

**ORIGINAL**



FILED  
LORAIN COUNTY

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**LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO**

CURT OF COMMON PLEAS  
TOM ORLANDO

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

Date 5/10/19

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 TO EXCLUDE THE TESTIMONY  
OF PLAINTIFFS' EXPERT WITNESS RICHARD MAGGIORE**

Defendants have filed a motion to exclude the testimony of Plaintiffs' expert witness, Richard Maggiore. Mr. Maggiore is affiliated with Innis-Maggiore, an advertising agency in the Akron-Canton Area. Mr. Maggiore is not an accountant or an economist. A review of Mr. Maggiore's testimony at the motion hearing, his discovery deposition, and his report shows Mr. Maggiore has recommended that the Plaintiffs utilize an extensive, multi-phase marketing and advertising campaign in the future to mitigate, repair, and restore the reputation or brand of Plaintiffs' business as well as the Plaintiffs' personal reputations. Mr. Maggiore has quantified the dollar amount necessary to complete this campaign at approximately \$13 million dollars.

Defendants' argument in support of their motion and Plaintiffs' response are a part of the record and will not be repeated by this Court.

The Ohio Supreme Court has held that damage to reputation is a tort injury, subjecting any recovery to the damage caps set forth in Ohio Revised Code § 2315.18. Those damage caps apply only to non-economic damages. Plaintiffs argue that Mr. Maggiore's thirteen million dollar brand restoration plan is an economic loss that is not subject to the damage cap or limit.

This Court has been unable to find a case specifically on point regarding the issue of whether the future projected cost to repair, restore, or mitigate the damage to a business's reputation is a proper element of economic damages in a business defamation case.





In reviewing case law from other jurisdictions, this Court notes the discussion of a distinction between reputational harm to an individual versus a business. See *Mut. Of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wash App. 702, 315 P.3d 1143 (2013).

In *Enumclaw*, the Court stated: "[w]ith regard to reputation, individuals and businesses suffer different types of injury." *Id.* at ¶ 37. More specifically, the Court stated that an individual's reputation may involve "a 'personal' type of harm, such as hurt feelings, humiliation, embarrassment, and loss of self esteem" and "[t]his type of personal harm goes beyond economic loss and necessarily is unquantifiable." *Id.*

With regard to businesses however, the *Enumclaw* Court stated:

[B]usinesses do not have feelings. Businesses cannot experience humiliation or embarrassment [...]. Businesses have no "personal" interests that can be harmed. As a result, the only damages a business can recover for injury to its reputation are economic. If a business has not suffered any financial loss from diminished reputation, it has not been damaged. And by definition economic harm to a business is quantifiable and measurable.

*Id.* at ¶ 38.

As a result, in order for a business to recover damages for injury to its reputation, it must provide evidence of some measurable loss. Courts have generally identified three areas of measurable loss: 1) decreased income; 2) the diminished value of the business; and 3) known reduction of the business's good will (generally deemed by Courts to be synonymous with "reputation"). All of these measures are reflected in the business's balance sheet.

Plaintiffs will utilize expert testimony from Frank Monaco, CPA. Mr. Monaco is the managing partner of an accounting firm and the director of the litigation support and business valuation division of the accounting firm. Mr. Monaco has prepared a report wherein he opines that the quantifiable and measurable economic loss caused to the Plaintiffs' business is \$5.3 million dollars. Mr. Monaco employed many routinely accepted methods and principles of accounting, including a present value analysis, in reaching his opinions. These are damages that may be recoverable by the business for the harm caused to its reputation by the alleged defamation.

Mr. Maggiore's report is more akin to an advertising or marketing proposal. Mr. Maggiore is proposing that the Plaintiffs spend in excess of \$13 million dollars in the future to repair or restore their business reputation.





The Court notes that as to the element of future damages, expert testimony is necessary to establish that the damages are "reasonable and necessary" and reasonably certain to occur.

Mr. Maggiore will not offer any opinion regarding the value of the Plaintiffs' business before versus after the alleged damage to reputation. Without that information, his opinion that \$13.5 million dollars is reasonable and necessary to restore the business reputation of the Plaintiffs is inherently unreliable. See Evid R. 702(C). Is \$13 million dollars a reasonable and necessary amount to spend to save a business valued at \$50,000, or \$100,000 or \$1,000,000? Even if Mr. Maggiore relied on Mr. Monaco's economic loss analysis, he has not offered an opinion that spending in excess of \$13 million dollars is reasonable and necessary in the future to repair a damaged reputation valued at \$5.3 million.

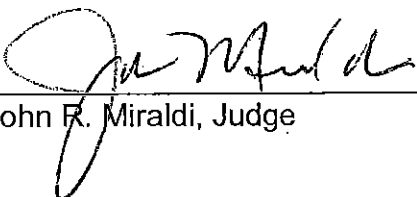
Employing the analogy to property damage in the context of a total loss of a motor vehicle, it is an accepted measure of damage that the injured person is permitted to recover either the market value of the vehicle at the time of the loss, or the cost of repair, but not both. If the market value of the vehicle is less than the cost of repair, the injured party is entitled to the market value, not the cost of repair.

Mr. Monaco has opined using accounting principles that the measurable amount of damage, past and future, caused by the harm to the business reputation is \$5.3 million dollars. That is the market value. Mr. Maggiore has recommended \$13.5 million dollars to repair that same loss in the future. This is not permitted under common principles of damage law. To permit Mr. Maggiore to testify regarding a future amount of money recommended to repair that loss will confuse the jury and could result in duplicative or excessive damages.

Based on the foregoing reasons, Defendants' motion to exclude testimony of Richard Maggiore is granted.

IT IS SO ORDERED.

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John R. Miraldi, Judge

cc: All Parties

