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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL & MOTION FOR REMITTITUR

After six (6) weeks of evidentiary hearings and trial, a fair and impartial jury of eight (8) Lorain County citizens found that Defendants[1] were responsible for the destructive libel campaign aimed at Gibson's Bakery,[2] David Gibson,[3] and Grandpa Gibson.[4] Now, after hearing the verdict, Defendants challenge the jury's decision based on evidence Defendants failed to introduce during trial, or based on evidence that was introduced without objection by one of Defendants' eleven (11) attorneys.

Defendants' Motion is baseless, incorrectly challenges the jury's verdict, and must be denied for the following reasons:

- ***First***, the Court properly submitted libel actual malice to the jury during the punitive phase. Because Defendants filed a motion to bifurcate the compensatory and punitive phases of trial, libel actual malice was two separate issues that were required to be submitted in both phases of trial. Further, the Court also properly permitted the jury to allocate the compensatory damages to the various claims during the punitive phase, and Defendants failed to identify any prejudice resulting from this procedure;

- ***Second***, the Court's jury instructions on the libel claims properly stated Ohio law.

[1] "Defendants" refers to Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Dean Raimondo").
[2] "Gibson's Bakery" refers to Plaintiff Gibson Bros., Inc.
[3] "David Gibson" or "David" refers to Plaintiff David R. Gibson.
[4] "Grandpa Gibson" refers to Plaintiff Allyn W. Gibson.

Further, even if the libel instructions were incorrect (they were not), Defendants either failed to properly object to the instructions or failed to identify any prejudice related to the instructions;

- ***Third***, for nearly all the evidentiary issues raised, Defendants either failed to object to the admission of the evidence or failed to correctly proffer the evidence during trial, which resulted in waiver of those arguments. Further, the Court properly excluded and/or admitted the evidence Defendants identified in their Motion;

- ***Fourth***, Defendants waived their previously denied Motion for Change of Venue by not raising the issue during voir dire. Further, even had the issue been raised, the parties were able to seat an impartial jury of Lorain County citizens and the motion would have been denied;

- ***Fifth***, the damages awarded by the jury were based on Plaintiffs' proven damages and Defendants' malice, not the jury's passion or prejudice; and

- ***Finally***, Defendants are not entitled to remittitur as Plaintiffs' damages were based on competent credible evidence and Defendants' malicious conduct. Further, the Court already granted Defendants a de facto remittitur when it reduced Plaintiffs' combined damages by more than $19 million through application of the caps on noneconomic and punitive damages.

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I. INTRODUCTION

The most enduring feature of the American justice system is the jury trial. As the Court recognized during the compensatory phase, participating as a juror is "an incredible duty and act of service." (June 6, 2019 Tr. Trans., p. 81). However, before the trial even concluded, Defendants sent a communication to thousands of people questioning the service and decision of the jury, who sacrificed more than a month of their lives to listen to the evidence and decide this case. During the punitive phase of trial, Oberlin College Vice President and General Counsel Donica Varner testified as follows:

> Q. The position following the jury verdict clearly said that Oberlin College did not agree -- "regretted that the jury did not agree with the clear evidence our team presented." That was one pronouncement publicly, correct?
> A. Correct.
> Q. And in addition, Oberlin College, to thousands of people in the public domain, said that neither Oberlin College nor Dean Raimondo defamed a local business or its owners, correct?
> A. Correct.

(June 12, 2019 Tr. Trans., p. 140).

Defendants have continued this theme of disregarding the jury decisions in their Motion for New Trial and Remittitur. In their Motion, Defendants re-argue ***numerous*** issues this Court has already heard and decided and challenge the jury verdicts based on unpresented and irrelevant evidence or evidence that was introduced without objection. In short, Defendants' Motion is entirely baseless and should be denied out of hand.

II. LAW & ARGUMENT: DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL OR REMITTITUR

A. Standard of Review.

Ohio R. Civ. P. 59(A) "provides that a trial court 'may' grant a new trial on any of nine specific grounds or for 'good cause shown.'" *Watkins v. Roetzel*, 9th Dist. Medina No. 07CA0024-M, 2008-Ohio-1881, ¶ 8. While granting a motion for new trial rests in the sound discretion of the trial court, "a trial court abuses its discretion when it grants a motion for new trial after a jury verdict where there is substantial evidence to support [the] verdict." *Verbon v. Pennese*, 7 Ohio App.3d 182, 454 N.E.2d 976 (6th Dist. 1982), ¶ 3 of the syllabus.

Defendants' Motion must be denied.

B. The Jury Interrogatories were Proper.

1. The Court properly submitted libel actual malice to the jury during the punitive phase of trial.

Defendants' first argument related to the jury interrogatories regurgitates the same arguments from the JNOV motion regarding the submission of libel actual malice to the jury during the punitive phase of trial. To avoid needless repetition, Plaintiffs incorporate their arguments from the JNOV as if fully restated here. (*See,* Pl. Br. Opposition to JNOV, Sec. III(E)(1)). Because libel actual malice was properly submitted to the jury during the punitive phase of trial, Defendants are not entitled to a new trial.

2. The Court properly permitted the jury to allocate compensatory damages by claim during the punitive phase of trial.

Defendants next claim that the allocation of compensatory damages via jury interrogatories used during the punitive phase of trial entitles them to a new trial. For several reasons, Defendants are wrong:

First, Defendants' arguments are entirely unsupported by relevant case law or other

authorities, and Plaintiffs were unable to locate ***any*** cases where the allocation of damages during the punitive phase of trial was found to be improper.

Second, Defendants' citation to the bifurcation process for punitive damages in R.C. 2315.21 is unavailing. While the statute provides that evidence specific to punitive damages cannot be presented during the compensatory phase, *see,* R.C. 2315.21(B)(1), the statute is silent on the allocation of compensatory damages for purposes of calculating punitive damages. Thus, the statute does not bar allocation of compensatory damages during the punitive phase. Further, this is consistent with the General Assembly's reasoning for creating the statute. The Ohio Supreme Court recognized that bifurcation was enacted to avoid "inflation of noneconomic damages ... due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages." *Havel v. Villa St. Joseph*, 131 Ohio St.3d 225, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 31 (citations omitted). This has no bearing on allocation because the ***amount of damages was already determined by the jury during the compensatory phase of trial and was not increased during the punitive damage phase***. The allocation merely assigned the already determined amount of damages to specific claims with no potential of inflation due to the presentation of punitive specific evidence.

Third, even if the allocation was improper (it was not), Defendants were required to show prejudice, and they were unable to do so. When a party challenges the propriety of jury interrogatories or verdict forms, it is required to show prejudice. *See, e.g. Kallergis v. Quality Mold, Inc.*, 9th Dist. Summit Nos. 23651 & 23736, 2007-Ohio-6047, ¶ 12 (declining to grant a new trial based on jury interrogatories where no prejudice was identified). Defendants' attempts to manufacture prejudice are unavailing:

- Defendants first argue that they were prejudiced because the jury completed the allocation after hearing evidence on punitive damages. But, this argument falls flat

because the jury had already determined the ***amount*** of damages. The allocation did not allow the jury to increase or decrease the compensatory damages but instead just asked them to assign the amounts to the various claims.

- Defendants next claim that the delay in the allocation allowed Plaintiffs' counsel to unduly influence the jury's decision. Again, this argument does not reveal any prejudice. Plaintiffs' counsel properly suggested damages amounts not only for the allocation, but also for the overall award of both punitive and compensatory damages. (See, June 5, 2019 Tr. Trans., pp. 45-46; June 13, 2019 Tr. Trans., p. 42).

- Lastly, Defendants claim that the allocation somehow impacted the application of the noneconomic damages cap. (See, Def. Mt. New Trial, p. 6). Defendants argue that Plaintiffs were somehow able to avoid the application of the noneconomic damages cap by suggesting more damages for the libel claim. (Id.). This argument makes even less sense than the others. Indeed, it would only apply to damages awarded to David because the damages for Gibson's Bakery were purely economic and the damages for Grandpa Gibson were purely noneconomic. Regardless, during the compensatory phase, the jury ***specifically identified the amount of economic and noneconomic damages***. Thus, regardless of the allocation during the punitive phase, the application of the damages cap would have been ***identical***. (See, Compensatory Damages for David Gibson Interrogatory, pp. 1-2).

Simply put, there is no rule or law preventing the allocation of compensatory damages during the punitive phase of trial, and, even if there was, Defendants cannot identify any actual prejudice flowing therefrom. Therefore, Defendants' Motion for New Trial must be denied.

C. The Jury Instructions did not Contain any Errors of Law.

Defendants wrongly claim that issues with the jury instructions require a new trial. Similar to an appeal, as the party assigning the error here, Defendants have "the burden of affirmatively demonstrating the error" and also "substantiating its arguments in support." *Tesar Indus. Contractors, Inc. v. Republic Steel*, 9th Dist. No. 16CA010957, 2018-Ohio-2089, 113 N.E.3d 1126, ¶ 24 (citations omitted). Ohio courts hold that where "there is no inherent prejudice in the inclusion of a particular jury instruction," as here, then "prejudice must be ***affirmatively shown*** on the face of the record and it cannot be presumed." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 35, citing *Wagner v. Roche Laboratories*, 85

Ohio St.3d 457, 461–462, 709 N.E.2d 162 (1999) (emphasis added).

Furthermore, where there are alleged errors in 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.'" *Id.*, quoting *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995). The general rule is that even if an instruction is erroneous, it does not necessarily result in a misled jury. *Id.* at ¶ 36. *See also, Cleveland Elec. Illum. Co. v. Astorhurst Land Co.,* 18 Ohio St.3d 268, 274–275, 480 N.E.2d 794 (1985).

In cases where a party moves for new trial based on error, that party "must demonstrate prejudice which requires a showing that the result of the trial was probably changed by the trial court's failure to give the proposed instructions." *Bertsch v. Ohio Savings Association*, 9th Dist. Summit No. 11158, 1983 WL 3932, *3, citing *Smith v. Fleshe*, 12 Ohio St. 2d 107, 233 N.E.2d 137 (1967); *Morgan v. Cole*, 22 Ohio App. 2d 164, 259 N.E.2d 514 (1969).

1. The Court's libel instructions were proper.

a. *The Court's instruction on what it takes to "publish" defamatory materials was proper and Defendants' proposed "deliverer" instruction does not accurately describe Ohio law and was thus properly rejected by the Court.*

Defendants' proposed jury instruction on "the liability of a deliverer of defamatory statements published by a third person," discussed as page 8 of Defendants' Motion for New Trial, does not accurately describe Ohio law and as a result, it would have been error to provide such an instruction. As discussed within Plaintiffs' response to Defendants' Motion for JNOV, the treatises cited by Defendants in support of their contrived "deliverer" instruction has not been adopted by any Ohio court. (See Sec. III(B)(4)(a) of Pl. Br. Opposition to JNOV). Moreover, the single case cited by Defendants, a New York case, does not represent an accurate depiction of Ohio law and

would not even apply here because Defendants were not merely passive conduits for the defamatory statements, but were active defamers. Finally, Defendants' "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 Sec. III(B)(4)(a) of Pl. Br. Opposition to JNOV). As a result, Defendants' proposed "deliverer" instructions did not accurately describe Ohio law and were thus properly rejected by the Court.

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

Defendants also challenge the Court's definition of aiding and abetting in the jury instructions. For several reasons, the aiding and abetting instruction was a correct statement of Ohio law:

First, Defendants' initial complaint is that Ohio does not recognize aiding and abetting in civil cases. (Def. Mt. New Trial, p. 10). However, Defendants are conflating two separate concepts. In *DeVries Dairy, LLC v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828, 974 N.E.2d 1194, ¶ 2, one of the cases relied upon by Defendants, the Ohio Supreme Court found that Ohio does not recognize a claim in accordance with 4 Restatement 2d of Torts, Section 876 (1979), which defines certain tort liability for individuals acting in concert with others. In essence, the *DeVries* case and its progeny have determined that Ohio does not recognize ***a separate claim for aiding and abetting liability***.[5]

Defendants take this concept and, without citing a single case, attempt to extend it to the concept of publication of defamatory materials. This is clearly wrong. As the Ninth District has held: "***Any act by which the defamatory matter is communicated to a third party constitutes***

[5] *See, Wells Fargo v. Smith*, 12th Dist. Brown No. CA2012-04-006, 2013-Ohio-855, ¶ 36 [emphasis added] ("Therefore, Ohio does not recognize a ***cause of action*** for aiding and abetting").

publication." *Gosden*, 142 Ohio App.3d at 743 (emphasis added) (citations omitted). For purposes of publication of defamatory materials, "any act" includes aiding and abetting:

> 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.").

Defendants even tried to submit their own aiding and abetting instruction:

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 10

(Aiding, Abetting, and Ratification of Libelous Statements)

(Defs.' Proposed Jury Instructions June 4, 2019, p. 11). However, Defendants proposed instruction was rejected because it added substantial additional language that was unsupported by Ohio law.

Second, Defendants again refer to "deliverer" liability and its alleged incompatibility with aiding and abetting. However, as discussed in detail above [*see supra* Sec. II(C)(1)(a)] and in Plaintiffs response to Defendants' JNOV motion (see Pl. Br. Opposition to JNOV, Sec. III(B)(4)), Ohio does not recognize deliver liability. Thus, this argument is completely irrelevant.

Third, Defendants take issue with the definition of aiding and abetting. Defendants complain that the definition borrows from criminal law concepts and also could allow the jury to find liability where none existed. But this argument is meritless. As an initial matter, Defendants ***failed to specifically object to the Court's definition of aiding and abetting***, which waives the issue. *See, Coyne v. Stapleton*, 12th Dist. Clermont No. CA2006-10-080, 2007-Ohio-6170, ¶ 27. When Plaintiffs identified their requested language, Defendants' ***only objection*** was that the

"correct" definition was already contained in the instructions. (See, June 6, 2019 Tr. Trans., p. 16). However, aiding and abetting ***was not defined***. Thus, the objection is not specific and has no basis. Later during the hearing on jury instructions, Plaintiffs provided a different definition based on *Black's Law Dictionary*, and Defendants did not offer any objection on the record. (See, id., p. 42). Thus, Defendants have waived any objection to the definition of aiding and abetting.

The Court provided a definition of aiding and abetting for one purpose: to assist the jury with understanding terms that are not generally used in everyday life. (See, id., p. 16). The definition provided by the court was simple and taken from *Black's Law Dictionary*: "To aid and abet means to encourage, assist, or facilitate the act or to promote its accomplishment." (See, Comp. Jury Instructions, p. 10). *See, Black's Law Dictionary* (11th ed., 2019), liability.

Defendants further challenge the instruction because the verbs used to describe aiding and abetting could, according to Defendants, lead the jury to find them liable for protected conduct. Specifically, Defendants claim that they are not liable for the transmission of the Student Senate Resolution as the internet service provider. This, again, is a regurgitation of Defendants' arguments regarding publication in their JNOV motion. However, as discussed above [*see supra* Sec. III(B)(4)(a)], Defendants were not held liable for being an internet service provider but rather for their independent tortious conduct.

Fourth, even if the aiding and abetting instruction was incorrect (it was not), any error was harmless because Plaintiffs submitted substantial evidence of Oberlin College administrators, including Dean Raimondo and Julio Reyes, actually distributing copies of the Flyer at the protests:

- Local newspaper reporter Jason Hawk testified that Dean Raimondo retrieved and physical handed him a copy of the defamatory Flyer. (See, May 10, 2019 Tr. Trans., p. 104).
- Gibson's Bakery employee Clarence "Trey" James testified that Dean Raimondo distributed ***numerous*** copies of the Flyer at the protests in addition to instructing

students to make copies of the Flyer at the Oberlin College conservatory building. (See, May 14, 2019 Tr. Trans., pp. 177-79).

- Former Oberlin College Direct of Security Rick McDaniel testified that Oberlin College administrator Julio Reyes had a stack of the defamatory Flyers and was passing them out. (See, May 13, 2019 Tr. Trans., pp. 15-16).

Thus, the Court's aiding and abetting instruction was a proper statement of Ohio law.

c. *Defendants failed to properly raise a specific objection to the negligence instruction, but in any event, the instruction was proper when taken as a whole.*

At the outset, Defendants' argument as it relates to the negligence definition for libel is severely weakened by the fact that Defendants failed to provide a citation for the instruction language they wished to include and further failed to specifically state the grounds of their objection. Under Civ.R. 51(A), "a party may not assign as error the…failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating ***specifically*** the matter objected to ***and the grounds of the objection***." (emphasis added).

While Defendants may have submitted proposed jury instructions, they failed to cite to the Ohio Supreme Court case they now attempt to use, and instead only cited to the Ohio Jury Instructions, which do not contain the language demanded by Defendants. (*See* Defs' Proposed Second Amended Jury Instructions, filed June 5, 2019, p. 15). Even when given the opportunity to specifically object to the instructions, Defendants merely stated, "We object to the inclusion of that definition and believe that the definition provided in defendants' proposed instruction number 13 should be given to the jury." (June 6, 2019 Tr. Trans., p. 26). At no time did Defendants raise an alleged error pursuant to caselaw.

Unfortunately for Defendants, "Ohio courts have routinely held that a party fails to preserve for review an error based upon a given jury instruction where the party raises only a general objection to the instructions at trial and fails to state a specific basis for the objection."

Coyne at ¶ 27; *See e.g.*, *Galmish v. Cicchini,* 90 Ohio St.3d 22, 32, 734 N.E.2d 782, 2000-Ohio-7 (2000); *Hoops v. Mayfield*, 69 Ohio App.3d 604, 607 591 N.E.2d 323 (3rd Dist.1990). Because Defendants only made a general objection to the instruction, the objection has been waived.

But, even if Defendants properly objected to the jury instruction (which did not occur), taken as a whole, the jury instruction was proper. In Ohio, a plaintiff must prove fault in a defamation case by clear and convincing evidence, which is exactly what was instructed by this Court. *See*, *Gosden v. Louis*, 116 Ohio App.3d 195, 213, 687 N.E.2d 481, 492 (9th Dist.1996). As Ohio courts have also held, "Ohio adopted the ordinary negligence standard as the standard of liability for actions involving a private individual defamed in a matter of public concern." *Gilson v. Am. Inst. of Alternative Medicine*, 10th Dist. No. 15AP-548, 2016-Ohio-1324, 62 N.E.3d 754, ¶ 41, citing *Lansdowne v. Beacon Journal Publishing Co.,* 32 Ohio St.3d 176, 180, 512 N.E.2d 979 (1987).

Defendants argue that this Court was required to use the exact words identified by *Lansdowne*, but ignore that the jury instructions, as a whole, encompass the ordinary negligence standard. Negligence is defined, and was defined by this Court, as "a failure to use reasonable care." OJI-CV 401.01(1). Further, the jury was instructed that it "must also find by clear and convincing evidence that, in publishing the statement, the defendant acted with negligence," i.e. that the Defendant ***lacked reasonable care in publishing the false statement.*** (June 6, 2019 Tr. Trans., p. 60). Put simply, Defendants' requested language is included in the jury instructions on the elements of libel and negligence. As such, the jury instructions here were proper.

And, as if this were not enough, Defendants further failed to demonstrate prejudice, which required that Defendants show that the result of the trial was probably changed by this Court's alleged failure to give their proposed instruction. For all of the above reasons, Defendants' motion

on these grounds must be denied.

d. *The Court did not err when it provided jury instructions without reiterating its earlier instruction that verbal statements at the protests could not form the basis of a legal claim.*

Defendants next incorrectly argue that the Court should have given a second instruction regarding the verbal statements made during the protests. Defendants are wrong.

First, Defendants fail to cite any case law in support of their theory that the Court had some obligation to reiterate this instruction. There is none.

Second, Defendants themselves "reiterated" the Court's earlier instruction regarding verbal statements at the protest during Defendants' closing argument. There can be no prejudice from a 'lack of reiteration' when the Court's instruction was actually repeated word-for-word to the jury in closing. In closing argument, Attorney Panza directly quoted from the Court's earlier instruction and the jurors actually read the trial transcript containing that instruction:

15	Now, like it or not, the Court has determined
16	the following -- and this is his direct quote to you at
17	the commencement of the trial, which I know seems like
18	years ago. But trust me, this is a direct quote.
19	Finally -- I'm sorry.
20	MR. MATTHEW NAKON: It's on the screen.
21	MR. PANZA: Thank you. Can you see it up there?
22	It's up there?
23	"Finally, as to any verbal or oral statements,
24	chants or words that were made at the protests on
25	November 10th and 11th of 2016 and that were directed at

1	the plaintiffs, Gibsons or their employees, the Court
2	has determined that those oral or verbal statements are
3	constitutionally protected opinion and therefore cannot
4	form the basis of any legal claim."

(See June 5, 2019 Tr. Trans., pp. 57-58)

Third, Defendants do not argue that the Court's instruction on libel was an incorrect statement of law. Rather, Defendants only contend that in instructing the jury on libel, the Court should have reiterated that libel does not include *verbal* statements made at the protest. "A trial court is not required to give a proposed jury instruction in the precise language requested by its proponent ... Instead, the court has the discretion to use its own language to communicate the … legal principles." *Henderson v. Spring Run Allotment*, 99 Ohio App.3d 633, 638, 651 N.E.2d 489 (9th Dist.1994). "[I]f the court's instruction correctly states the law pertinent to the issues raised in the case, the court's use of that instruction will not constitute error." *Id.* Here, the Court correctly instructed the jury on the law of libel. Absent an abuse of discretion, the "trial court's judgment on the basis of the wording of jury instructions" will not be disturbed. *Id.* quoting *State v. Chisholm*, 9th Dist. Summit No. 26007, 2012-Ohio-3932.

Fourth, Defendants' suggestion that the jury would be confused by the instructions is woefully weak. The Court's libel instruction clearly identified that the jurors' focus must be on the written statements in the Flyer or senate resolution. In fact, the Court repeatedly instructed the jury that each element of the claim depended on "the statements in the flyer or senate resolution":

(A) you must find by the greater weight of the evidence that:

(1) the statements in the flyer or senate resolution were made; and

(2) the statements in the flyer or the senate, student senate resolution concerned or were about the plaintiff; and

(3) the statements in the flyer or the student senate resolution were false; and.

(4) the statements in the flyer or the student senate resolution were published to a third party other than the plaintiff; and

(See June 6, 2019 Tr. Trans., p. 60).

Finally, "the court has the discretion to refuse to give a proposed jury instruction if that instruction is either redundant or immaterial to the case." *Henderson*, 99 Ohio App.3d at 638. On summary judgment, this Court dismissed Plaintiffs' deceptive trade practices act claim as well as Plaintiffs' slander claim. These claims were therefore immaterial and instructing the jury on claims that have previously been dismissed would only serve to confuse them.

2. The jury instruction on compensatory damages for the IIED claims was straight from OJI and proper. Further, Defendants failed to identify any prejudice as a result of this instruction.

Defendants next claim that the instruction on compensatory damages for the IIED claims was flawed. This assertion is incorrect.

First and foremost, this Court properly used and relied on OJI when crafting the instruction for damages flowing from IIED claims, specifically OJI-CV 429.05 and OJI-CV 315.01. Per the Ohio Supreme Court, "A trial court is obligated to provide jury instructions that correctly and completely state the law," which is exactly what this Court did here. *Cromer*, 142 Ohio St.3d 257,

29 N.E.3d 921 at ¶ 22 (citations omitted).

Defendants do not cite to ***any*** caselaw to support their allegations that this Court improperly or erroneously instructed the jury on the IIED damages. Defendants fail to show any prejudice or potential misleading of the jury given the jury's verdict. Had Defendants reviewed the caselaw, detailed above, they would have realized that they cannot prevail on their quest for a new trial under this theory.

As Defendants admit within their own motion, the jury did not award ***any*** compensatory damages to Grandpa Gibson for economic loss. Thus, Defendants focus only on David to allege and presume that the $1,800,000.00 award for his future economic loss could ***only*** have resulted from the jury instruction. What Defendants ignore is the allocation by the jury that only $1,000,000.00 of the total $5,800,000.00 verdict in favor of David was for the intentional infliction of emotional distress. (*See* Jury Interrogatory #2: Apportionment of Compensatory Damages for David R. Gibson). Defendants also conveniently ignore the testimony by Plaintiffs' expert Frank Monaco that David's economic damages flowed from the Defendants' defamation, not the emotional injuries. (*See,* May 20, 2019 Tr. Trans., pp. 7, 17). This make sense considering the libel claim tries to destroy a plaintiff's reputation with third parties and to stop those parties from conducting business with the plaintiff; whereas, the IIED claim is intended to harm the plaintiff's emotional state. Additionally, the jury instructions and jury charge as a whole clearly show that the jury was not misled. The Court specifically noted in the jury instructions that, when deciding the amount of damages to award for IIED, "you will consider the plaintiff's economic loss and noneconomic loss, ***if any***, proximately and directly caused by the plaintiff's actual injury." (June 6, 2019 Tr. Trans., p. 73, [emphasis added]).

Because Defendants failed to affirmatively demonstrate any error related to the IIED

instruction on compensatory damages, failed to substantiate their arguments in support, and failed to show any prejudice, Defendants' Motion for new trial must be denied.

D. The Court Properly Admitted/Excluded the Evidence Identified in Defendants' Motion. Additionally, Defendants Waived Nearly Every Identified Evidentiary Issue.

1. The Court properly excluded evidence of the November 9, 2016 shoplifting because the facts of that event could not be contested.

At the outset, Defendants have misstated the Court's ruling on Plaintiffs' motion *in limine* to preclude evidence that contradicts the guilty pleas of the three shoplifting students. Defendants claim that the Court "initially ruled that Defendants could not introduce" that evidence. (See Defs.' Motion for New Trial, p. 17). In fact, the Court withheld its ruling on the motion *in limine*:

> **5. Plaintiff's Motion in Limine to preclude introduction of any evidence that conflicts with the criminal convictions of Jonathan Aladin, Endia Lawrence, and Cecelia Whettstone**
>
> The Court withheld ruling on this motion.

(May 8, 2019 Entry and Ruling on All Motions in Limine, p. 2). *See, State v. Brooke*, 113 Ohio St.3d 199, 863 N.E.2d 1024, ¶ 47 (2007) ("The court speaks through its journal entries.").

Moreover, the exclusion of former President Marvin Krislov's testimony about his interaction with Jonathan Aladin was proper. Defendants misconstrue the basis on which the Court excluded Krislov from testifying on this topic. Defendants claim that the Court excluded that testimony based on a broad exclusion for any evidence relating to the incident. In actuality, the Court excluded the testimony on grounds of hearsay because Krislov was not present for the shoplifting and gained all knowledge from the statements of third parties. (May 29, 2019 Tr. Trans., p. 104). Thus, the exclusion was proper. Evid.R. 801(C) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

As to Constance Rehm, Defendants have again misconstrued the Court's ruling. The alleged purpose of this line of testimony was to have the witness say that another person entered the bakery on the night of November 9, 2016 and allegedly yelled "You're racists." (May 16, 2019 Tr. Trans., p. 117). During the sidebar, the Court correctly pointed out that Defendants had been distancing themselves from the students throughout the trial and thus, it did not make sense that they would then seek evidence of students' conduct, including shouts of racism. (Id., p. 119). This testimony was completely irrelevant to the claims and would have permitted Defendants to present a confusing dual narrative to the jury and thus, the Court properly excluded that testimony. Additionally, Defendants' questioning sought impermissible hearsay, that being the shouts of a third-party, which would be properly excluded under the hearsay bar.

As to Defendants' closing argument, the Court properly precluded Defendants' counsel from discussing details of the November 9, 2016 incident. Defendants' closing argument would have attacked the integrity of the students' convictions because it would have given credence to Defendants' theory that the students did nothing wrong. While Defendants could not come out and say this to the Court or to the jury given their opening statement wherein their counsel said the three students got what "they deserved," they certainly wanted to create a phantom presence that something more occurred. Furthermore, because Defendants had failed to submit proper evidence on the November 9, 2016 incident, their counsel could not thereafter refer to matters outside evidence. *Wilson v. Ahn*, 1st Dist. Hamilton No. C-020615, 2003-Ohio-4305, ¶ 19 ("When counsel, however, refers to facts that are not in evidence during closing argument, the court has an affirmative duty, even when there is no objection, to intervene *sua sponte* and to instruct the jury to disregard counsel's improper remarks. *** The trial court commits error if it allows counsel to use closing argument to offer unsworn testimony concerning matters that are not in evidence."

(Internal citations omitted.)).

Moreover, Defendants' complaint about Plaintiffs' allegedly opening the door to this type of evidence through the testimony of Victor Ortiz is classic revisionist history. Defendants did not object to the question and answer exchange where Officer Ortiz discussed the arrest of the three shoplifting students. As a result, they have waived any objection to that testimony. *Bolen v. Mohan*, 9th Dist. No. 16CA011000, 2017-Ohio-7911, 98 N.E.3d 956, ¶ 12, appeal not allowed, 152 Ohio St.3d 1424, 2018-Ohio-923, 93 N.E.3d 1004, ¶ 12 (2018). Furthermore, even if Plaintiffs' allegedly opened the door to this type of testimony (which they did not), Defendants do not cite any portions of the transcripts showing that they raised this issue with the Court. As a result, Defendants cannot complain about this issue post-trial.

Finally, evidence surrounding the November 9th shoplifting incident is irrelevant to Plaintiffs' claims and Defendants' defenses because none of the Defendants were present during the actual shoplifting. Pursuant to Evidence Rule 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact ***that is of consequence to the determination of the action*** more probable or less probable that it would be without the evidence." Evid.R. 401. (Emphasis added.) Evidence that is not relevant is not admissible at trial. See Evid.R. 402 ("Evidence which is not relevant is not admissible."). As a general matter, the relevancy of evidence is a question of experience and logic, not law. See *Harley v. Harley*, 4th Dist. Athens No. 02CA25, 2003-Ohio-232, ¶ 35 (citations omitted) ("Generally speaking, the question of whether evidence is relevant is ordinarily not one of law but rather one . . . based on common experience and logic.").

In this case, based on common experience and logic, evidence contrary to the facts established in the criminal cases is not relevant. All persons or entities that were actually involved

in the November 9, 2016 shoplifting incident (i.e., Plaintiffs, the criminal defendants, and the Oberlin Police Department) believe or have admitted that Aladin, Whettstone, and Lawrence attempted to steal two bottles of wine with a fake ID from Gibson's Bakery and that Gibson's Bakery did not racially profile Aladin, Whettstone, and Lawrence or otherwise stop or detain them on the basis of race. Thus, the evidence was irrelevant and therefore inadmissible. Additionally, the evidence should have been excluded on the separate grounds that it would confuse or mislead the jury or waste judicial resources by presenting a "trial within a trial." *State v. Veliev*, 10th Dist. Franklin No. 09AP-1059, 2010-Ohio-6348, ¶ 24; 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."); see also *State v. Carroll*, 12th Dist. Warren No. CA84-08-056, 1985 WL 8687 at *5 (May 31, 1985) (affirming the exclusion of extrinsic evidence regarding a collateral matter because the admission would create "a trial within a trial"); *State v. Clark*, 8th Dist. Cuyahoga No. 95928, 2011-Ohio-4109, ¶ 40 (finding that trial courts have the discretion to exclude "the admission of extrinsic evidence that could 'invite a trial within a trial' or lead to 'juror confusion.'").

Based on the foregoing, Defendants are not entitled to a new trial on the basis of the exclusion of certain evidence relating to the November 9, 2016 shoplifting incident.

2. Defendants have waived all arguments relating to the alleged exclusion of Allyn D. Gibson's Facebook materials because Defendants did not seek to offer those materials during trial.

The Court may easily overrule Defendants' complaints about the exclusion of Allyn D. Gibson's Facebook materials, contained at pages 19 and 20 of Defendants' Motion for New Trial, because Defendants failed to proffer that evidence at trial and have thus waived any objection to that preliminary ruling. It is blackletter law that a motion *in limine* is a preliminary ruling, subject

to modification by a court during trial. *State v. Grubb*, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986). Due to the interlocutory nature of such rulings, a party who is temporarily restricted from submitting evidence under a motion *in limine* ruling must seek to introduce "the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." Thus, one who fails to make that proffer during trial waives any argument that the preliminary exclusion was erroneous. *Id.*; *Phibbs v. Children's Hosp. Med. Ctr. of Akron*, 9th Dist. Summit No. 22301, 2005-Ohio-3116, ¶¶ 11-12, citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). ("Because a ruling this [sic] motion is only preliminary, a party must seek to introduce the evidence or testimony once the issue is presented at trial, in order to properly preserve the issue for appeal.").

The Court never precluded Defendants from introducing the Facebook materials during trial for the simple reason that Defendants never sought to actually introduce them at trial. On May 8, 2019, the Court issued its ruling on the parties' motions *in limine* and with regard to the Facebook materials stated:

> **2. Plaintiffs' Motion in Limine to preclude introduction of materials from Allyn D. Gibson's Facebook Account**
>
> The Court granted this motion in part and withheld ruling in part. To the extent that any materials from Allyn D. Gibson's Facebook account relate to his character, they are not permitted to be introduced as evidence. To the extent that these materials relate to the reputation of Gibson's Bakery in the community, their introduction is permissible, provided that they do not run afoul of any other applicable rules of evidence.

(May 8, 2019 Entry and Ruling on All Motions *in Limine*, pp. 1-2). The Court left open the possibility that Defendants could seek to introduce these materials for a legitimate purpose, assuming of course the evidence met all issues relating to admissibility. Defendants did not seek to do so and thus, they have waived any objection or complaint about the Facebook materials. Defendants' failure to seek to introduce these materials highlights the key concept for motions in

limine – they are preliminary rulings. Had Defendants attempted to introduce them at trial, Plaintiffs could have objected on several grounds, such as improper character evidence and hearsay. The Court would have had the opportunity to determine those evidentiary issues at trial. No such procedure occurred and Defendants therefore, as a matter of law, irrevocably waived any arguments about the exclusion of these materials.

3. This Court properly excluded inadmissible back-door truth and hearsay evidence from Marvin Krislov and Chris Jenkins, who had not been identified to provide such evidence in discovery.

As discussed in Plaintiffs' bench brief for this Court during trial,[6] Defendants failed to identify witnesses related to their defense of truth within the discovery period and were therefore prohibited from calling such witnesses to the stand. Midway through trial, however, Defendants attempted to change course and change tactics by trying to back-door previously undisclosed evidence.

Defendants attempt to argue that Plaintiffs never requested that "Defendants identify individuals with knowledge of the affirmative defense of truth," a strange argument given that Defendants then note that Plaintiffs ***did*** make the below request:

> **INTERROGATORY NO. 4:** Identify each and every individual who possesses knowledge or information relating to the facts, claims, and defenses involved in this action; and with respect to each person identified, indicate the general area of the knowledge or information possessed by each such person.
>
> **ANSWER:** Objection. This interrogatory seeks information subject to the attorney-client privilege and work-product doctrine, and is therefore not discoverable. Further objecting, this Interrogatory is overly broad, compound, vague, ambiguous, not relevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving all objections, Oberlin College states that the following individuals may have knowledge regarding the events giving rise to this action: David Gibson, Allyn D. Gibson, Allyn W. Gibson, and Meredith Raimondo.

(OC Dis. Resp., p. 15).[7] A substantially similar interrogatory was also submitted to Dean

[6] Plaintiffs incorporate their bench brief regarding evidence related to racism, filed on May 28, 2019 ("May 28 Bench Brief"), as if fully restated herein.

[7] "OC Dis. Resp." refers to Oberlin College's Answers and Objections to Plaintiffs' First Set of Discovery, which were served on February 22, 2018.

Raimondo, who identified only three areas of knowledge for the identified individuals: potential knowledge about the arrest, potential knowledge about support provided to arrested students and their families, and potential knowledge that the protests occurred and support for some students involved. (MR Dis. Resp., pp. 15-16).[8] As noted in the May 28 Bench Brief, Defendants identified "truth" as an ***affirmative defense*** and were thus required to prove their defense and respond to the above interrogatory with individuals with knowledge of their defense.

Defendants knew that they had failed to identify ***anyone*** in discovery to support their defense of truth, and so after the close of discovery, which occurred on February 8, 2019, Defendants supplemented their responses to Plaintiff's First Set of Discovery, 20 days later. Then, ***for the very first time***, Defendants attempted to insert new individuals who had not been deposed. So, during hearings on pretrial motions, the Court stated:

> THE COURT: I think we settled this issue. If the witness hasn't been identified prior to the discovery cutoff deadline of February 8th, then they're [excluded] from testifying.

(May 7, 2019 Tr. Trans., p. 67).

Defendants complain that Marvin Krislov could not explain why the College *allegedly* took "neutral" measures and that Chris Jenkins could not explain why he took certain actions. But, for multiple reasons, this Court correctly excluded hearsay evidence from Marvin Krislov and alleged racism evidence from Chris Jenkins, who had not been previously identified. It is well within this Court's discretion to do so.

As noted in the May 28 Bench Brief, a trial court may exclude evidence at trial where the

[8] "MR Dis. Resp." refers to Dean Raimondo's Answers and Objections to Plaintiffs' First Set of Discovery, which were served on June 15, 2018.

evidence was not produced due to intentional non-compliance with the rules of discovery. *See, e.g. Jones v. Murphy*, 12 Ohio St.3d 84, 86, 465 N.E.2d 444 (1984) (excluding an expert from testifying at trial and finding that "[a]n intentional violation of the [Civil Rules] should not be so easily disregarded."). Further, the Court may even exclude evidence at trial for nonproduction where the failure to comply with the rules of discovery was due to "neglect, a change in defense strategy or an inadvertent error." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 85, 482 N.E.2d 1248 (1985). Further, the Civil Rules specifically allow for the exclusion of evidence at trial where a party fails to properly supplement discovery responses to identify persons with knowledge or fails to properly answer interrogatories and requests for production of documents. *See*, Civ.R. 37(C)(1), (D)(1)(ii).

While reiterating its concerns that Defendants were attempting to introduce inadmissible hearsay testimony, the Court also acknowledged that a limiting instruction would be insufficient in this case:

> THE COURT: So here's where I am on this. I just -- I just don't know how I can parse it, but here's what I will permit the defense to say. We, the college, did not take a position on racial profiling; and after we gathered information in the community, that was still our position and that's why we did what we did. That's the best I could come up with. Okay? I mean, that's consistent with your discovery.
>
> ***

THE COURT: Okay. I know, Ron, it's going to play out and we will just have to handle it. I just cannot -- my gut is telling me you are trying to backdoor the truth and that's what my gut is telling me. I cannot -- and I'm concerned about that. I don't care what limiting instruction I give, I'm just not going to --

***

THE COURT: There's usually a limiting instruction. Again -- so, but in this case, if Krislov didn't think there was some truth to it, then his conduct wouldn't be affected by it.

(May 28, 2019 Tr. Trans., pp. 7-8).

Indeed, Defendants' counsel confirmed that they were not going to call in witnesses who had personal knowledge one way or the other, but that they were going to try to get that hearsay evidence in through other 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.

(Id., p. 10).

This admission by Defendants' counsel prior to Defendants' case in chief solidifies the necessity for this Court's rulings to exclude the impermissible hearsay, the out-of-court statements offered to prove the truth of the matter asserted. Evid.R. 801(C). Defendants cite to a few instances to claim that their witnesses should have been permitted to continue testifying, yet had the

witnesses done so, there would have been no way to cure the effects of the prejudicial statements that, according to Defendants, were not to be offered for "truth."

For example, Defendants claim that Marvin Krislov should have been permitted to continue his statement, "Well, what we had heard was very different differing views from a number of people in a very short period of time. People were coming out of the woodwork to --". (May 29, 2019 Tr. Trans., p. 115). While at sidebar to discuss Plaintiffs' objection prior to Krislov making any hearsay statements, Defendants' counsel confirmed to this Court exactly why such information should not be permitted:

> MR. HOLMAN: Sure. And again, for the record, I would make this proffer. That if allowed, President Krislov would talk about what those different views are and how they informed the decisions that were made or were not made in connection with all these events.
>
> MR. PLAKAS: That's of course the basis of our objection that we talked about.
>
> THE COURT: Yeah, we did.

(Id., p. 117).

Similarly, Chris Jenkins, when questioned by Defendants' counsel, twice tried to go into things that students had said to him. (See, May 30, 2019 Tr. Trans., pp. 74, 80). The second time, Chris Jenkins began with, "Well, as I mentioned, as I would say, students certainly had at times reported to me --", which could have only ended in hearsay statements. (Id., p. 80). Following an objection by Plaintiffs' counsel, Jenkins attempted to inject his own alleged experiences that had never been previously disclosed. During sidebar, this Court once again informed Defendants' counsel of its reasoning in excluding any such evidence from Jenkins:

> THE COURT: So here's -- here's my concern. The prejudicial value of that, given the fact this witness hadn't been disclosed as one who is going to speak on that outweighs any probative value. So I'm going to sustain the objection.

(Id.).

Additionally, the suggestion that the inadmissible hearsay testimony of President Krislov and Chris Jenkins is part of Plaintiffs' burden is obviously wrong. As this Court is well aware, Plaintiffs submitted substantial evidence to the jury about the falsity of the defamatory statements within the Flyer and the Student Senate Resolution. The jury heard testimony from Oberlin College's own administrators admitting they had never heard of claims of racism prior to November 2016, and from community members Sharon Patmon, Vicky Gaines, Dr. Roy Ebihara, Eddie Holoway, Rick McDaniel, Lieutenant McCloskey, and Eric Gaines, as well as former Oberlin Police Department Office Henry Wallace –many of whom are people of color and all of whom confirmed that there has never been even a hint of racism at Gibson's Bakery or from David and Grandpa Gibson. (*See*, May 10, 2019 Tr. Trans., pp. 19, 92-94, 140; May 13, 2019 Tr. Trans., p. 35; May 15, 2019 Tr. Trans., pp. 15, 21-23).

For all of the above reasons, this Court properly excluded inadmissible back-door truth and hearsay evidence from Marvin Krislov and Chris Jenkins, who had not been identified to provide such evidence in discovery. As such, Defendants' motion for new trial must be denied.

4. The Court properly excluded the testimony of Carman Ambar about protests which are completely unrelated to the protests at issue because (1) said testimony was cloaked expert testimony and Ms. Ambar did not submit an expert report and (2) the other protests at other institutions are completely irrelevant to the claims, defenses, and issues in this case.

Despite Defendants' claims otherwise, Defendants attempted to back-door in another

expert witness by attempting to have Oberlin College President Carman Ambar testify about the procedures of other protests at other institutions. Ms. Ambar was not present at the November 2016 protests. Her presidency began the following fall. Thus, she was not capable of providing any personal knowledge of how the protests were handled. (See Defs.' Dec. 3, 2018 Brief in Supp. of Motion for Limited Protective Order Regarding the Deposition of President Carman Twillie Ambar, p. 6 ("Plaintiffs have failed to cite to anything in the record that would substantiate that President Ambar—who assumed her role as President approximately 10 months after the events giving rise to this lawsuit occurred—has any personal knowledge regarding Plaintiffs' claims...")).

In its May 8, 2019 motions *in limine* entry the Court stated the following on the issue of expert witness testimony:

> **7. Plaintiffs' Motion in Limine to preclude Defendants' experts from offering new opinions at trial and to preclude Defendants from using experts not previously identified**
>
> The Court granted this motion with one exception. After discussion regarding Plaintiffs' lost business opportunity damages related to certain rental properties, the Court ordered that Defendants' expert witness could submit a supplemental report on this limited issue and/or offer opinions outside of those contained in his or her report during their testimony at trial. *See Local Rule 11.*

The Court clearly saw this potential testimony for what it was – expert testimony on the standard of care:

> THE COURT: I'm leaning toward excluding any standard-of-care testimony from Krislov or any Oberlin College administrator who did not provide a report. They could testify as to personal knowledge of their policies and procedures regarding protests.

(May 1, 2019 Tr. Trans., p. 71).

Ms. Ambar's experience with protests at other institutions, having nothing to do with the

protests at issue and was nothing more than Defendants' attempt to introduce standard of care evidence. Defendants' purpose in seeking to introduce that testimony was to permit them to argue to the jury that how Oberlin College dealt with the protests at issue shared common characteristics with how Ms. Ambar allegedly handled these other protests.

In fact, Defendants' counsel admitted as much when during the sidebar session quoted at page 25 of Defendants' motion he said "I'm going to ask how she dealt with them, whether there was commonality in the way she dealt with them." (May 31, 2019 Tr. Trans., p. 144). Furthermore, Defendants actually admit within their motion that this was the purpose of the testimony, when at page 25 they say: "If President Ambar had testified regarding her personal experiences at other protests, jurors would have been able to ***evaluate whether Defendants' actions paralleled those of administrators, faculty, and/or staff during student protests at other colleges and therefore conclude that Defendants should not be liable for defamation or IIED***." (emphasis added). This is blatant standard of care testimony and thus, expert testimony. *Toth v. Oberlin Clinic, Inc.*, 9th Dist. Lorain No. 01CA007891, 2002-Ohio-2211, ¶ 11 (acknowledging that expert testimony may be necessary to establish standard of care unless it is "so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.").

There is no dispute that Ms. Ambar did not submit a report on the standard of care applicable to higher educational institutions confronted with protests. As a result, she was barred from offering that standard of care testimony at trial. Local Rule 11(I)(B).

Defendants' attempt to get Ms. Ambar to provide testimony to explain how Defendants' subjective intent during the protests was proper is equally troubling because Defendants' pretrial motion to exclude Dr. John McGrath explicitly stated that such testimony was not proper. In that

pretrial motion, Defendants stated that "[t]he proposed testimony by McGrath as to Defendants' purported knowledge, motivation, intent, state of mind, or purpose in acting or not acting has no basis in any relevant body of knowledge or expertise." (Defs.' Motion to Exclude John McGrath, p. 6). This same defect applies to Ms. Ambar's attempt to compare how Defendants handled the protests at issue. Defendants' further attacked Mr. McGrath by stating that "McGrath's opinions about that which Defendants purportedly knew, were aware of, or should have done, as well as concerning Oberlin College's compliance with its internal policies, must be excluded as improperly asserted legal conclusions." (Id. at p. 7). Again, Defendants were trying to use Ms. Ambar to offer this same type of testimony.

Based on the foregoing, the Court properly excluded Ms. Ambar from testifying about her experience with protests at other institutions.

5. The Court properly admitted Oberlin College's internal text messages and emails, and Defendants waived any arguments regarding the exclusion of these documents by failing to object during trial.

Neither Civ.R. 59(A)(9) nor good cause entitles Defendants to a new trial based on the admission of certain emails and text messages. Subsection (A)(9) allows for a new trial where there was an "[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." However, a party cannot avail themselves of relief under Civ.R. 59(A)(9) where there was a failure to object to the admission of disputed evidence at trial. *Patterson v. Colla*, 7th Dist. Mahoning No. 03 MA 18, 2004-Ohio-3033, ¶ 24.

Defendants reference two emails and two text messages at page 26 of their motion that it claims are examples of evidence that should not have been admitted. The record reveals that except for an email exchange between Tita Reed and College Vice President for Communications, Ben Jones, dated November 23, 2016, Defendants failed to object to any of the evidence it now claims the Court improperly admitted. Further, a review of the basis for the objection as to the November

23, 2016 email reveals Defendants' counsel was merely concerned about the terms being used in the context of Plaintiffs' counsel's questioning about the email and not the use of the email itself. (*See* May 14, 2019 Tr. Trans., p. 30). Finally, these emails and text messages were never even the subject of any of Oberlin's motions *in limine*. The admission of this evidence was not properly challenged at trial and therefore, cannot serve as a basis for a new trial.

At footnote 26, Oberlin identifies additional Plaintiffs' exhibits (internal emails and text messages, among college employees) that it contends are also irrelevant and unfairly prejudicial and that should not have been admitted at trial. These include Plaintiffs' Exhibits Nos. 63, 86, 100, 101, 125, 129, 135, 140, and 248. As with the above referenced evidence, none of these exhibits were the subject of any of Oberlin's motions *in limine*. Further, Oberlin's counsel only objected to the introduction of two of the exhibits (86[9] and 140[10]) during trial. Having failed to object to the introduction of this evidence at trial, Oberlin forfeited the issue of admissibility and cannot now use it as a basis for a new trial. *See Bolen v. Mohan*, 9th Dist. Lorain No. 16CA011000, 2017-Ohio-7911, ¶ 12, citing *Gollihue v. Consol. Rail Corp.*, 120 Ohio App.3d 378, 388, 697 N.E.2d 1109 (3rd Dist.1997) ("A failure to object to evidence at trial constitutes a waiver of any challenge to its admission.").

Oberlin also maintains the emails and text messages have no relevance to any elements of Plaintiffs' claims for libel, tortious interference, or IIED. It concludes the Court should have excluded this evidence under Evid.R. 401, 402, and 403, yet it never raised any evidentiary objections under these rules.

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[9] As to Exhibit 86, Defendants failed to timely object to the exhibit. Vice President Raimondo was asked several questions about the content of this document and Defendants failed to timely object prior to that line of testimony. (See, May 13, 2019 Tr. Trans., pp. 102-105). Additionally, Defendants have not made out a case that a new trial is warranted based on the introduction of this particular exhibit.

[10] Defendants' counsel only objected to Exhibit 140 based on authentication, and the exhibit was quickly authenticated by Dean Raimondo after the objection was made. (See, May 28, 2019 Tr. Trans., pp. 140-43).

Oberlin never objected to the introduction of the emails and text messages as being irrelevant or unfairly prejudicial, confusing or misleading. Evid.R. 103(A)(1) makes clear that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection * * *" Oberlin made no timely objection, under Evid.R. 401, 402, or 403 and therefore, cannot challenge the admission of this evidence as a basis for a new trial.

Finally, Oberlin asserts it is entitled to a new trial for good cause. In addition to the nine grounds contained in Civ.R. 59, "a new trial may also be granted in the sound discretion of the court for good cause shown." Oberlin has not suggested what constitutes good cause other than the emails and text messages that it references above – which it never objected to at trial. For all of the reasons discussed above, Oberlin has waived its right to object to the admission of this evidence now as a basis for a new trial. Moreover, there is absolutely no good cause for new trial.

6. Frank Monaco's testimony concerning lost business opportunity and rental income was properly allowed.

a. *David Gibson's rental properties and plan for 549 W. College St.*

David Gibson acquired land at 189 W. College Street in 1996, rezoned it, and constructed apartment units thereon. The apartments at 189 W. College Street were successful and consistently occupied. Given that success, David acquired an additional 4.9 acres of land at nearby 549 W. College Street in 2003. The property at 549 W. College had an existing apartment building. Importantly, the 549 W. College property had sufficient available land to allow David to build two additional apartment buildings in the future. Mr. Monaco, whose expertise and experience includes his role on the Board of the Pro Football Hall of Fame in implementing a billion-dollar building project, identified on an aerial map the significant available space on 549 W. College for additional

buildings. (May 20, 2019 Tr. Trans., pp.13-14, 56-60).

In 2008, David did an expansion of the sanitary sewer lines, storm water lines and sidewalks at 549 W. College St. in order to serve the two additional buildings that would be forthcoming. (Id. at pp. 54-55). Further, the evidence demonstrated that David diligently paid down the mortgage on the rental properties so that they would be debt-free in 2018 and he would be in prime position to proceed with construction of the first additional apartment building on the 549 W. College land. (Id. at pp. 54-55).

The new buildings would be replicas of the 189 W. College St. building and would be built according to the same plans used to construct the building at 189 West College. (Id. at pp. 56-60). Given his experience on Oberlin's planning commission for approximately 30 years, David Gibson was very familiar with the requirements necessary for the development. (*Id.* at pp. 59-60). Further, the current head of the planning commission said that it certainly would be reasonable to assume that David would obtain the necessary zoning change at 549 W. College St. (Id.). In fact, the properties all around the 549 W. College St. property have multi-unit apartment buildings. (Id.). Thus, it would be unreasonable to believe that the rezoning would not occur, and Defendants cite no evidence to dispute this.

b. *Mr. Monaco's testimony concerning the lost opportunities at 549 W. College St. was not improperly speculative.*

Defendants contend that because the zoning change at 549 W. College St. had not yet occurred, any damage claim for the future buildings is speculative. Neither the evidence nor the case law supports Defendants' contention.

Defendants contend that because the zoning change at 549 W. College St. had not yet occurred, any damage claim for the future buildings is speculative. Neither the evidence nor the case law supports Defendants' contention.

In *Masheter v. Kebe*, the Court held that an expert need not confine his valuation testimony to the use permitted under existing zoning regulations. 49 Ohio St.2d 148, 152 (1976) (experts could testify to use for an apartment building even though area currently zoned single-family residences). Instead, an expert may testify to a use that is not permitted under existing zoning regulations even without evidence of a probable change in the zoning within the foreseeable future." *Proctor v. Davison*, 5th Dist. Licking No. 09 CA 122, 2010-Ohio-3273, ¶¶ 39-40, citing *Wray v. Stvartak*, 121 Ohio App.3d 462, 700 N.E.2d 347 (6th Dist.1997) (zoned agricultural/residential and valued as commercial).[11] The *Proctor* court held that the record contained competent, credible evidence from which the trial court could conclude that the likelihood exists that the property would be rezoned and the necessary permits obtained. And, *"[e]ven in the absence of such testimony, it was not error to permit Appellee to present evidence at trial of the highest and best use of the property for a use other than its zoned use." Id.* at ¶ 43.

Likewise, the Ohio Supreme Court has ruled that compensation can properly be based upon the use of the land *even where the land is held under a deed containing restrictions against such use. In re Appropriation of Easement for Highway Purposes v. Thormyer,* 169 Ohio St. 291 (1959) (could base damages on evidence of value for commercial uses notwithstanding that deed contained restrictions against selling land/using land except for children's home).

Defendants incorrectly suggest that when a property owner does not pursue a rezoning prior to the proceeding, it would be speculation to base a damage report on a use for which the property is not currently zoned. However, the Ohio Supreme Court and lower courts dealing

[11] *Bd. of Trustees of Sinclair Community College Dist. v. Farra*, 2010-Ohio-568, 2010 WL 597098 (Ohio Ct. App. 2d Dist. Montgomery County 2010); *Proctor v. King*, 2008-Ohio-5413, 2008 WL 4615990 (Ohio Ct. App. 5th Dist. Licking County 2008); *Proctor v. Dennis*, 2006-Ohio-4442, 2006 WL 2474340 (Ohio Ct. App. 5th Dist. Fairfield County 2006).

directly with this issue have consistently held to the contrary. For instance, eminent domain compensation can properly be based upon a use of land *even if a change in zoning would be required and even without evidence of a probable change in the zoning regulations in the foreseeable future*. O. Jur. 3d Eminent Domain, Section 147.

Although the cases do not require it, in the case at hand, there is competent, credible evidence that the rezoning at issue is not speculative but instead, it is exceedingly likely, if not certain, that the rezoning will be readily obtained.

c. *Mr. Monaco's testimony concerning lost rental income was not impermissibly speculative.*

It is well-known in the community that the apartment buildings at issue belong to David Gibson. The apartments are known as "Gibson's Rentals." The thorough and relentless attack of the Gibsons has resulted in their business—including the bakery and the apartment leasing—being shunned and boycotted. The defamatory flyers disseminated throughout the community identify the Gibsons as the owners of an establishment that racially profiles and discriminates. The Student Senate Resolution proclaims that the Gibsons have "a history of racial profiling and discriminatory treatment of students **and residents** alike." It is no surprise that the vicious lies about the Gibsons have not only resulted in far less people coming through the doors of the bakery, but also *less people willing to live under Gibson's roof.*

Mr. Monaco walked the jury through the financial numbers that clearly showed the declining rental income following the distribution of the flyers and senate resolution. (May 20, 2019 Tr. Trans., pp. 48-52). Mr. Monaco further demonstrated how the declining rental income corresponded with the declining bakery revenues. (Id.). In calculating the lost rental income, Mr. Monaco utilized the well-established "Before and After" Method, which Defendants' own expert acknowledged that the AICPA has recognized as a valid approach in the industry. (Id. at p. 50;

May 31, 2019 Tr. Trans., p. 122). Evidence of past performance "will form the basis for a reasonable prediction as to the future." *AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177, 181 (1990). Mr. Monaco utilized this well-recognized methodology in determining lost profits resulting from vacancies at 189 and 549 W. College St.

Under Ohio law, a business, even a new business, may establish lost profits with reasonable certainty through the use of evidence such as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts. *AGF, Inc.*, 51 Ohio St.3d 177, syllabus ¶ 3. While lost profits may not be too remote or speculative, courts recognize that "damages for lost profits often require some conjecture." *Miami Packaging, Inc. v. Processing Sys., Inc.*, 792 F.Supp. 560, 566 (S.D.Ohio 1991), citing *Jaynes v. Vetel*, 51 Ohio Law Abs. 202, 207, 80 N.E.2d 621 (2d Dist.1948) ("profits must in their very nature be to some extent uncertain and conjectural, so that one cannot on that account, or account of difficulties in the way of proof, be deprived of all remedy.")

All issues raised by Defendants concerning Mr. Monaco's testimony go to the weight, not the admissibility, of the evidence. Defendants cross-examined Mr. Monaco for at least four (4) hours and conducted approximately four (4) hours of direct examination of their own expert on these topics. Reasonable minds could (and did) certainly conclude that the evidence established the future lost profits with reasonable certainty.

7. The Court properly admitted evidence of Grandpa Gibson's May 2017 fall and injury which is relevant and supported by case law.

Neither Civ.R. 59(A) (1), (7), (9) nor good cause entitle Oberlin to a new trial based on the admission of evidence of Grandpa Gibson's fall and injury. First, the issues raised by Defendants in Section III(D)(1) of their Motion for New Trial were also raised through a motion *in limine* by Defendants, including that the evidence is irrelevant under Evid R. 401 and unfairly prejudicial

under Evid.R. 403. On May 8, 2019, the Court denied this Motion *in Limine*, noting specifically that "[i]n so doing, the Court only ruled that preliminary exclusion was not warranted, but the Court did not rule on its admissibility."[12]

Here, Defendants never renewed their motion to exclude this evidence at trial. Defendants made no objections to any of the trial testimony of Grandpa Gibson cited by Defendants. (May 16, 2019 Tr. Trans., pp. 29-35, 40). Likewise, Defendants did not preserve any objection as to the cited trial testimony of Lorna Gibson. (May 15, 2019 Tr. Trans., pp. 132-136). Defendants' sole objection to Lorna Gibson's testimony was to preclude her from giving her personal assessment of Grandpa Gibson's medical condition after the fall. (May 15, 2019 Tr. Trans., pp. 134-135). Plaintiffs' counsel agreed to and abided by this restriction, and thereafter Defendants made no further objections to the testimony that Defendants now claim should have been excluded concerning Grandpa Gibson's fall.

In sum, having failed to renew their objections as to the admissibility of this evidence, the Defendants have waived any such objection.

Likewise, resort to Civ.R. 59(a)(1) fails for the same reason—Defendants failed to object to the admissibility of the evidence at trial. Civ.R. 59(A)(1) would allow a new trial where "[i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial." It is settled law that "[a]n 'irregularity' that would justify a new trial under Civ.R. 59(A)(1) must be 'a departure from the due, orderly and established mode of proceeding therein, where a party, *with no fault on [her] part,* has been deprived of some right or benefit otherwise available to [her].'" *Simon v. Simon,* 9th Dist. Summit No. 2007-06-1815, 2014-Ohio-

[12] *See,* May 8, 2019 Entry and Ruling on All Motions in Limine.

1390 (emphasis added) (because Mother did not provide the Court with doctors' orders that she was not medically able to attend the hearing, Civ.R. 59(A)(1) was not applicable); see also *Frees v. ITT Tech. School,* 2nd Dist. Montgomery No. 23777, 2010-Ohio-5281.

At page 31of their Motion for a new trial, Defendants allege that the evidence of Grandpa Gibson's fall and injury was irrelevant to any pending claim, and on page 32 Defendants allege that they were unfairly prejudiced by the introduction of this evidence. First, because Defendants raised these issues in their motion *in limine* on the fall, but did not thereafter object to admissibility at trial, Defendants waived the objection. Second, regardless of the motion *in limine*, Defendants' failure to object to the evidence at trial constitutes a waiver of any challenge to its admissibility and relevance, and therefore it cannot now be used as a basis for a new trial. *See Bolen v. Mohan*, 9th Dist. Lorain No. 16CA011000, 2017-Ohio-7911, ¶ 12, citing *Gollihue v. Consol. Rail Corp.*, 120 Ohio App.3d 378, 388, 697 N.E.2d 1109 (3rd Dist.1997).

Further, Defendants' failure to object at trial to the introduction of the evidence of Grandpa Gibson's fall and injury as being irrelevant or unfairly prejudicial, confusing or misleading, precludes a new trial based on Evid. R. 401, 402, and 403. Evid.R. 103(A)(1) clearly provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection * * *" Having made no timely objection under Evid.R. 401, 402, or 403, Defendants cannot use the admission of this evidence as a basis for a new trial.

Moreover, Defendants' argument pursuant to Civ.R. 59(A)(7) cannot withstand scrutiny. Civ.R. 59(A)(7) would allow a new trial if "[t]he judgment is contrary to law." A motion for a new trial based on Civ.R. 59(A)(7) is to decide whether the judge erred as a matter of law; it does not

permit a consideration of the weight of the evidence or credibility of witnesses. *Elwer v. Carrol's Corp.*, 3rd Dist. Allen No. 1-06-33, 2006-Ohio-6085, ¶22; *Pangle v. Joyce*, 76 Ohio St.3d 389, 1996-Ohio-381, 667 N.E.2d 1202 (1996).

In this regard, Defendants erroneously argue that evidence of Grandpa Gibson's fall and injury is simply evidence of unpled and unrecoverable damages that are remote and speculative. Frankly, they overstate the impact of this evidence. To the contrary, this evidence is relevant to and was introduced to prove multiple aspects of both the libel and IIED claims, none of which concern compensatory damages and none of which are subject to any defense based on remote and speculative compensatory damages.[13] Under Ohio law, defamation occurs "when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business, or profession.'" *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 77, citing *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9 (quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995)). "Under the tort of intentional infliction of emotional distress, '[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, and if bodily harm to others results from it, for such bodily harm." *Cherney v. Amherst*, 66 Ohio App.3d 411, 413, 584 N.E.2d 84 (9th Dist.1991), quoting *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 453 N.E.2d 666, 667 (1983) (abrogated on other grounds by *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051 (2007)).

[13] *See,* Plaintiffs' Response in Opposition to Defendants' Motion *in Limine* Regarding Evidence of Allyn W. Gibson's Fall and Subsequent Injury.

The Court correctly admitted this evidence to prove the following multiple aspects of Plaintiffs' defamation and IIED claims that are unrelated to damages:

- Defendants' defamatory acts created and exacerbated a charged, hostile environment that injured Plaintiffs' reputations, and exposed Plaintiffs, including Grandpa Gibson, to public hatred, contempt, ridicule, shame, and disgrace, and adversely affected them in their trade, business, or profession;
- The scope and extent of defamation;
- The defamation and hostile environment caused severe emotional distress; and
- Defendants defamation and hostile environment caused significant, substantial, real, and long-lasting impact on the Gibsons, exposing them to public hatred, contempt, ridicule and shame and further exposing them to even physical home invasion at all hours of the day, as well as physical injury long after the statements were made.

Under Ohio law, the Court correctly permitted the jury to determine whether proximate cause existed. Ohio Courts have long held defendants such as Oberlin responsible for negligent/criminal acts of known and unknown third parties where the affirmative acts of the defendant created the situation in which others were likely to commit the act at issue. *See, E.g., Fed. Steel and Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St3d 171, 174-178, fn 3 (1989), citing Restatement (Second) Torts, §§448 and 449 (1981).

8. The Court properly admitted evidence of the hostile environment created by Defendants and this evidence is not subject to any defense that compensatory damages are remote and speculative.

Again, neither Civ.R. 59(A)(1), (7), (9), nor good cause entitle Defendants to a new trial based on the admission of evidence of the hostile environment created and exacerbated by Defendants' publication of the defamatory statements—the puncturing of Gibson Bakery employee tires, keying of cars, kicking in David Gibson's back door, and banging on Grandpa Gibson's doors and windows. Of note, Defendants incorrectly argue that this is evidence only of damages and as such is too remote and speculative. To the contrary, Plaintiffs admitted this hostile

environment evidence as evidence of the hatred and ill-will spewed into the environment by Defendants toward Plaintiffs and, as such, it is also relevant (a) as evidence of causation for Plaintiffs' defamation claim, showing that Plaintiffs were in fact subject to hatred and ill-will and (b) as evidence of causation related to Plaintiffs' IIED claim.[14]

Defendants did not object to the testimony of Shane Cheney about the damage to his car tire. (May 15, 2019 Tr. Trans., pp. 105-106). Likewise, Defendants failed to object to the testimony of David Gibson, meaning they waived any objection under Evid.R. 401, 402, or 403. (May 21, 2019 Tr. Trans., p. 212).

As outlined above [*see supra* Sec. II(D)(7)], Defendants cannot avail themselves of relief under Civ.R. 59(A)(9) or Civ.R. 59(A)(1) because they did not object to the admission of the evidence at trial.

Even if the Court were to reach the merits of this argument, this evidence is relevant for non-damages issues to prove elements of Plaintiffs defamation and IIEC that Defendants, including that the hostile environment is evidence of causation related to (a) Plaintiffs' defamation claim by showing that Plaintiffs were, in fact, subject to hatred and ill-will; and (b) Plaintiffs' IIED claim. Plaintiffs also incorporate in full the legal analysis in this regard from the previous section.

Further, Plaintiffs did not attempt to prove, and the jury did not award, any compensatory damages related to the property damage and personal injury damage at issue and therefore the defense that such damages are remote and speculative cannot be used to obtain a new trial.

Finally, Defendants also assert they are entitled to a new trial for good cause. Again, Defendants have not suggested what constitutes good cause for excluding this evidence – which it never objected to at trial. For all of the reasons discussed above, Defendants have waived their

[14] *See,* Plaintiffs' Bench Brief: Presentation of Evidence Related to Hostile Environment.

right to object to the admission of evidence of the hostile environment.

E. The Court Properly Denied Defendants' Motion to Transfer Venue, and Defendants Waived this Issue by Failing to Raise it at the Time of Jury Selection.

In a last-ditch effort, Defendants argue their Motion to Transfer Venue, which was filed and denied more than a year before trial, should have been granted and that they are entitled to a new trial because of it. This argument is obviously wrong, particularly because Defendants waived the issue by not raising it with the Court during jury selection.

As discussed in Plaintiffs' response to Defendants' original motion to transfer venue,[15] a "trial court ***must make a good faith effort to seat a jury before granting a change of venue***." *Burton v. Dutiel*, 5th Dist. No. 14-CA-00024, 2015-Ohio-4134, 43 N.E.3d 874, ¶ 40, *citing State v. Weaver*, 5th Dist. Holmes No. 06CA0001, 2007-Ohio-3357 (emphasis added). This general rule stems from Ohio Supreme Court precedent which holds that "the voir dire process provides the best evaluation as to whether such prejudice exists among community members that precludes the defendant from receiving a fair trial." *Id.*, *citing Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 857 N.E.2d 621 (3rd Dist.2006) (*citing State v. Swiger*, 5 Ohio St.2d 151, 214 N.E.2d 417 (1966)); *State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001).

The parties spent several days engaged in voir dire, including extensive questioning by both the Court and counsel for the parties. Defendants and their counsel did not ***at any point*** raise any objection during or after the voir dire process that the venue of this trial needed to be moved based on an alleged inability to seat an impartial jury. Thus, Defendants waived this argument, and it should be dismissed out of hand.

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[15] Plaintiffs' incorporate their Response in Opposition to Defendants' Motion to Transfer Venue as if fully restated in this brief.

Even if this issue was somehow preserved (it was not), Defendants did not offer even a shred of evidence that there was juror bias necessitating a change of venue. Instead, Defendants blame daily reporting as somehow poisoning the jury pool.[16] This argument is baseless and without merit. The Court conducted ***substantial*** voir dire of the jury pool related to pre-trial media attention. The Court began by questioning every prospective juror in the courtroom on whether they were aware of the facts and circumstances underlying this litigation. (See, May 8, 2019 Tr. Trans., pp. 30-31). For each prospective juror that read an article on this issue, the Court inquired as to whether the prospective juror posted any comments or opinions on any online forum or social media. (See, Id. at pp. 31-34).

The Court also questioned each prospective juror that was familiar with this case as to whether they had formed any opinions or pre-conceived notions on the case prior to trial and dismissed those who had for cause. (See, Id. at pp. 34-81). After the substantial discussion of pre-trial media attention, the vast majority of jurors were found to be impartial and were not challenged for cause by ***either party***. The Defendants' suggestion now that the jurors were biased before trial is simply not true and is a sour-grapes distortion of the trial process in this case.

Additionally, while there was some daily reporting on this case in the media, at the end of every day of trial, the Court cautioned and instructed the jury under threat of ***criminal contempt of court*** to not read, watch, or listen to the reporting on this case:

> Certainly do not get on any social media site and post anything. Do not do any homework, you know, what case you may be a juror on. Do not start looking up old news articles ... And I am giving you a direct order. If you violate it, you will be in contempt of this Court's order. ***I can impose jail time and fines***[.]

[16] Oddly, Defendants seem to imply that the Court's order quashing subpoenas issued to Plaintiffs' counsel that sought blatantly privileged information somehow is to blame for the unsubstantiated allegations of media bias and lack of jury impartiality. (See, Defs.' Mt. New. Tr., p. 34). Defendants conveniently ignore the fact that Plaintiffs were ordered to identify the media outlets they communicated with prior to the filing of the Motion to Transfer Venue.

(Id. at pp. 190-91 [emphasis added]). Defendants' suggestion that threatened criminal action from the Court was insufficient to warn the jury from reviewing media coverage is completely lacking in factual support and insufficient to support any claim that Lorain County was an improper venue for the trial of this matter.

Therefore, Defendants' request for a new trial based on the Court's denial of a motion filed more than a year before the trial occurred is baseless, was waived, and should be denied out of hand.

F. The Damages Awarded by the Jury were Based on the Evidence Presented and Defendants' Malicious Conduct, Not Passion or Prejudice.

The jury did not award "excessive" damages. Defendants continue to shirk responsibility for the impact of their conduct. Instead, Defendants contend that the damages assessed by the jury were merely the "result of passion or prejudice."

It is "well established that the mere size of the jury verdict does not constitute evidence of passion or prejudice." *Gedetsis v. Anthony Allega Cement Contractors, Inc.*, 8th Dist. Cuyahoga No. 64954, 1993 WL 379351, *3, citing *Jeanne v. Hawkes Hosp. of Mt. Carmel*, 74 Ohio App.3d 246, 598 N.E.2d 1174 (10th Dist.1991), cause dismissed, 62 Ohio St.3d 1437, 579 N.E.2d 210 (1991). "Absent evidence to the contrary, it is well established that jury verdicts are presumed to be based on the evidence presented at trial and *uninfluenced* by passion or prejudice." *Id.* (emphasis added). Defendants fall far short of demonstrating their burden of overcoming this presumption.

In this section of their Motion for New Trial, Defendants rehash arguments concerning admission of emails and text messages among Oberlin College administration, Frank Monaco's economic damages testimony, Grandpa Gibson's fall, and slashed tires of the bakery employees' vehicles. Defendants likewise rehash earlier arguments that they should have been able to present additional evidence. Each of these arguments was disposed of above, and the Court properly ruled

on such evidentiary determinations. Moreover, these evidentiary determinations did not result in a verdict improperly influenced by passion or prejudice.

Defendants also contend that statements during closing arguments "wrongfully inflamed the sensibilities of the jury." However, Defendants' arguments fail for a multitude of reasons.

First, Defendants did not object during trial to the statements that they now complain about. When trial counsel fails to object to statements made by opposing counsel during closing arguments, "such failure to object waives one's right to reversal of the judgment unless there is 'gross and persistent abuse of privilege of counsel.'" *Kubiszak v. Rini's Supermarket*, 77 Ohio App.3d 679, 689, (8th Dist.1991) quoting *Eastin v. Eastin–Rossi* (Dec. 1, 1988), Cuyahoga App. No. 54660, 1988 WL 128231. Defendants are not permitted to cull back through the transcripts and cite to statements that they retroactively contend were intended to inflame the passions of the jury. Instead, "[a]n immediate objection is necessary to raise, for review, the question of improper argument of counsel." *State v. Kelly*, 9th Dist. Lorain No. 2227, 1975 WL 180356, *1.

The Ohio Supreme Court further explained the importance of timely objections to statements of counsel during trial:

> Except where counsel, in his opening statement and closing argument to the jury, grossly and persistently abuses his privilege, the trial court is not required to intervene sua sponte to admonish counsel and take curative action to nullify the prejudicial effect of counsel's conduct. Ordinarily, in order to support a reversal of a judgment on the ground of misconduct of counsel in his opening statement and closing argument to the jury, it is necessary that a proper and timely objection be made to the claimed improper remarks so that the court may take proper action thereon.

Snyder v. Stanford, 15 Ohio St.2d 31, 35, 238 N.E.2d 563 (1968) (superseded by statute on other grounds).

Second, none of the remarks that Defendants *now* complain of (after not objecting at trial) are improper. They certainly do not constitute the kind of exceptional, gross and persistent abuses

that Defendants must demonstrate in order to obtain a new trial. See *Wynn v. Gilbert*, 1st Dist. Hamilton No. C-060457, 2007-Ohio-2798, ¶ 33, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997) (proper and timely objections to statements by counsel must be made at trial; otherwise, reversal shall apply "'only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.'").

Moreover, "[t]he initial determination of whether the permissible bounds of argument have been exceeded is a discretionary function of the trial court." *Larissey v. Norwalk Truck Lines*, 155 Ohio St. 207 (1951). Such determination will not be reversed absent an abuse of discretion. *Id.* Likewise, the denial of a motion for new trial on the ground of excessive damages rests within the sound discretion of the trial court and is therefore not disturbed on appeal absent an abuse of discretion. *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 9th Dist. Summit No. 28082, 2018-Ohio-2393, ¶ 61.

The wide latitude permitted to counsel in closing argument is well-established:

> There is nothing wrong with a passionate closing argument within the wide latitude of permissible argument set by the court. Counsel may persuade and advocate to the limit of counsel's ability and enthusiasm so long as counsel does not misrepresent evidence or go beyond the limits of propriety set on the arguments by the trial court in its sound discretion. Thus, it is the privilege of counsel, in the closing argument to the jury, freely to discuss the facts; to arraign the conduct of parties; to impugn, excuse, justify, or condemn motives so far as they are developed by the evidence; and to assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony.
>
> Statements of counsel in argument which are descriptively colorful summations of facts in evidence are entirely permissible, as distinguished from other statements of a less factual nature.
>
> The court should not be severe in arresting argument on the ground that the analogy or inference is forced or unnatural, or that the argument is illogical; illustrations

> may be as various as counsel's resources, and argument as full and profound as counsel's learning can make it.

90 Ohio Jur. 3d Trial § 395.

For instance, Defendants now complain about references to "David and Goliath." Defendants' Motion fails to cite to any objection that Defendants lodged during trial to such a reference, because no objection was ever made. In fact, Oberlin College embraced the "David and Goliath" comparison and acknowledged its role as Goliath as early as voir dire:

16	MR. PANZA: I want to thank you. That's really,
17	really difficult and I really do appreciate it.
18	Back to Lady Justice. Equal before the law.
19	Mr. Plakas used David and Goliath yesterday. Well, in
20	this situation, David has sued Goliath for money. So
21	equal before the law. Do you think Goliath deserves the
22	same rights as David?
23	PROSPECTIVE JURORS: Yes.

(May 9, 2019 Tr. Trans., p. 17)

Oberlin College's powerful influence in the Oberlin community was certainly relevant in this case, as it demonstrated the scope and long-lasting impact of the reputational harm to the Gibsons. Likewise, counsel's reference to the Defendants' own words—"rain fire and brimstone"—cannot be considered wrongful. Defendants also complain about testimony concerning a 91-year-old man's fears that the reputation he had built over a lifetime had been destroyed. Obviously, such testimony concerning reputational harm and ridicule goes to the essence of a defamation claim.

Third, courts must be "particularly circumspect about attributing passion or prejudice to a jury's determination of damages, a matter peculiarly in their province." *Kluss v. Alcan Aluminum*

Corp., 106 Ohio App.3d 528, 539 (8th Dist.1995). This is particularly true in defamation cases where courts must "allow[] the jury wide discretion" in rendering damages due to the nature of the resulting harms to plaintiffs' businesses, standing in the community, personal humiliation, anguish, and suffering. *Id.* at 540 citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)

Fourth, the Court properly informed the jury that the arguments and statements of counsel are not evidence. (Trial Tr., June 6, 2019 at 52:7-12).

Fifth, it was Oberlin College who raised the issue of sympathy in its closing argument. In closing rebuttal, Attorney Plakas forcefully confirmed: "The Gibsons do not want any sympathy." (June 5, 2019 Tr. Trans., p. 84). A presumption always exists that the jury has followed the instructions given to it by the trial court. *State v. Fox*, 133 Ohio St. 154 (1938). Here, this Court properly instructed the jury that the law required them to disregard sympathy in rendering their verdict:

> Circumstances in the case may arouse sympathy for one party or the other. Sympathy is a common, human emotion. The law does not expect you to be free from such normal reaction. However, the law and your oath as jurors require us to disregard sympathy and not to permit it to influence your verdict.

(June 6, 2019 Tr. Trans., p. 77)

Sixth, the jury heard significant evidence concerning the severe and long-lasting impact that Defendants' conduct has had on Plaintiffs, in the form of both economic and non-economic damages. For instance, the jury heard Dr. Deborah Owens testify about how negative statements in a small community are so powerfully persistent and difficult to overcome. Likewise, expert Frank Monaco explained (through use of well-recognized accounting principles) the long-lasting

economic damages resulting from Defendants' conduct. Oberlin College's former president, Marvin Krislov, admitted to the jury that "being called a racist is one of the worst things a human being can be called." (May 29, 2019 Tr. Trans., at 179). It cannot be said that the jury, who admirably paid careful attention throughout the 5-week long trial, awarded excessive damages influenced by passion or prejudice.

Finally, Defendants fail to cite to any Ohio case law that would suggest otherwise. Defendants' reference to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) is inapplicable. There, the jury awarded the plaintiff $1 million in non-economic damages and $145 million in punitive damages. Under those particular circumstances, the Court determined that the 145-to-1 ratio of punitive to compensatory damages was too disproportionate. Here, on the other hand, the jury awarded economic damages as well as non-economic damages and this Court has already applied statutory caps to both the non-economic damages and the punitive damages.

Defendants' reference to a district court case in Oklahoma is also off-base. *Moody v. Ford Motor Co.*, 506 F.Supp.2d 823, 838 (N.D. Okla. 2007). There, the district court determined that plaintiff counsel's 'wire-to-wire' misconduct throughout the trial (including repeatedly violating evidentiary orders) resulted in an excessive verdict of $15 million in non-economic damages (without any economic damages). Here, Defendants are unable to identify any misconduct that would result in excessive damages.

G. Defendants are not Entitled to Remittitur.

Lastly, Defendants ask for remittitur of the jury's verdict. However, before issuing a remittitur, the "damages awarded by the jury must be so manifestly against the weight of the evidence to show a misconception by the jury of its duties." *Howard v. City Loan & Sav.*, 2nd Dist. Greene No. 88-CA-39, 1989 WL 33137 at *5 (Mar. 27, 1989) (citations omitted). Indeed, "[t]he damages must not be excessive solely in the mind of the court, the excess must be so great

as to shock sound judgment and a sense of fairness toward the defendant." *Id.* (citations omitted).

For several reasons, Defendants are not entitled to remittitur.

First, Defendants' reliance on R.C. 2315.19 as one of the avenues allegedly supporting a reduction of damages is misplaced. R.C. 2315.19 ***only applies to noneconomic damages***. *See,* R.C. 2315.19(A) [emphasis added] ("Upon a post-judgment motion, a trial court in a tort action shall review the evidence supporting an award of compensatory damages for ***noneconomic loss*** that the defendant has challenged as excessive."). Nearly all of the damages awarded in this case were for ***economic*** or ***punitive*** damages, for which R.C. 2315.19 has no application.

Second, the Court ***already reduced the damages by nearly twenty million dollars through application of the statutory caps on noneconomic and punitive damages***. Combined for all three Plaintiffs, the jury awarded $44.2 million in compensatory and punitive damages. However, after application of the statutory damages caps, *see,* R.C. 2315.18 and R.C. 2315.21, the Court entered judgment on the three verdicts for a total of $25 million in damages, ***which amounts to a reduction of $19.2 million or forty-three percent***. (June 28, 2019 Order, pp. 2-3). Thus, in essence, Defendants have already been granted a remittitur of the damages awarded by the jury.[17]

Third, Defendants regurgitate former arguments related to the alleged speculative nature of Frank Monaco's testimony on economic damages. But, as Plaintiffs argued in substantial detail above, *see supra* Sec. II(D)(6), Mr. Monaco's testimony on damages was not speculative. Defendants also point to the alleged valuation of Gibson's Bakery provided by their expert and irrelevant economic information as alleged evidence that the verdicts were excessive. However,

[17] At the very end of their Motion, Defendants insist that the Court should "properly apply the statutory damages caps." (Def. Mt. New Trial, p. 42). Because this issue has already been fully briefed by both parties, Plaintiffs will not waste the Court's time to argue it again. Simply put, and as argued in Plaintiffs' June 21, 2019 Bench Brief on Calculation of Compensatory & Punitive Damages, the Court properly applied the statutory damages caps to the extent they are constitutional and apply in this case. Additionally, Plaintiffs incorporate their Bench Brief on Calculation of Compensatory & Punitive Damages as if fully restated herein and again move this Court to not apply the punitive damages caps against Plaintiffs, because to do so would be unconstitutional.

where a jury verdict is based on credible expert testimony, as is the case here, 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 jury's award was based on credible evidence and expert testimony. The jury was free to believe the testimony and we cannot say that it was unsupported by the evidence.").

Fourth, the damages awarded by the jury were not excessive. Defendants' entire "argument" for excessive damages is an alleged comparison of other defamation verdicts in Ohio. This is an improper standard. "Each individual case presents unique facts for the jury's determination. ***Comparison with other cases will inevitably result in facially inconsistent results***." *Betz v. Timken Mercy Med. Ctr.*, 96 Ohio App.3d 211, 222, 644 N.E.2d 1058 (5th Dist. 1994) [emphasis added].[18] This makes logical sense and applies with even more force in this case. This was an extremely unique situation involving the malicious acts of a college and its administrators to publicly shame and destroy a 134-year-old family business. It had devastating effects on the business and the entire Gibson family. Indeed, even if a comparison was proper, none of the cases cited by Defendants involved similarly situated Plaintiffs that were publicly shamed on a national scale.

Furthermore, one must remember that this case involved expert testimony valuing Plaintiffs' ***economic damages*** in excess of $5,000,000.00. And, per Mr. Monaco, that opinion was conservative. The actual economic damages could have gone well above that figure. This proof of economic damages renders Defendants' cases irrelevant. Indeed, for some cases, Defendants falsely recite the relevance facts.[19] *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822,

[18] While R.C. 2315.19(A)(2) allows trial courts to consider other verdicts, that statute only applies to awards of noneconomic damages. Defendants improperly mash everything together when conducting their "comparison."
[19] Some of the cases cited by Defendants, such as *Au v. Yulin* and *Laughman v. Selmeier*, are of little value to the

122 N.E.3d 92 (2018) (no economic damages proven by plaintiff); *Guinn v. Mt. Carmel Health*, S.D.Ohio No. 2:09-CV-226 (no evidence submitted to the Court as to the amount of claimed damages); *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 15 (2012) (jury awarded "$26.5 million in compensatory and punitive damages, plus attorney fees..." and furthermore, the Ohio Supreme Court held that the statements were not actually defamatory, whereas, here the Lorain County jury determined that Defendants' vicious allegations of racist and criminal conduct were false)[20]; *Isquick v. Dale Adams Enterprises, Inc.*, 9th Dist. Summit No. 20839, 2002-Ohio-3988, ¶ 38 ("After hearing Isquick's defamatory comments at a car show, Walther decided not to have Adams restore his Duesenbergs. Mark Bober, a certified public accountant, estimated Adams' loss of future profits at $814,515, with a total economic loss to the company of $1,100,999. Dale Adams also testified that at one time he wrote a column for an automobile collector magazine, but, after Isquick's defamatory statements about his work on the Skiff, he 'resigned in disgrace.'"). Based on the foregoing, Defendants have failed to make the necessary showing for remitter because they have failed to undertake any analysis of the facts of this case versus the facts of the cases they cited within their Motion.

Therefore, Defendants are not entitled to a remittitur of the jury's verdict.

III. CONCLUSION

Therefore, for the foregoing reasons, Plaintiffs request that this Court deny Defendants' Motions for New Trial and Remittitur.

Court's analysis because Defendants have failed to provide any factual discussion of those cases. Instead of actually comparing the facts of these cases to the present case, Defendants attempt to get by purely on an economic comparison. Unfortunately for Defendants, remitter is not based on pure economic comparisons.

[20] Defendants' reference to the Ohio Supreme Court's overturning of the verdict in *Am. Chem. Soc.*, 133 Ohio St.3d 366, is egregiously misleading because the Court overturned the damages because it found that the statements at issue were not defamatory as a matter of law. *Id.* at ¶ 92. The Court was not discussing whether the damage award was excessive.

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Respectfully submitted,

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