

FILED
LORAIN COUNTY
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COURT OF COMMON PLEAS
TOM ORLANDO

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs,

vs.

OBERLIN COLLEGE, et al.,

Defendants.

CASE NO. 17CV193761

JUDGE: HON. JOHN R. MIRALDI

MAGISTRATE: HON. JOSEPH BOTT

**PLAINTIFFS' BENCH BRIEF: R.C. 2315.21 IS UNCONSTITUTIONAL
"AS APPLIED" IN THE CASE AT HAND¹**

I. INTRODUCTION

A Lorain County jury unanimously determined that Defendants Oberlin College and Vice President and Dean of Students Meredith Raimondo acted with the requisite malice in causing damage to Plaintiffs² through their libel and intentional infliction of emotional distress. The jury awarded Plaintiffs compensatory damages in the total amount of \$11,074,500 and awarded punitive damages to the Plaintiffs in the total amount of \$33,223,500.

¹ Plaintiffs have separately filed two briefs discussing how the punitive damages cap should be applied in this case. The purpose of the brief herein is to discuss the fact that the Court *should not apply* the punitive damages cap to the facts of this unique case because to do so would violate the Ohio Constitution.

² "Plaintiffs" means Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson.

The caps in R.C. 2315.21 are unconstitutional as applied to this case, and therefore, Plaintiffs are entitled to the total punitive damage amounts awarded by the jury, without any application of the caps. Therefore, the Court should not follow the calculation of punitive damages set forth in Defendants' June 21, 2019 *Motion to Cap Compensatory and Punitive Damages*.

II. LAW AND ARGUMENT

The Ohio Supreme Court in *Arbino v. Johnson & Johnson* clearly articulated that, under Ohio law, an award of punitive damages is to punish reprehensible conduct and to deter its future occurrence. *Arbino v. Johnson & Johnson*, 116 Ohio St3d 468, 488, 2007-Ohio-6948, ¶ 97. In awarding punitive damages, the factors the trier of fact should consider include, without limitation, the following: the nature of the conduct that resulted in the injury, the financial condition of the defendant(s), the amount necessary to deter future similar conduct, the relationship between the parties, the probability of reoccurrence unless the conduct is deterred, the reprehensibility of the conduct, the removal of financial profit so that future conduct results in a loss,³ whether the conduct involved repeated actions or was an isolated incident; whether the harm was a result of intentional malice, trickery or deceit, or mere accident.

Yet, under R.C. 2315.21, the only factor that can be considered in capping punitive damages is the amount of compensatory damages. R.C. 2315.21(D) provides in relevant part:

(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

³ See, e.g., *Wightman v. Consol. Rail Corp.*, 94 Ohio App.3d 389, 407-08, 640 N.E.2d 1160 (6th Dist.1994); *Angus v. Ventura*, 9th Dist. Medina No. 2740-M, 1999 WL 33287, *4; *Smith v. Gen. Motors Corp.*, 168 Ohio App.3d 336, 859 N.E.2d 1035 (2nd Dist.2006).

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) 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* from that defendant, as determined pursuant to division (B)(2) or (3) of this section. (Emphasis added.)

Mechanical application of R.C. 2315.21(D) does not take into consideration the following factors: the Defendants’ malicious conduct, the amount necessary to deter Defendants’ future conduct, and the amount necessary to punish Defendants. These factors are not considered even though common law has made such factors the guideposts for awarding and analyzing punitive damages. And, as will be discussed in greater detail below, limiting the analysis to a matter of simple arithmetic would be inappropriate in this unique case because it would not reasonably serve the interests advanced by R.C. 2315.21.

A. As applied to the facts in the case at hand, R.C. 2315.21 violates the due course of law/due process clause of the Ohio and United States Constitutions.

In *Arbino*, the Ohio Supreme Court found that R.C. 2315.21 was constitutional *on its face*. However, the Court left open “as applied” challenges to the constitutionality of this statute. As applied to the facts of the matter at hand, the caps on punitive damages in R.C. 2315.21(D)(2) violate the Plaintiffs’ right to due course of law under Article I, Section 16 of the Ohio Constitution.⁴ When reviewing R.C. 2315.21 on due process grounds, courts must apply the rational basis test. *Arbino*, 116 Ohio St.3d 468, ¶¶ 49, 99. Under the rational basis test, a statute must (1) bear a real and substantial relation to the public health, safety, morals or general welfare

⁴ As explained by the Ohio Supreme Court in *Arbino*, this “due course of law” provision is equivalent to the “due process of law” protections under the United States Constitution. *Id.* at ¶ 48

of the public, and (2) be neither unreasonable nor arbitrary. *Id.* at ¶ 49. The statute fails both prongs when applied to the facts at hand.

In *Arbino*, the Ohio Supreme Court discussed the General Assembly’s reasons for enacting punitive damages caps:

The General Assembly cited several studies and other forms of evidence upon which it relied in concluding that the civil justice system as it then existed was harming the state's economy. S.B. 80, Section 3(A)(1) through (3), 150 Ohio Laws, Part V, 8024. It then reviewed punitive damages in view of this evidence and concluded that such awards were part of the problem. Section 3(A)(4)(a) and (b). **The General Assembly noted that while punitive damages serve the purpose of punishing tortfeasors for certain wrongful actions and omissions, the “absence of a statutory ceiling upon recoverable punitive or exemplary damages in tort actions has resulted in occasional multiple awards * * * that have no rational connection to the wrongful actions or omissions of the tortfeasor.”** Section 3(A)(4)(b)(ii). The uncodified section further explained the basis for limitations on awards against small employers and stated that the ratio used for the limitation derived from recent United States Supreme Court precedent. Section 3(A)(4)(b) and (c), 150 Ohio Laws, Part V, 8025. (Emphasis added.)

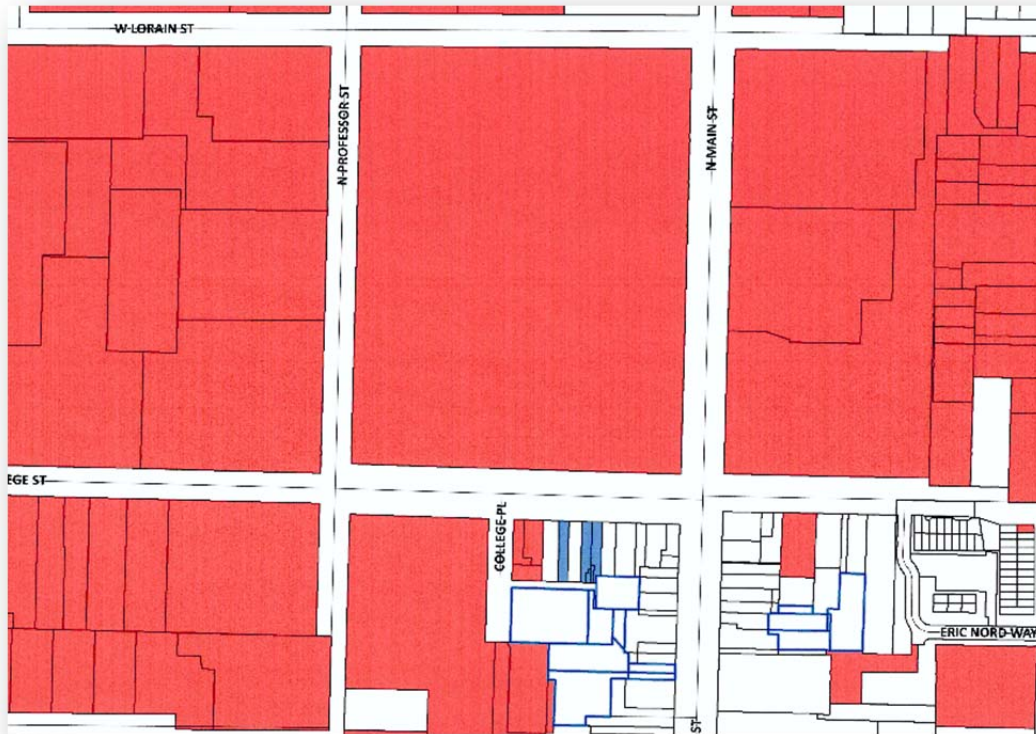
Id. at ¶¶ 100-101. Thus, the legislative purpose behind R.C. 2315.21 was to maintain focus on keeping punitive damage awards rationally connected to the defendant’s wrongful conduct. It cannot be said that the statute was supposed to remove any analysis of whether the particular amount of punitive damages is sufficient to deter the defendant from future conduct or sufficient to place a safeguard between the defendant, and other potential tortfeasors, and society at large. Further, *Arbino* acknowledged that if a double-the-compensatory award does not punish the defendant, then applying the caps to that particular case would be arbitrary and unreasonable. *Id.* at ¶ 103.

1. **As applied to the facts in the case at hand, application of R.C. 2315.21 would not bear a real and substantial relation to the general welfare of the public.**

In the instant case, R.C. 2315.21 is unconstitutional, as applied, and the punitive damages in the amount of \$33,223,500, as awarded by the jury, should not be reduced. Application of the

caps to the facts of this case does not bear a real and substantial relation to the public health, safety, morals or general welfare of the public. As was discussed at length during trial, Defendant Oberlin College wields tremendous power in its community.

Oberlin College possesses net assets in excess of \$1 billion. *Burns v. Prudential Securities, Inc.*, 3rd Dist. No. 9-03-49, 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621, ¶ 146 (acknowledging that a defendant's net worth is a proper factor to be considered when deciding the reasonableness or excessiveness of a punitive damages award); *Weaver v. Fenwick*, 9th Dist. Summit No. 17995, 1997 WL 416323, *5 (same); *LeForge v. Nationwide Mut. Fire Ins. Co.*, 82 Ohio App.3d 692, 702, 612 N.E.2d 1318 (12th Dist.1992) (same). Moreover, the College owns a significant portion of the downtown real estate in Oberlin:



[A snapshot from Plaintiffs' Trial Exhibit 457]. In fact, Assistant Dean Chris Jenkins openly acknowledged the College's view that the properties located adjacent (except conveniently Gibson's Bakery) to Tappan Square are college-properties:

15 Q. And if protesters wanted to make copies of
16 documents, your office would have been one of the
17 closest on-campus locations to do so; is that right?
18 A. I believe there's also a copier in Ben
19 Franklin's, but it would be relatively close.
20 Q. And Ben Franklin's isn't on campus, is it?
21 A. We think of that entire block as being more or
22 less on campus.
23 Q. Including Gibson's Bakery?
24 A. No, not including Gibson's Bakery, but that area
25 is campus area.

[May 30, 2019 Trial Trans., p. 88].

As a result, the Court must look beyond the text of R.C. 2315.21 to determine which punitive damages award (the jury award or the proposed statutorily-capped award) actually bears a real and substantial relation to the public health, safety, morals or general welfare of the public. Plaintiffs submit that, given the unique facts of this case, namely a billion-dollar-institution versus a small business, the Court should apply the jury award of \$33,223,500. To apply a statutorily-capped punitive award to the facts of this case would not serve the public welfare because it would, in effect, permit Oberlin College to consider its tortious conduct as nothing more than the cost of business.

2. **As applied to the facts in the case at hand, application of R.C. 2315.21 is arbitrary and/or unreasonable because there is no rational connection between the amount of punitive damages and the Defendants' wrongful conduct.**

Moreover, application of the punitive caps in this case would be arbitrary or unreasonable because it would remove any rational connection between: (a) the amount of the punitive damages award and (b) Defendants' tortious conduct or Defendants' financial wherewithal for purposes of arriving at a sufficient deterrent and punishment. In *Arbino*, the Ohio Supreme Court clearly identified that the purpose of punitive damages is not to compensate a plaintiff, but to punish the guilty, deter future misconduct, and demonstrate society's disapproval of the defendant's actions. *Id.* at ¶ 97; *see Rieger v. Giant Eagle, Inc.*, 8th Dist. No. 105714, 2018-Ohio-1837, 103 N.E.3d 851, ¶ 19, appeal allowed sub nom. *Reiger v. Giant Eagle, Inc.*, 153 Ohio St.3d 1474, 2018-Ohio-3637, 106 N.E.3d 1260, ¶ 19 (2018), and appeal allowed, 154 Ohio St.3d 1432, 2018-Ohio-4670, 111 N.E.3d 1193, ¶ 19 (2018). When dealing with punitive damages, the societal element, i.e. society's disapproval of the defendant's conduct, is the most important. *Sivit v. Village Green of Beachwood, L.P.*, 8th Dist. No. 103340, 2016-Ohio-2940, 65 N.E.3d 163, ¶ 53, *quoting Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121. The Ohio Supreme Court has held that "a punitive damages award is more about the defendant's behavior than the plaintiff's loss," and that "[t]he focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant." *Dardinger*, 98 Ohio St.3d at 102, *citing Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546 (1999).

However, as the statutory language quoted above shows, R.C. 2315.21 only permits doubling the amount of compensatory damages. It ignores all other factors applicable to punitive

damages awards, including how best to serve society's disapproval of Defendants' tortious conduct. Critically, doubling the amount of compensatory damages on the unique facts at hand removes all connection to Defendants' wrongful conduct because it has no relationship to whether the punitive damage amount in fact is an amount that will actually punish Defendant Oberlin College or sufficiently deter it. Defendants have proclaimed that they did no wrong, which undoubtedly signals to Plaintiffs that Defendants will continue forward with their goal of putting Plaintiffs out of business and out of work. Defendants' own expert witness testified about this, stating that Plaintiffs should close their five-generation business and go out and get a job:

15	Q.	Right. So summarizing your position, if they
16		accept your analysis, the 134-year-old bakery closes up
17		shop, takes \$35,000, and they go out and find other
18		jobs?
19	A.	Yes.

[May 31, 2019 Trial Transcript, p. 83].

Capping punitive damages to two time compensatory damages is arbitrary *and* unreasonable because it fails to set forth sufficient safeguards necessary to protect Plaintiffs and other members of society from Defendants' bulldozer mentality. Likewise, calculating the punitive damages through mere arithmetic on the facts at hand removes all connection to the critical factor of whether the award is sufficient to deter the conduct of the Defendants. In fact, when discussing the unique facts of this case, we know that using arithmetic will not deter Defendants from committing future conduct similar to that in this case. As the Court knows, immediately after the jury issued their verdict against Defendants on issues of compensatory damages, Defendants told the world that they did nothing wrong:

4 A. Yes. Our position has been consistent, and we
5 respect the outcome of the jury. And I think it would
6 be disrespectful to this Court, to the parties, and to
7 the jury for us to indicate that we had a position and
8 that we believed in that position and we have wasted
9 this jury's time by not articulating that position.

10 Q. **The position following the jury verdict clearly**
11 **said that Oberlin College did not agree -- "regretted**
12 **that the jury did not agree with the clear evidence our**
13 **team presented." That was one pronouncement publicly,**
14 **correct?**

15 A. Correct.

16 Q. **And in addition, Oberlin College, to thousands**
17 **of people in the public domain, said that neither**
18 **Oberlin College nor Dean Raimondo defamed a local**
19 **business or its owners, correct?**

20 A. Correct.

21 Q. **And it said that they never endorsed statements**
22 **made by others, correct?**

23 A. That is also true.

[June 12, 2019 Trial Transcript, p. 140].

Indeed, the facts necessary to determine an amount of punitive damages that will actually meet the goals of deterring and punishing Defendants are arbitrarily and unreasonably removed from consideration. Applying the statute to the facts of this unique case prohibits considering numerous important facts, including without limitation the following: (a) the Defendants' malice; (b) whether the amount is sufficient to deter Defendants who have publicly repudiated the jury verdict and proclaimed that they did not libel or otherwise injure the Plaintiffs; (c) whether the resulting amount is an amount sufficient to punish Defendants based on the actual financial

wherewithal and condition of Defendants; and (d) Defendants' position of power in the community. In sum, on the facts at hand, applying R.C. 2315.21 would not serve the purpose of connecting punishment and deterrence effects to the actual conduct of Defendants. Instead, R.C. 2315.21 offers nothing more than a mechanical doubling of the compensatory damages awarded by the jury. As a result, application of the punitive caps in R.C. 2315.21 to the unique facts of this case would be arbitrary and/or unreasonable and is therefore, unconstitutional under Article I, Section 16 of the Ohio Constitution.

B. As applied to the facts in the case at hand, the jury's award of \$33,223,500 is within a constitutionally acceptable range and is not excessive.

The limits on punitive damages set forth in R.C. 2315.21(D)(2) were based on guidance provided by the United States Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) and *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). *Rieger*, 103 N.E.3d at 859. Three guideposts for determining whether punitive damages are excessive have been set forth:

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 860. The Ohio Supreme Court instructed lower courts to apply these principles when reviewing punitive damage awards. *Barnes v. Univ. Hosps. of Cleveland*, 119 Ohio St.3d 173, 181, 2008-Ohio-3344, 893 N.E.2d 142 (2008).

In the instant case, the jury's award is within a constitutionally acceptable range and is not excessive, and is within the confines of the legislative purpose of punitive damages, which is to deter future similar conduct, and punish the Defendants' malicious actions. The Ohio Supreme Court, in cases such as *Wightman* in 1999 and *Dardinger* in 2002, has consistently upheld large punitive damage awards and has found a ratio of compensatory damages to have less relevance

based on the egregiousness of the defendants' conduct and the likelihood that deterrence to prevent future similar conduct is necessary. The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as that that defendant. The law requires an effective punishment. *Dardinger*, 98 Ohio St.3d 77, ¶ 178. In *Wightman*, despite a 6250:1 damages ratio, \$15,000,000 was necessary to "sufficiently punish Conrail and create a positive inducement to change its practices." *Wightman*, 86 Ohio St.3d at 438-39. In *Dardinger*, \$30 million in punitive damages was likewise appropriate to meet these goals even when the ratio between punitive damages and compensatory damages was 3:1. 98 Ohio St.3d 77 at ¶¶ 180-183. Moreover, like Conrail's corporate attitude that needed changed in *Wightman*, Oberlin College's institutional attitude reflects that it still refuses to accept responsibility for its conduct. Indeed, Oberlin College's conduct needs to be deterred to prevent future similar harms to businesses in the community. Based on the foregoing, the \$33 million punitive damage award is not excessive under Ohio punitive damages jurisprudence.

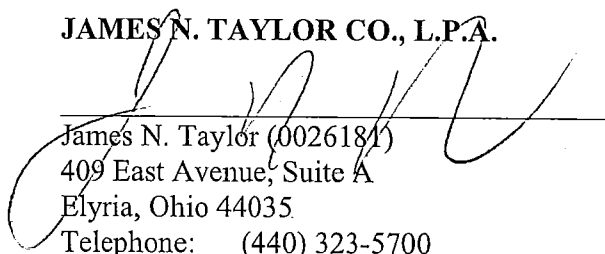
III. CONCLUSION

Therefore, based on the foregoing, the Court should not apply the caps in R.C. 2315.21, but should apply the compensatory and punitive damages awarded by the jury.

DATED: June 26, 2019

Respectfully submitted,

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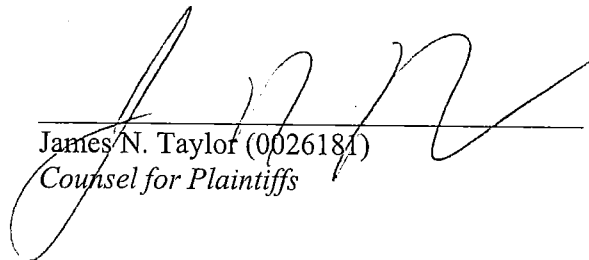
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