)(5) deposition and the deposition testimony of Henry Wallace – a long-time Oberlin Police Department Auxiliary Officer that patrolled and enforced parking violations in the parking lot. This testimony collectively asserted that the parking lot has been wrongfully utilized by Oberlin College employees, Oberlin College students, and contractors doing construction for Oberlin College. It does not conclusively establish that Defendants intentionally instructed, ordered, or caused these individuals to intentionally invade Plaintiffs' purported possessory interest, but at this juncture, it is sufficient to create an issue of material fact that precludes summary judgment in Defendants' favor.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' trespass claims. Therefore Defendants' Motion for Summary Judgment on Count Eight of Plaintiffs' Complaint is denied.

7. Conclusion

Defendants are entitled to judgment as a matter of law on Count Two (Slander) as to both Defendants; Count Five (Deceptive Trade Practices) as to both Defendants; and Count Seven (Negligent Hiring, Retention, Supervision) as to Defendant Meredith Raimondo only. Plaintiffs' remaining claims will proceed subject to the above limitations.

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 6/27/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

JUDGMENT ENTRY

Pursuant to Ohio Revised Code Section 2315.18 (Compensatory Damages in Tort Actions) and Ohio Revised Code Section 2315.21 (Punitive or Exemplary Damages) the Court hereby reduces the jury's verdicts to judgment as follows:

On June 6, 2019, the parties stipulated and agreed that Oberlin College would be vicariously, jointly, and severally liable for any verdict or judgment rendered against Meredith Raimondo, regardless of whether a separate verdict or judgment was entered against Oberlin College.

On June 7, 2019, the jury returned a compensatory damages verdict in favor of David R. Gibson in the amount of $5,800,000.00, which included $4,000,000.00 in non-economic damages and $1,800,000.00 in economic damages. The jury completed an interrogatory further specifying that $4,800,000.00 of the $5,800,000.00 was awarded to David R. Gibson and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,000,000.00 was awarded to David R. Gibson and against Oberlin College on the intentional infliction of emotional distress claim. On June 13, 2019, the jury returned a punitive damages verdict in favor of David R. Gibson in the amount of $17,500,000.00.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment is hereby rendered against Defendants and in favor of David R. Gibson for compensatory damages for economic loss in the amount of $1,800,000.00.

Judgment is hereby rendered against Defendants in favor of David R. Gibson for compensatory damages for noneconomic loss in the amount of $600,000.00. ($350,000.00 on the libel claim and $250,000.00 on the intentional infliction of emotional distress claim)

Judgment is hereby rendered against Defendants and in favor of David R. Gibson for punitive damages in the amount of $11,600,000.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR DAVID R. GIBSON: $14,000.000.00

On June 7, 2019, the jury returned a compensatory damages verdict in favor of Allyn W. Gibson in the amount of $3,000,000.00 in non-economic damages and $0.00 in economic damages. The jury completed an interrogatory further specifying that $2,000,000.00 of the $3,000,000.00 was awarded to Allyn W. Gibson and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,000,000.00 was awarded to Allyn W. Gibson and against Oberlin College on the intentional infliction of emotional distress claim.

One June 13, 2019, the jury returned a punitive damages verdict in favor of Allyn W. Gibson in the amount of $8,750,000.00.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment is hereby rendered against Defendants and in favor of Allyn W. Gibson for compensatory damages for noneconomic loss in the amount of $500,000.00. ($250,000.00 on the libel claim and $250,000.00 on the intentional infliction of emotional distress claim)

Judgment is hereby rendered against Defendants and in favor of Allyn W. Gibson for punitive damages in the amount of $6,000,000.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR ALLYN W. GIBSON: $6,500.000.00

On June 7, 2019, the jury returned a compensatory damages verdict in favor of Gibson Bros., Inc. in the amount of $2,274,500.00 in economic damages. The jury completed an interrogatory further specifying that $1,137,250.00 was awarded to Gibson Bros., Inc. and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,137,250.00 was awarded to Gibson Bros., Inc. and against Meredith Raimondo on the intentional interference with business relations claim.

On June 13, 2019, the jury returned a punitive damages verdict in favor of Gibson Bros., Inc., on the libel claim only, in the amount of $6,973,500.00.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

Judgment is rendered against Defendants and in favor of Gibson Bros., Inc. for compensatory damages for economic loss in the amount of $2,274,500.00. ($1,137,250.00 on each claim: libel and intentional interference with business relations).

Judgment is rendered against Defendants and in favor of Gibson Bros., Inc. for punitive damages in the amount of $2,274,500.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR GIBSON BROS. INC.: $4,549,000.00

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 7/17/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

JUDGMENT ENTRY ON AWARD OF ATTORNEYS' FEES & LITIGATION EXPENSES

On July 10, 2019 a hearing was held in the above matter to determine the amount of Plaintiffs' reasonable attorney fees. On June 13, 2019 the jury concluded its deliberations and returned a verdict awarding the Plaintiffs both punitive damages and reasonable attorneys' fees. The jury was instructed prior to deliberating that if attorneys' fees were awarded, the Court would determine the amount. On June 27, 2019, the Court, per the statutory damage caps, reduced the jury verdict for compensatory and punitive damages to judgment and scheduled an attorneys' fees hearing on July 10, 2019 at 1:30 PM by separate entry.

Prior to the hearing on July 10, 2019, Defendants filed a Motion for Reconsideration, asking the Court to reconsider its June 27, 2019 ruling applying the punitive and compensatory damages caps in Ohio Revised Code §§ 2315.18 and 2315.21. Defendants' Motion for Reconsideration is denied. Defendants also filed a written Renewed Motion to Continue the Hearing on Attorney Fees which they presented on the record prior to the attorney's fees hearing. The Court denied Defendants' motion to continue the hearing and cited the reasons therefore on the record.

At the hearing, Plaintiffs presented evidence in the form of the testimony and expert report of Attorney Dennis Landsdowne, the billing invoices and advanced costs invoices of the Plaintiffs' three law firms – Tzangas, Plakas, Mannos Ltd.; Krugliak, Wilkins, Griffiths, & Dougherty Co., L.P.A.; and James Taylor Co., L.P.A.; as well as the billing statements and costs advanced invoices of Defendants' counsel. Defendants presented evidence in the form of the testimony and expert report of Attorney Eric

Zagrans. Each party also briefed the issue of attorneys' fees[1] and attached several exhibits outlining their arguments. After considering all of the evidence presented and applicable precedent the Court makes the following ruling regarding Plaintiffs' attorney's fees:

I. Applicable Standard

The Supreme Court of Ohio has adopted a two-step method for determining reasonable attorney's fees. *See State ex. rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 3 (Ohio 2018) (citing *Bittner v. Tri-Cty. Toyota*, 58 Ohio St.3d 143, 145 (Ohio 1991). The analysis begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Id.* This "lodestar" number "provides an initial estimate of the value of the lawyers' services." *Id.* Next, the Court can adjust the lodestar number upward or downward by applying the factors listed in Prof. Cond. R. 1.5(a). *Id.* ("Ultimately, what factors to apply and what amount of fees to award are within [the Court's] sound discretion.").

Because of the overlap of the lodestar calculation and the Prof. Cond. R. 1.5(a), a Court, in its discretion, may choose not to adjust the lodestar number when the relevant factors are subsumed by the lodestar calculation. *See Id.* at ¶ 12 (citing *Miller v. Grimsley*, 197 Ohio App.3d 167, 173 (Ohio Ct. App. 11th Dist. 2011)).

Ultimately, there is no requirement that the fee be linked or proportionate to the underlying award. *See Welch v. Prompt Recovery Servs., Inc.*, 2015-Ohio-3867, ¶ 16 (Ohio Ct. App. 9th Dist.) ("The Supreme Court has refused to establish a rule linking reasonable attorneys' fees to the underlying monetary award."); *see also Grimsley*, at ¶16 ("Proportionality is not synonymous with reasonableness. A 'reasonable' fee must be related to the work reasonably expended on the case and not merely to the amount of the judgment awarded.").

II. Application of Law

Plaintiffs filed an Application for Attorneys' Fees and Litigation Expenses in an amount between $9.5 million and $14.5 million. This proposed amount is based on a lodestar amount of $4,855,856.00 and a multiplier of 2 to 3 times the lodestar. Plaintiffs' counsel also believes the Court should award them $404,129.22 in litigation expenses.

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[1] On July 9, 2019, Plaintiffs filed an Application for Attorneys' Fees and Litigation Expenses with exhibits, and on July 12, 2019, Defendants filed their Brief in Opposition to Plaintiff's application with exhibits. Plaintiffs' also filed a Motion for Leave to file a reply brief instanter on July 15, 2019, but that motion is hereby denied.

Defendants requested that the Court not award fees, but if it does, to award fees only related to Plaintiffs' successful claims, and to exclude any fees related to experts that were not permitted to testify at the trial. Defendants' counsel and Defendants' expert opined that a reasonable attorneys' fee would be between $2,000,000.00 and $2,250,000.00 and that the combined litigation expenses should be reduced to $241,247.84. (Ex. 2 to Defs. Brief in Opposition to Pltfs. Application).

A. Attorneys' Fees

a. Reasonable Hourly Rate

The reasonable hourly rate "[...] is the prevailing market rate in the relevant community, given the complexity of the issues and the experience of the attorney." *See Harris*, at ¶ 4 (internal citations omitted). Plaintiffs presented evidence of hourly rates for their attorneys and paralegal/support staff that ranged from $675.00 per hour on the high end and $115.00 per hour on the low end, creating an average hourly rate of $395.00 per hour. Defendants' average hourly rates for attorneys and paralegals/support staff ranged from $400.00 per hour on the high end and $100.00 on the low end, creating an average hourly rate of $250.00 per hour. The Court hereby finds that a reasonable average hourly rate in this community, given the complexity of the issues and experience of the attorneys handling the case, is $290.00 per hour.

b. Hours Reasonably Expended

Next the Court must calculate the hours reasonably expended. Hours not properly billed to a client are also not properly billed to an adversary. *See Id.* at ¶ 5. In calculating the hours reasonably expended, it follows that the Court must exclude "[...] hours unreasonably expended, e.g., hours that were redundant, unnecessary, or excessive in relationship to the work done." *Grimsley*, at ¶ 14.

In sum, Plaintiffs tallied 14,417 hours of billed hours in this matter. At the hearing Plaintiffs argued that all of their hours were reasonable, and referenced the fact that Defendants' counsel – who did not bear the burden of proof – tallied 15,626 hours (1,209 more billed hours than Plaintiffs' counsel).

Defendants argued that Defendants' counsel's hours were not relevant to the reasonableness of Plaintiffs' counsel's hours simply because Defendants' counsel was not seeking to have their attorneys' fees awarded. The Court fails to understand the distinction, particularly given the fact that both Defendants' and Plaintiffs' counsel's fees are subject to the reasonableness standard of Prof. Cond. R. 1.5(a). The Court's lodestar analysis is not limited to a comparison with Defendants' fee bills, it just serves as a helpful reference point to the lodestar analysis because Defendants' counsel prepared for and tried the same case. Defendants also asserted that Plaintiffs'

counsel's invoices utilize block-billing, a practice recently criticized by the Supreme Court of Ohio in *Rubino*. *See Rubino*, at ¶ 7 (citing *Tridico v. Dist. Of Columbia*, 235 F.Supp.3d 100, 109 (D.D.C. 2017). In *Rubino*, the Supreme Court stated that it "will no longer grant attorney-fee applications that include block-billed time entries." This appears at first glance to be a bright-line rule, but the Supreme Court's citation of *Tridico*, and the Court's later statement that "[a]pplications failing to meet these criteria [i.e. that are block-billed] *risk* denial in full", leaves the door open for a trial Court to determine, on a case by case basis and in its' discretion, whether any block-billed time renders all or part of an attorney fee unreasonable. *See Id.* (emphasis added). The concern in both *Rubino* and *Tridico* was that certain methods of block-billing – generally those that involve large chunks of time (more than 5 hours), and multiple tasks (particularly unrelated tasks) – may render the Court unable to determine the reasonableness of the hours expended on the case. *See Rubino*, at ¶¶ 6-9; *see also Tridico*, at 109-110.

But here, the Court has no such concern with Plaintiffs' hours. Though the case was not filed until November 2017, Plaintiffs' counsel's invoices reflect that this case began for Plaintiffs in April of 2017. After the complaint was filed, nearly every phase of the case was vigorously contested, including the trial which encompassed twenty-four days over the course of nearly six weeks. Plaintiffs' counsel's billing invoices are reflective of, and consistent with, a case of this magnitude.

Furthermore, the Court finds that due to the nature of claims at issue in this case, it is not possible to separate the time spent on recoverable punitive damage claims (or related litigation expenses for experts) from non-recoverable punitive damage claims. *See Bittner*, at 145. The Court therefore finds that Plaintiffs' counsel's 14,417 billable hours were hours reasonably expended on the case.

c. Calculation of the Lodestar

Applying the above, Plaintiffs' counsel's reasonable hourly rate ($290.00 per hour) times the number of hours reasonably expended (14,417) equates to a lodestar amount of $4,180,930.

d. Application of the Factors for Enhancement or Reduction

Having calculated the lodestar number, the remaining issue is whether or not the lodestar should be reduced or multiplied for enhancement based on the factors in Ohio Prof. Cond. R. 1.5(a). Ohio Prof. Cond. R. 1.5(a) provides in relevant part: the factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

The parties strongly debated the appropriateness of a multiplier. Plaintiffs' counsel believes the lodestar should be multiplied 2 to 3 times, which would result in a total fee between $8,361,860 and $12,542,790 (using the Court's lodestar amount in Paragraph C above). Plaintiffs' argument for enhancement lies in the application of factors (1), (4), (7), and (8).

Defendants believe the Court should not utilize a multiplier because the relevant 1.5(a) factors are subsumed by the lodestar analysis and based on the United States Supreme Court's decision in *Perdue v. Kenny A. ex rel Winn*, 559 U.S. 542 (2010).

In *Perdue*, the Supreme Court issued a decision that addressed lodestar fee enhancements in the context of a federal civil rights case and 42 U.S.C.A. § 1988. In *Perdue* and its progeny, the United States Supreme Court opined that the lodestar amount is presumptively reasonable and that enhancements (or multipliers) should not be based on factors that are accounted for in the lodestar analysis. *Id.* at 552-553 (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("We have established a 'strong presumption' that the lodestar represents the "reasonable" fee [...].") (internal citations omitted). Recently, the Supreme Court of Ohio accepted a limited appeal[2] on the issue of fee enhancements or multipliers in *Phoenix Lighting Group LLC v. Glenlyte Thomas Group LLC*, Ohio S.Ct. Case No. 2018-1076, 2018-Ohio-4092 (Ohio 2018). *Phoenix* has been set for an oral argument on September 10, 2019. This Court cannot speculate as to the future holding or rationale of *Phoenix*. In *Rubino*, less than one year

[2] Specifically, the proposition of law accepted for appeal states: "Because there is a strong presumption that the loadstar [sic] method yields a sufficient attorney fee, enhancements should be granted rarely and only where the applicant seeking the enhancement can produce objective and specific evidence that an enhancement is necessary to compensate for a factor not already subsumed within the Court's loadstar calculation. (Perdue v. Kenny A., ex rel. Winn, 559 U.S. 542 (2010), followed.)

ago, the Supreme Court of Ohio considered the appropriateness of a lodestar multiplier. *See Rubino*, at ¶ 12. It follows then, that the Court in its discretion can adjust the lodestar amount upward or downward, if the 1.5(a) factors are not entirely subsumed within the lodestar calculation.

Here, the Court has determined that not all of the factors are entirely subsumed within the lodestar calculation precluding enhancement. Here, factor (1) - the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, while a component of the lodestar calculation, it was not entirely subsumed by it. The case presented extraordinary challenges for the plaintiffs. Similarly, factor (7) – the experience, reputation, and ability of the lawyer or lawyers performing the services – was a component of the lodestar calculation. But when considered with other relevant factors such as factor (3) – the fee customarily charged in the locality for similar legal services, factor (4) – the amount involved and the results obtained; and factor (8) – whether the fee is fixed or contingent, the Court believes a multiplier of one and a half (1.5) times the lodestar calculation is appropriate and necessary.

The Court therefore finds that the Plaintiffs' should be awarded $6,271,395.00 in reasonable attorneys' fees.

B. Litigation Expenses

In addition to attorneys' fees, Plaintiffs' also seek $404,139.22 in litigation expenses. Defendants and their expert believe Plaintiffs' proposed expenses are excessive and that several categories are not properly includable as expenses. Defendants believe the proper amount of litigation expenses total $241,247.84. This Court agrees that the expenses should be limited, albeit not to the extent requested by Defendants. In calculating the amounts below, the Court included expenses for discovery transcripts, witness fees, focus groups, video discovery, trial transcripts, mediation services, expert witness fees, filing fees, travel for Marvin Krislov's deposition, and process server fees. The Court makes the following ruling regarding each Plaintiffs' firms' litigation expenses:

- Plaintiffs are awarded litigation expenses advanced by Krugliak, Wilkins, Griffiths, & Dougherty Co., L.P.A's in the amount of $213,835.05 (reduced from $272,645.02);
- Plaintiffs are awarded litigation expenses advanced by James N. Taylor Co., L.P.A. in the amount of $796.00;

- Plaintiffs are awarded litigation expenses advanced by Tzangas, Plakas, Mannos Ltd. in the amount of $79,505.74 (reduced from $117,081.44).

Therefore, in addition to attorneys' fees of $6,271,395.00, Plaintiffs are hereby awarded the above litigation expenses, which total $294,136.79. In addition court costs are assessed to the Defendants. Case closed.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

TO THE CLERK: THIS IS A FINAL APPEALABLE ORDER PLEASE SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 9/9/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

This matter comes before the Court upon Defendants Oberlin College and Meredith Raimondo's Ohio Civ. R. 50 Motion for Judgment Notwithstanding the Verdict filed August 14, 2019. Plaintiffs Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson filed a Response in Opposition on August 28, 2019. An Ohio Civ. R. 50(B) motion for judgment notwithstanding the verdict is reviewed under the same standard as an Ohio Civ. R. 50(A) motion for a directed verdict. *See Goodrich Corp. v. Commercial Union Ins. Co.*, 2008-Ohio-3200, ¶ 11 (Ohio Ct. App. 9th Dist.). Judgment notwithstanding the verdict is only appropriate where, when the evidence is construed most strongly in favor of the non-moving party, reasonable minds can come to one conclusion, and that conclusion is adverse to the non-moving party. *See McMichael v. Akron General Medical Center*, 2017-Ohio-7594, ¶ 10 (Ohio Ct. App. 9th Dist.); *see also Goodrich*, at ¶ 11.

The Court has reviewed and considered the parties' respective briefs and applicable precedent and, after construing the evidence most strongly in Plaintiff's favor, the Court does not find that the Defendants are entitled to judgment notwithstanding the verdict. Accordingly, Defendants' Motion for Judgment Notwithstanding the Verdict is denied.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 9/10/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS' MOTION FOR NEW TRIAL OR REMITTITUR

This matter comes before the Court upon the Defendants Oberlin College and Meredith Raimondo's Ohio Civ. R. 59 Motion, in the Alternative to Judgment Notwithstanding the Verdict, for a New Trial or Remittitur, filed August 14, 2019. The Plaintiffs Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson filed a Response in Opposition on August 28, 2019.

Ohio Civ. R. 59(A) empowers a trial court to grant a new trial when a party has been awarded "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice". *Tesar Indus. Contractors, Inc. v. Republic Steel*, 2018-Ohio-2089, ¶¶ 31 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

Having considered the parties respective briefs and arguments and applicable precedent, the Court finds that the amount awarded is not manifestly excessive nor does it appear to be influenced by passion or prejudice. Accordingly, Defendants' Motion for a New Trial or Remittitur is denied.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

ORIGINAL

ENTERED

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

FILED
LORAIN COUNTY
2020 FEB 26 P 12: 22
COURT OF COMMON PLEAS
TOM ORLANDO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

STIPULATED ORDER GRANTING:
PLAINTIFFS' MOTIONS TO AMEND COMPLAINT TO REMOVE COUNTS IV & VIII

-and-

DEFENDANTS' MOTION FOR PARTIAL DIRECTED VERDICT

This matter is before the Court to journalize rulings on three (3) oral motions that were made to and granted by the Court on May 9, 2019 (prior to trial) and June 5, 2019 (prior to closing arguments during the compensatory phase of trial).

For the first motion, Plaintiffs[1] moved the Court to amend their Complaint to remove Count VIII, which contained claims by each Plaintiff against each Defendant for civil trespass. This motion was not opposed by Defendants[2] and thus granted by the Court. (See, Tr. Trans. Vol. II, pp. 44-45). For the second motion, Plaintiffs moved the Court to amend their Complaint to remove Count IV, which contained claims by each Plaintiff against each Defendant for tortious interference with contract. (See, Tr. Trans. Vol. XIX, p. 4). Defendants did not object to this motion, and it was granted by the Court. (Id.). For the third motion, Defendants moved the Court for directed verdict on David R. Gibson's claim for tortious interference with business relationships against each Defendant and on Allyn W. Gibson's claim for tortious interference

[1] "Plaintiffs" refers to Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson.
[2] "Defendants" refers to Oberlin College & Conservatory and Meredith Raimondo.

with business relationships against each Defendant. (Id., pp. 4-5). Plaintiffs did not object to this motion, and it was granted by the Court. (Id., p. 5).

This Order journalizes the Court's May 9, 2019 and June 5, 2019 decisions granting each motion. Plaintiffs' Complaint is hereby amended and Counts IV and VIII are dismissed. In addition, the Court enters judgment for Defendants on David R. Gibson and Allyn W. Gibson's claim for tortious interference with business relationships (Count III).

IT IS SO ORDERED.

Per Civ.R. 58(B), the Clerk of Courts is directed to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal.

HON. JOHN R. MIRALDI

Approved by:

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