IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,	)	**CASE NO. 17CV193761**
	)	
Plaintiffs,	)	**JUDGE JOHN R. MIRALDI**
	)	
v.	)	
	)	
OBERLIN COLLEGE, et al.,	)	**TRIAL BRIEF OF DEFENDANTS**
	)	**OBERLIN COLLEGE AND DR.**
Defendants.	)	**MEREDITH RAIMONDO**

In accordance with this Court's Case Scheduling Order dated March 1, 2018, Defendants Oberlin College ("Oberlin College" or the "College") and Dr. Meredith Raimondo ("Dean Raimondo," and together with the College, "Defendants") hereby submit their trial brief.

I. A Succinct Statement Of Plaintiffs' Causes Of Action.

Plaintiffs David Gibson, Allyn W. Gibson, and Gibson Bros., Inc. (collectively, "Plaintiffs") asserted eight (8) claims against Defendants: (1) Libel; (2) Slander; (3) Tortious Interference with Business Relationships; (4) Tortious Interference with Contracts; (5) Deceptive Trade Practices; (6) Intentional Infliction of Emotional Distress; (7) Negligent Hiring, Retention, and Supervision; and (8) Trespass. Pursuant to the Court's ruling on April 22, 2019 (the "Ruling"), the Court entered summary judgment for Defendants as to Plaintiffs' Slander and Deceptive Trade Practices claims. The Court also entered summary judgment for Dean Raimondo as to Plaintiffs'

Negligent Hiring, Retention, and Supervision claims. As to Plaintiffs' Libel claim, the Court ruled that only the Flyer and the Student Senate Resolution remain at issue for trial.

II. A Clear Statement Of The Issues Involved.

The issues for trial are as follows:

(1) Whether Defendants libeled Plaintiffs in connection with either of the two following written documents:

> (a) the Flyer that Oberlin College students published during the off-campus November 10-11, 2016 protests; and (b) the November 10, 2016 resolution of the Oberlin College Student Senate.

(2) Whether Defendants tortiously interfered with Plaintiffs' business relationships.

(3) Whether Defendants tortiously interfered with a purported contract between Plaintiffs and Oberlin College's food vendor, Bon Appetit.

(4) Whether Defendants intentionally inflicted emotional distress upon Plaintiffs David Gibson and Allyn W. Gibson.

(5) Whether Oberlin College negligently hired, supervised, and/or retained Dean Raimondo and/or other College employees.

(6) Whether Defendants trespassed a parking lot owned by non-party Off-Street Parking.

III. Defendants' Summary Of The Facts.

Defendants incorporate by reference their Statement of Facts from the Joint Pre-Trial Statement filed on April 15, 2019, as if fully written herein.

IV. Defendants' Statement Of The Principles Of Law.

A. Defendants Did Not Libel Plaintiffs.

A cause of action for libel, or defamation in a writing, has five elements:

(1) a false statement of fact was made;
(2) the statement was defamatory;
(3) the statement was published;
(4) the plaintiff suffered injury as a proximate result of the publication; and
(5) the defendant acted with the requisite degree of fault in publishing the statement.

Grubb & Assocs. LPA v. Brown, 2018-Ohio-3526, – N.E.3d –, ¶ 9 (9th Dist.). A statement may be defamatory *per se*—which means some damages are presumed—if it tends to subject a person to public hatred, ridicule, contempt or injure one in their trade or business. *N.E. Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne*, 183 Ohio App.3d 104, 2009-Ohio-2612, 916 N.E.2d 484, ¶ 7 (9th Dist.). Even so, a plaintiff must still prove all other elements, including but not limited to, that the published statement is false and the defendant acted with the necessary degree of fault. *See id.* at ¶ 9.

Per the Ruling, the only statements at issue for trial regarding Plaintiffs' Libel claim are: (1) the Flyer that Oberlin College students prepared in connection with the November 10-11, 2016 protests; and (2) the November 10, 2016 resolution passed by the Oberlin College Student Senate, which hung in the Student Senate's display case in the College's student union. Neither of these statements are defamatory or false. And, most importantly, Defendants published neither of these statements—Oberlin College students did.

1. Defendants are not liable for the speech of Oberlin College students or the independent actions of College employees.

Colleges are not vicariously liable for the torts of their students because they do not stand *in loco parentis*, meaning that they are not "charged, factitiously, with a parent's rights, duties, and responsibilities." *State v. Abubakar,* 10th Dist. Franklin No. 11AP-440, 2011-Ohio-6299, at ¶ 9, citing *State v. Noggle,* 67 Ohio St.3d 31, 33, 615 N.E.2d 1040 (1993). Ohio courts have concluded that there is "no authority establishing that colleges and universities act 'in loco parentis' with respect to their students[.]" *A.M. v. Miami Univ.*, 2017-Ohio-8586, 88 N.E.3d 1013, ¶ 40 (10th Dist.). Stated differently, there is "no requirement of the law . . . placing on a university or its employees any duty to regulate the private lives of their students, to control their comings and goings and to supervise their associations." *Hegel v. Langsam*, 29 Ohio Misc. 147, 148, 273

N.E.2d 351 (C.P. Hamilton 1971).

Further, an employer is not liable for the "independent, self-serving conduct of its employee/agent which does not so facilitate its business," including for alleged defamatory comments made by its employees. *Corradi v. Emmco Corp.*, 8th Dist. Cuyahoga No. 67407, 1996 WL 65822, *3 (Feb. 15, 1996). An alleged defamatory statement is within the employee's scope of employment when "made in the furtherance of [the employer's] business and under the general direction of [the employer]." *Lamson v. Firestone & Rubber Co.*, 9th Dist. Summit No. 14692, 1991 WL 35098, *3 (Mar. 13, 1991).

Here, the Flyer and the Student Senate Resolution were prepared, drafted, and published by Oberlin College students. Plaintiffs can show no evidence that any College employees—including Dean Raimondo—authored, prepared, or were even aware of the Flyer or the Student Senate Resolution before they were circulated. Further, Plaintiffs cannot present any admissible evidence that an Oberlin College employee acting within the scope of his/her employment, and under direction from the College's administration, published the Flyer or Student Senate Resolution. Accordingly, Defendants cannot be liable for this alleged speech of Oberlin College students.

2. The alleged defamatory statements are protected opinions.

Under Ohio law, statements of opinion are constitutionally protected speech and cannot serve as the basis for a defamation claim. *Scott v. News-Herald*, 25 Ohio St.3d 243, 250, 496 N.E.2d 699 (1986); Section 11, Article I of the Ohio Constitution. *See also Wampler v. Higgins*, 93 Ohio St.3d 111, 752 N.E.2d 962 (2001), syllabus (extending the free speech protections of the Ohio Constitution to non-media defendants).

The test to determine whether a statement constitutes protected opinion involves examining the totality of the circumstances, which includes four factors: (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. *Vail*, 72 Ohio St.3d at 282. No single factor predominates over the others. *Id.* Courts do not examine the alleged defamatory statements in isolation because the general context in which the remarks are published may place the reader on notice that what is being read is the opinion of the writer or, in the case of slander, the speaker. *Wampler*, 752 N.E.2d at 980. In addition, truth is an absolute defense to a claim for defamation. R.C. 2739.02; *Henson v. Henson*, 9th Dist. Summit, No. 22772, 2005-Ohio-6321, ¶ 10.

Here, there are five reasons why the Flyer and the Student Senate Resolution are not defamatory. First, the term "racist" and its iterations are opinions not subject to verification. *See Condit v. Clermont Cty. Review,* 110 Ohio App.3d 755, 760, 675 N.E.2d 475 (12th Dist.).[1] Second, the entirety of the Flyer and the Resolution confirms that they contain statements of opinion and a call to action (e.g., "PLEASE STAND WITH US"; "the students of Oberlin College call on President Marvin Krislov . . . ."). *See Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶ 23 (1st Dist.) (Defendants' letter to a newspaper designed

[1] *See also, e.g., Vail*, 649 N.E.2d at 185-186 (accusations of bigotry and homophobia were non-actionable); *McNeil v. Ohio Dept. of Rehab. & Corr.*, No. 2014-00813, 2015 WL 5053726, *3 (Ohio Ct. Cl. Aug. 18, 2015) ("Indeed, the statements that plaintiff is a racist and a booger-eating Muslim do not constitute defamation per se."). Courts in other jurisdictions likewise hold that use of the term "racist" and similar name calling are protected opinions because the term "racist is hurled about so indiscriminately that it is no more than a verbal slap in the fact." *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir.1988); *see also, e.g., Forte v. Jones*, No. 1:11-cv-0718, 2013 WL 1164929, at *6 (E.D. Cal. Mar. 20, 2013) ("[T]he allegation that a person is a "racist," . . . is not actionable because the term "racist" has no factually-verifiable meaning."); *Smith v. Sch. Dist. of Philadelphia*, 112 F.Supp.2d 417, 429-30 (E.D. Pa. 2000) (statement that plaintiff was "racist and anti-Semitic" constituted protected opinion); *Ward v. Zelikovsky*, 643 A.2d 972, 983-84 (N.J. 1994) (reference to plaintiffs as anti-Semitic constituted non-actionable name-calling); *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. Richmond Cty. 1995) (allegation of racism cannot be verified as true or false and is non-actionable); *Raible v. Newsweek*, 341 F.Supp. 804, 807 (W.D. Pa. 1972) ("to call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel").

to "help publicize their boycott" is non-defamatory). Third, the Flyer was handed out during a protest, which is the quintessential venue for the expression of opinion. *Scott*, 25 Ohio St.3d at 253; *see Wampler*, 752 N.E.2d at 981; *Jorg*, 2003-Ohio-3668, ¶ 20. Fourth, neither Oberlin College nor Dean Raimondo published the Flyer or the Resolution. *See Grubb & Assocs. LPA*, 2018-Ohio-3526, ¶ 9; *Vail*, 72 Ohio St.3d at 282. And fifth, the Flyer and the Resolution restated a matter of public knowledge. *See* R.C. 2739.02; *Henson*, 2005-Ohio-6321, ¶ 10.

3. Defendants did not act with actual malice or act negligently.

In defamation claims, public figures or limited-purpose public figures, such as Plaintiffs, "must show by clear and convincing evidence that the statements were made with actual malice, that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not." *Daubenmire v. Sommers*, 156 Ohio App.3d 322, 2004-Ohio-914, 805 N.E.2d 571, ¶ 90 (12th Dist.). In contrast, "in private-figure defamation actions, where a prima facie showing of defamation is made by a plaintiff, 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. Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180-81, 512 N.E.2d 979 (1987). Here, Plaintiffs cannot prove by clear and convincing evidence that Defendants acted with actual malice or acted negligently in connection with the Flyer or Student Senate Resolution.

B. Defendants Did Not Tortiously Interfere With Any Contract.

Plaintiffs' claim is limited to their dealings with Bon Appetit, which purchased goods from Gibson's Bakery on behalf of Oberlin College at the direction of the College. A claim for tortious interference with contracts requires Plaintiffs to show: (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, 176 707 N.E.2d 853 (1999).

There are four reasons why Plaintiffs' claim fails. First, no written contract existed between Gibson's Bakery and Bon Appetit. Thus, there was no contract with which the College could possibly interfere. Second, even if a contract existed between Gibson's Bakery and Bon Appetit, no one at Oberlin College had knowledge of any such contract. Third, pursuant to the Management Agreement between Oberlin College and Bon Appetit, as principal, Oberlin College cannot interfere with any purported contract entered into by its agent, Bon Appetit. *See Boyd v. Archdiocese of Cincinnati*, 2d Dist. Montgomery No. 25950, 2015-Ohio-1394, ¶ 31; *Willoughby Hills Dev. & Distribution, Inc. v. Testa*, -- N.E.3d --, 2018-Ohio-4488, ¶ 27. Fourth, Oberlin College justifiably directed Bon Appetit to stop purchasing items from Gibson's Bakery after the protests in November 2016 to help quell student unrest and to promote a mutually beneficial resolution following the violent attack by Allyn Jr. on an unarmed student. Finally, this claim must also be dismissed as to Plaintiffs David Gibson and Allyn W. Gibson, as neither of them can identify any contract that they—as opposed to Gibson's Bakery—were parties to that has been breached.

C. Defendants Did Not Tortiously Interference With Any Business Relationships.

The elements for tortious interference with a business relationship are: "(1) a business relationship, (2) known to the tortfeasor, (3) an act by the tortfeasor that adversely interferes with that relationship, (4) done without privilege and (5) resulting in harm." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit, 2005-Ohio-4931, ¶ 88. Plaintiffs allege that Defendants interfered with Gibson's Bakery's business relationships with its customers, including Bon Appetit. Notwithstanding that Plaintiffs cannot identify anyone who stopped patronizing the Bakery, Defendants were privileged to: (i) express their opinion regarding Gibson's Bakery; and (ii) direct Bon Appetit to stop purchasing items from the Bakery. Further, this claim must be dismissed as to Plaintiffs David Gibson and Allyn W. Gibson, as any prospective business relationship would have been between Gibson's Bakery—not David Gibson and Allyn W. Gibson as individuals—and unidentified third parties.

D. Defendants Did Not Intentionally Inflict Emotional Distress Upon Plaintiffs.

A plaintiff asserting IIED must prove "(1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *Howkins v. Walsh Jesuit High School*, 9th Dist. Summit No. 26438, 2013-Ohio-917, ¶ 29 (quotation omitted). Plaintiffs cannot satisfy any element—let alone all three elements—as to their IIED claim, which is entirely based upon the allegedly defamatory statements. There are four reasons why Plaintiffs cannot prevail as to their IIED claim. First, Defendants did not cause, or even intend to cause, Plaintiffs serious emotional distress, and Plaintiffs cannot produce any contrary evidence. Second, Defendants did not engage in any "extreme and outrageous" conduct, which must be "so outrageous in character, and so extreme in degree, as to go beyond all possible

bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howkins*, ¶ 30. Third, Plaintiffs cannot show that they suffered "serious emotional distress," let alone that Defendants caused any such distress. (*See* Court's May 31, 2018 Order.) Fourth, David Gibson cannot show that he suffered any physical injuries, or that Allyn W. Gibson's identified physical injuries were caused by Defendants.

E. Oberlin College Was Not Negligent In Hiring, Retaining, Or Supervising Any College Employees, Including Dean Raimondo.

To prevail on this claim, Plaintiffs must establish:

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

Collins v. Flowers, 9th Dist. Lorain, 2005-Ohio-3797, ¶ 32 (emphasis added). Liability for negligent hiring, retention, or supervision arises only where an "employer chooses to employ an individual who 'had a past history of criminal, tortious, or otherwise dangerous conduct about which the [employer] knew or could have discovered through reasonable investigation.'" *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶ 14 (10th Dist.) (quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 61, 565 N.E.2d 584 (1991)); *see also Jevack v. McNaughton*, 9th Dist. Lorain No. 06CA008928, 2007-Ohio-2441, ¶ 21 (plaintiff must also prove that employee's acts were reasonably foreseeable to the employer).

Here, Plaintiffs cannot point to any evidence that shows Dean Raimondo, Tita Reed, Julio Reyes, or any other College employees were incompetent or that Oberlin College had knowledge of such incompetence.

F. Defendants Did Not Trespass Plaintiffs' Property.

To prove a trespass claim, a plaintiff must show that: "(1) he or she 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*, 9th Dist. Summit, 2002-Ohio-1644, at *2 (Apr. 10, 2002). Off Street Parking, Inc. ("OSP")—but not any of the Plaintiffs—owns the parking lot behind Gibson's Bakery. OSP is not a party to this lawsuit. David Gibson and Gibson Bros., Inc. may own stock in OSP, but that does not give them standing to pursue a claim on behalf of OSP because "only a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation." *Hershman's Inc. v. Sachs-Dolmar Div.*, 89 Ohio App.3d 74, 77, 623 N.E.2d 617 (9th Dist. 1993).

V. An Itemized List Of Plaintiffs' Claimed Special Damages.

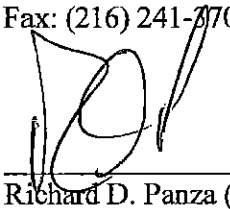
Defendants do not claim special damages.

VI. Requests For Any Special Jury Questionnaires Are To Be Shared With Opposing Counsel And A Good Faith Effort Made To Create A Joint Questionnaire. Those Questions Which Opposing Parties Have Not Agreed Upon Shall Be Noted. Absent Extraordinary Circumstances, The Court Will Limit The Questions To Those That Are Able To Be Completed With A 30 Minute Time Period.

Defendants understand that a questionnaire has been provided to the pool of jurors. Defendants intend to ask any special questions that they may have for the pool of jurors during voir dire.

Respectfully submitted,

Ronald D. Holman, II (0036776)
rholman@taftlaw.com
Julie A. Crocker (0081231)
jcrocker@taftlaw.com
Cary M. Snyder (0096517)
csnyder@taftlaw.com
William A. Doyle (0090987)
wdoyle@taftlaw.com
Josh M. Mandel (0098102)
jmandel@taftlaw.com
TAFT STETTINIUS & HOLLISTER LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
Phone: (216) 241-2838
Fax: (216) 241-3707



Richard D. Panza (0011487)
RPanza@WickensLaw.com
Matthew W. Nakon (0040497)
MNakon@Wickensaw.com
Malorie A. Alverson (0089279)
MAlverson@WickensLaw.com
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, OH 44011-1262
Phone: (440) 695-8000
Fax: (440) 695-8098

Co-Counsel for Defendants Oberlin College and Dr. Meredith Raimondo

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 25th day of April 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

Owen J. Rarric
Terry A. Moore
Matthew W. Onest
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
4775 Munson Street, NW
P.O. Box 36963
Canton, OH 44735
orarric@kwgd.com
tmoore@kwgd.com
monest@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Ayoub
Tzangas, Plakas, Mannos & Raies
220 Market Avenue South
8th Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jayoub@lawlion.com

James N. Taylor
James N. Taylor Co., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

Attorneys for Plaintiffs Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

One of the Attorneys for Defendants
Oberlin College and Dr. Meredith Raimondo