FILED
Lorain County Court of Common Pleas
4-25-19
Term Clerk of Courts

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE aka OBERLIN COLLEGE AND CONSERVATORY, et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

PLAINTIFFS' TRIAL BRIEF

Plaintiffs, David Gibson, Allyn W. Gibson, and Gibson Bros., Inc. (collectively the "Plaintiffs"), submit this Trial Brief pursuant to the Court's March 1, 2019 Jury Trial Order.

I. DISCUSSION OF CAUSES OF ACTION

A. Libel

Plaintiffs contend that Defendants, including their agents and employees, made or published, on numerous occasions over the course of almost two years, numerous written defamatory statements which have injured and damaged Plaintiffs' reputations.

A claim for libel contains five (5) 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.

Gilbert v. WNIR 100 FM, 142 Ohio App.3d 725, 735, 756 N.E.2d 1263 (9th Dist. 2001), citing *Gosden v. Louis*, 116 Ohio App.3d 195, 687 N.E.2d 481 (9th Dist. 1996). Under Ohio law,

"***[a]ny act by which the defamatory matter is communicated to a third party constitutes publication.***" *Hecht v. Levin*, 66 Ohio St.3d 458, 460, 1993-Ohio-110, 613 N.E.2d 585 (citations omitted) (emphasis added). Further, Ohio law recognizes that:

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

Cooke v. United Dairy Farmers, Inc., 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25 (citations omitted) (emphasis added). *See also, Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶ 104 (citations omitted) ("a person who requests, procures, or aids or abets in the publication of defamatory matter is liable.") In order to satisfy the 'publication' element of defamation, a plaintiff simply needs to show <u>any</u> intentional or negligent act which communicates the defamatory matter to a third party. *Gilbert*, 142 Ohio App.3d at743, citing 3 Restatement of the Law 2d, Torts (1965), Section 577(1) ("**<u>Any act</u>** by which the defamatory matter is communicated to a third party constitutes publication.") (Emphasis added.); *see Gosden*, 116 Ohio App.3d 195. The publishing act need only communicate the defamatory matter to one person. *Gilbert*, 142 Ohio App.3d at 743.

Because Plaintiffs are private figures, Ohio and constitutional law only require Plaintiffs to prove that Defendants negligently published defamatory material. *See, Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 178, 512 N.E.2d 979 (1987); *see also, Aronson v. City of Akron*, 9th Dist. No. CA 19816, 2001 WL 326875 at *5 (April 4, 2001) (emphasis added) ("the common law tort of defamation is generally considered an intentional tort ... [but] [t]o be sure, when examining the elements of defamation, ***it is clear that a person can defame another through negligent conduct.***") Furthermore, Defendant Oberlin College is responsible for the actions of its employees undertaken during the course and scope of their employment under the

doctrine of respondeat superior. *Osborne v. Lyles*, 63 Ohio St.3d 326, 330, 587 N.E.2d 825 (1992) (citations omitted); *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991) (citations omitted).

The evidence to be presented at trial will demonstrate that Defendants, including several employees who were acting within the scope of their employment, made or published several written statements which defamed Plaintiffs. The defamatory statements include a flyer which stated that Plaintiffs were racists and has a long account of racial profiling and racial discrimination, which was initially published during the November 10-11, 2016 protests in front of Gibson's Bakery. The evidence will also demonstrate that Defendants aided and abetted others in the publication of several written defamatory statements by providing substantial assistance to those persons.

Another issue to be presented during this trial is whether Defendants committed multiple occurrences of libel. This issue is relevant to the Court's future analysis under Ohio's statutory caps on noneconomic damages. Revised Code Section 2315.18 limits non-economic damages that may be recovered in a tort action. R.C. 2315(B)(2), with limited exceptions,[1] provides that compensatory damages for noneconomic loss that are recoverable in a tort action to recover damages for injury or loss to person or property shall not exceed the greater of $250,000 or an amount that is equal to three times the economic loss (determined by the trier of fact) up to a maximum of $350,0000 for each plaintiff in that tort action or a maximum of $500,000 for *each occurrence* that is the basis of the tort action. "Noneconomic loss" is defined as "nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action,

[1] The cap does not apply to noneconomic losses for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system or to permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities. R.C. 2315.18 (B)(3)

including, but not limited to pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss." R.C. 2315.18(A)(5).

Revised Code Section 2315.18 defines "occurrence" to mean "all claims resulting from or arising out of any person's bodily injury." There is very little case law on determining whether there are multiple occurrences for purposes of R.C. 2315.18. However, in 2016, the Ohio Supreme Court gave some guidance on what constitutes multiple occurrences in a case where it determined that there was only one occurrence for purposes of R.C. 2315.18. In *Simpkins v. Grace Brethren Church of Delaware, Ohio*, the plaintiffs alleged that a minor plaintiff suffered injuries as a result of two occurrences—oral penetration and vaginal penetration—and that a separate $350,000 damage cap applies to each occurrence. 149 Ohio St. 3d 307, 2016-Ohio-8118 (2016). In reviewing this issue the Ohio Supreme Court determined that the plain language of R.C. 2315.18(B)(2) required it to reject that argument that there were two occurrences. *Id.* at ¶ 53.

The Ohio Supreme Court reviewed the definition of occurrence in R.C. 2315.18(A)(5). The Court determined that even if the vaginal and oral penetrations gave rise to separate tort claims, under R.C. 2315.18, "they would nevertheless both be part of a single ***occurrence*** under 2315.18—as claims arising out of Simpkins's indivisible injury." *Id.* at ¶ 56 (emphasis added). The Court then analyzed that the two penetrations "occurred within a short period of time, in a confined space, without intervening factors, and there is no evidence that Williams's separate criminal acts affected Simpkins differently. Dr. Smalldon did not attribute separate injury to the separate incidents of penetration and he opined that Simkins's posttraumatic stress disorder is

direct result 'of *the incident.*" It concluded that for these reasons, a single damage cap under R.C. 2315.18(B) was appropriate. *Id.* ¶¶ at 56-57.

Thus, although the Ohio Supreme Court did not set out a bright line test for determining whether there are multiple occurrences, to show separate occurrences to obtain separate noneconomic damage caps under R.C. 2315.18, a jury should examine, at the minimum, all of the factors identified by the Ohio Supreme Court – whether the instances did not occur within a short time period, in a confined space, whether there were intervening factors, and whether the plaintiff was affected differently by the separate occurrences.

The following issues are present with regard to Plaintiffs' libel claim: (1) did Defendants, or their agents or employees, make or publish one or more false written statements of fact about the Plaintiffs?; (2) were Defendants, or agents or employees, acting negligently when they made or published the false statement or statements?; (3) if Defendants' agents or employees made or published the false statement or statements, were they acting within the scope of their employment?; (4) did the false statement or statements injure Plaintiffs' business, trade, or profession?; (5) did the false statement or statements proximately cause Plaintiffs' to suffer special damages; and (6) were each of the false statements separate occurrences for purposes of R.C. 2315.18[2]?

B. Tortious Interference with Contract

Plaintiffs contend that Defendants tortuously interfered with one or more of Plaintiffs' contracts, including a contract between Plaintiffs and Bon Appetit Management Company ("Bon

[2] Under R.C. 2315.18(D), the jury in a jury trial is required to return a general verdict accompanied by answers to interrogatories, that must specify all of the following: (1) the total compensatory damages recoverable by the plaintiff; (2) the portion of the compensatory damages that represents damages for economic loss; and (3) the portion of the compensatory damages that represents damages for noneconomic loss. Thus, for purposes of this review, the jury is to decide whether each libelous act constitutes a separate "occurrence," and the Court is to determine whether the jury's award of noneconomic damages, if any, complies with the statutory caps.

Appetit"). The evidence will demonstrate that for years Bon Appetit would routinely order a significant amount of baked goods and other prepared products, such as pizza dough, from Plaintiffs. Bon Appetit would place a daily "standing order" for the entire year. While this order may have been occasionally "tweaked," both Bon Appetit and Gibson's Bakery understood and agreed that Gibson's Bakery would be providing Bon Appetit with orders on a daily basis. Bon Appetit would order those goods so that Bon Appetit could meet its own commitments to Defendant Oberlin College. Bon Appetit would pay the invoices submitted by Plaintiffs. In November of 2016, Defendants demanded that Bon Appetit stop honoring its standing orders with Gibson's Bakery, which Bon Appetit did.

"The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260, 707 N.E.2d 853, paragraph one of the syllabus.

The following issues are present with regard to Plaintiffs' tortious interference with contract claim: (1) did Plaintiffs and Bon Appetit have a contract in November of 2016?; (2) did Defendants, without justification, procure Bon Appetit's breach of that contract?; (3) did Defendants' actions result in damages to the Plaintiffs?

C. <u>Tortious Interference with Business Relations</u>

Tortious interference with business relationship "'is similar [to a tortious interference with contract claim] but occurs when the result of the interference is not breach of contract, but that a third party does not enter into or continue a business relationship with the plaintiff.'" *Deems v. Ecowater Sys.*, Inc., 9th Dist. Summit No. 27645, 2016-Ohio-5022, ¶ 26, quoting

Magnum Steel & Trading, L.L.C. v. Mink, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431.

The following issues are present with regard to Plaintiffs' tortious interference with business relationship claim: (1) did Plaintiffs and Bon Appetit have a business relationship in November of 2016?; (2) did Defendants, without justification, convince Bon Appetit to cease its business relationship with Plaintiffs or to not enter into a future business relationship with Plaintiffs?; (3) did Defendants' actions result in damages to the Plaintiffs?

D. Intentional Infliction of Emotional Distress

Plaintiffs contend that Defendants intentionally caused Plaintiffs to suffer severe, emotional distress. Under Ohio law, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), abrogated on other grounds, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, syllabus. The Ohio Supreme Court, citing the Restatement 2d of Torts, defined "extreme and outrageous conduct" as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager* at 375 [citations omitted].

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

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

> (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress.

Phung v. Waste Mgt., Inc., 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994) [citations omitted]. In Ohio, a defendant is civilly liable for tortious conduct of another where the defendant knows of the tortious conduct and provides support for the conduct. *See, e.g. Kelley v. Buckley*, 193 Ohio App.3d 11, 2011-Ohio-1362, 950 N.E.2d 997, ¶ 70 (8th Dist.) [citations omitted].

Ohio law provides that "lay witnesses who were acquainted with the plaintiff, may testify as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff." *Paugh v. Hanks*, 6 Ohio St.3d 72, 80, 451 N.E.2d 759 (1983). While medical experts may be helpful in some cases, they are never required to support a claim for IIED. *See, Oyster v. S.M.E. Cement Co.*, 5th Dist. Stark Nos. CA-7098 & CA-7207, 1987 WL 27834 at *3 (Nov. 30, 1987) [citations omitted] ("Contrary to appellants' assertions, expert testimony is not a prerequisite to prove the severity of the emotional distress.").

There is substantial evidence showing that Defendants either knew or should have known that their conduct would cause Plaintiffs' serious emotional distress. Defendants not only participated in the defamatory protests of Gibson's Bakery but also aided and abetted the protesters in their defamatory conduct, which includes shouts "Fuck Gibson's" and "Gibson's is racist" and verbal assaults against Gibson's Bakery employees by calling them bigots, racists, and displaying the middle finger while restricting access to the bakery and banging on the windows of the bakery. There is no question that hundreds of individuals protesting a small family business for two straight days because an employee of the business exercised his statutory rights is outrageous and extreme. There is substantial lay witness testimony from individuals acquainted with David and Allyn W. Gibson supporting the severe emotional distress endured by David and Allyn W. Gibson. Further, David Gibson testified that as a result of the protests and

defamation, he experienced a racing heart, he was having panic attacks, and that he has been forced to withdraw from his usual activities due to the stress and anxiety and that he had seen a psychologist and a psychiatrist to address the severe stress that he has endured since the Defendants' defamation began.

The following issues are present with regard to Plaintiffs' intentional infliction with emotional distress claim: (1) did Defendants intentionally or recklessly cause Plaintiffs serious emotional distress; (2) was Defendants' conduct extreme and outrageous; and (3) was Defendants' conduct the proximate cause of Plaintiffs' serious emotional distress?

E. Negligent Hiring, Retention and Supervision

Plaintiffs contend that Defendant Oberlin College injured Plaintiffs through its negligent hiring, retention, and/or supervision of its employees. Specifically, the evidence will show that Defendant Oberlin failed to follow its own student policies, permitted its own employees to violate those policies, and permitted numerous employees to libel Plaintiffs.

A claim of negligent hiring, retaining, and/or supervising employees requires proof of the following:

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

Evans v. Ohio State Univ., 112 Ohio App.3d 724, 739, 680 N.E.2d 161 (10th Dist.1996), quoting *Ruta v. Breckenridge–Remy Co.*, 6th Dist. Erie No. E–80–39, 1980 WL 315648 (Dec. 12, 1980), *aff'd*, 69 Ohio St.2d 66, 430 N.E.2d 935 (1982); *see Collins v. Flowers*, 9th Dist. Lorain No. 04CA008594, 2005-Ohio-3797, ¶ 32, quoting *Evans*, 112 Ohio App.3d 724.

The "incompetence" element "relates not only or exclusively to an employee's lack of ability to perform the tasks that his or her job involves. It also relates to behavior while on the job inapposite to the tasks that a job involves and which materially inhibits other employees from performing their assigned job tasks." *Harmon v. GZK, Inc.*, 2nd Dist. Montgomery No. 18672, 2002-Ohio-545.

Oberlin College was certainly negligent in *supervising* and *retaining* several of its employees, including Dean Raimondo, Tita Reed, and Julio Reyes. These individuals orchestrated and implemented the defamation campaign against Plaintiffs. Dean Raimondo, along with numerous other employees under her control and supervision, distributed the defamatory Flyer. There is no evidence that Defendant Oberlin College took any steps to stop this defamatory behavior, behavior that violates the very rules that Defendant Oberlin College imposes, at least on paper, on its students. In fact, one Oberlin College professor who was present during those protest said that she would not have distributed the defamatory Flyer because it perpetrated lies and was beyond the pale.

The following issues are present with regard to Plaintiffs' negligent hiring, retaining, and/or supervision claim: (1) were any of Defendant Oberlin College's employees who are found to have tortiously harmed Plaintiffs incompetent at the time of the tortious conduct?; (2) was Defendant Oberlin College aware, through either actual or constructive knowledge, of that incompetence?; (3) was Defendant Oberlin College negligent in hiring, retaining, or supervising the employees?; and (4) was Defendant Oberlin College's negligence the proximate cause of Plaintiffs' injuries?

F. Trespass

Plaintiffs contend that Defendants intentionally interfered with Plaintiffs' right to possess certain parking spots relating to Gibson's Bakery. Specifically, the evidence will show that Defendant Oberlin College's employees routinely use the parking spots solely dedicated to customers of local businesses including, Gibson's Bakery. Furthermore, Defendant Oberlin College has used large construction vehicles to block access to and use the parking lot.

Under Ohio law, a trespass occurs when one party invades the possessory interest in property of another party. *City of Kent v. Hermann*, 11th Dist. Portage No. 95-P-0042, 1996 WL 210780, *2 (Mar. 8, 1996); *Columbus v. Parks*, 10th Dist. Franklin No. 10AP-574, 2011-Ohio-2164, ¶ 16. A plaintiff need not prove that its title to property was invaded or in any way impacted by the trespass. *Id.*

A tenant, like Gibson Bros., Inc., has a possessory interest in the leased property. *City of Kent*, 1996 WL 210780 at *2 ("Under applicable property laws, the owner sacrifices his possessory interests in the property to the renter..."); *Columbus*, 2011-Ohio-2164, ¶ 16 (acknowledging that a landowner "sacrifices" a possessory interest "to a tenant"; *State v. Smith*, 2nd Dist. Montgomery No. 25048, 2012-Ohio-4861, ¶ 15 (acknowledging that "the tenant of leased property has the right to the exclusive possession of the premises."); *Blood v. Hartland Twp.*, 6th Dist. Huron No. H-040032, 2005-Ohio-3860, ¶¶ 32-34 (July 29, 2005) (holding that a tenant had standing to pursue a trespass claim for invasion on leased premises); *Rowland v. Rowland*, 1837 WL 5, *2 (Dec. 1837) (same); *P.N. Gilcrest Ltd. Partnership v. Doylestown Family Practice, Inc.*, 9th Dist. Wayne No. 10CA0035, 2011-Ohio-2990, ¶ 8 ("Moreover, the Supreme Court expressly stated in *Rowland* that, where there is a tenant in actual possession, as is the case here, 'merely the tenant alone can have an action' for trespass.")

The following issues are present with regard to Plaintiffs' trespass claim: (1) did Defendants interfere with Plaintiffs' possessory rights in the parking lot located adjacent to Gibson's Bakery?

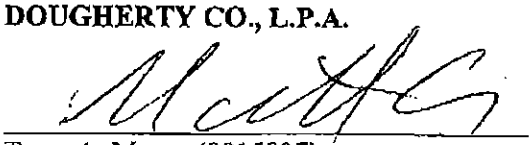
II. DISCUSSION OF SPECIAL DAMAGES

As a direct and proximate result of Defendants' tortious conduct, Plaintiffs have suffered special damages as follows: (1) $5,317,100.00, representing Economic Damages Relating to Lost Profits; and (2) $13,462,000.00, representing Economic Damages Relating to Reputational Repair Gibson's Bakery/Family Brand Mitigation / Recovery Plan.

DATED: April 25, 2019

Respectfully submitted,

KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.



Terry A. Moore (0015837)
Owen J. Rarric (0075367)
Matthew W. Onest (0087907)
4775 Munson Street, N.W.
P.O. Box 36963
Canton, Ohio 44735-6963
Telephone: (330) 497-0700
Facsimile: (330) 497-4020
Email: tmoore@kwgd.com
orarric@kwgd.com
monest@kwgd.com

-and-

TZANGAS | PLAKAS | MANNOS | LTD

Lee E. Plakas (0008628)
Brandon W. McHugh (0096348)
Jeananne M. Ayoub (0097838)
220 Market Avenue South
Eighth Floor
Canton, Ohio 44702
Telephone: (330) 455-6112

Facsimile: (330) 455-2108
Email: lplakas@lawlion.com
jayoub@lawlion.com
bmchugh@lawlion.com
-and-

JAMES N. TAYLOR CO., L.P.A.

James N. Taylor (0026181)
409 East Avenue, Suite A
Elyria, Ohio 44035
Telephone: (440) 323-5700
Email: taylor@jamestaylorlpa.com

Counsel for Plaintiffs

PROOF OF SERVICE

A copy of the foregoing was served on April 25, 2019, pursuant to Civ.R. 5(B)(2)(f) by sending it by electronic means to the e-mail addresses identified below:

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Josh M. Mandel
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
E: rholman@taftlaw.com;
jcrocker@taftlaw.com;
csnyder@taftlaw.com;
wdoyle@taftlaw.com;
jmandel@taftlaw.com
Attorneys for Defendants

Richard D. Panza
Matthew W. Nakon
Malorie A. Alverson
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, Ohio 44011
E: RPanza@WickensLaw.com
MNakon@WickensLaw.com
MAlverson@WickensLaw.com
Attorneys for Defendants

Matthew W. Onest (0087907)
Counsel for Plaintiffs