IN THE SUPREME COURT OF OHIO

STATE ex rel. WEWS-TV, Relator -vs.- **HON. JOHN R. MIRALDI,** Respondent	Case No.: 2021-0875 **ORIGINAL ACTION IN MANDAMUS**

ALLYN D. GIBSON'S MOTION TO INTERVENE

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Counsel for Intervenor

Now comes Allyn D. Gibson ("Intervenor"), who, pursuant to Ohio R. Civ. P. 24(A), hereby moves this Court for an order permitting him to intervene in this action as a party respondent. A copy of two proposed pleadings responsive to the Complaint as required by Ohio R. Civ. P. 24(C) are included with this Motion, including Intervenor's Answer and Affirmative Defenses as **Exhibit 1** and Intervenor's Motion for Judgment on the Pleadings as **Exhibit 2**.

I. BACKGROUND

On November 7, 2017, Gibson Bros., Inc. ("Gibson's Bakery"), David Gibson ("Dave"), and Allyn W. Gibson ("Grandpa Gibson") (collectively, the "Gibson Parties") filed a lawsuit (the "Gibson-Oberlin Lawsuit") against Oberlin College and Meredith Raimondo (collectively, "Oberlin Parties"). The complaint centered around a campaign of defamation, interference with business relationships, and emotional abuse orchestrated by Oberlin Parties against the Gibson Parties beginning in November of 2016. In May and June of 2019, the case proceeded to a six-week trial **that was open to the public**. At the conclusion, the jury returned verdicts against Oberlin Parties for compensatory and punitive damages.

Months after the six-week public trial ended, WEWS filed a motion with the trial court seeking to unseal Exhibit G, which was an exhibit to Oberlin Parties' summary judgment reply brief and which was never introduced during the six-week public trial. On April 29, 2020, the Respondent, the trial court, correctly denied WEWS' Motion, attached hereto as **Exhibit 3**, holding that [emphasis added]:

> The Court, ***having considered all of the factors in Sup. R. 45(E)***, hereby finds that the continued restriction of public access is warranted. ***Of particular importance is Sup. R. 45[E](2)(c), which includes the risk of injury to persons, individual privacy rights and interests, and fairness of the adjudicatory process***. Because of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction.

It is this entry restricting the contents of Exhibit G that WEWS contests.

A. Exhibit G is a Collection of Unauthenticated Social Media Messages that Allegedly Came from a Court-Ordered Mirror-Image of Intervenor's Private Facebook Account.

Intervenor was a nonparty to the Gibson-Oberlin Lawsuit. He was not a plaintiff and was not awarded any damages as part of the jury verdict. During the course of discovery, Oberlin Parties served Intervenor with a substantially overbroad subpoena and subjected Intervenor to multiple days of deposition testimony. As part of the subpoena, the trial court ordered Intervenor to produce to Oberlin Parties a mirror image copy of his Facebook account. The Facebook account is not connected to Gibson's Bakery, Dave, or Grandpa Gibson. Instead, it was Intervenor's ***private, personal Facebook account***. Exhibit G contains a grouping of ***unauthenticated, private*** Facebook messages that allegedly came from the mirror image of Intervenor's Facebook account.

Exhibit G was filed in conjunction with an affidavit executed by one of Oberlin Parties' attorneys, Cary M. Snyder, and attached as an exhibit to Oberlin Parties' Joint Reply in Support of Motions for Summary Judgment. The Facebook messages contained in Exhibit G were not authenticated during the discovery phase of the Gibson-Oberlin Lawsuit. Even though he was deposed for numerous days, Intervenor was not questioned on the contents of Exhibit G nor asked to authenticate Exhibit G. Intervenor was not called as a witness during trial by any party. Further, Oberlin Parties made no attempt to admit Exhibit G as evidence during the six-week public trial.

Several months following judgment against Oberlin Parties, and despite no attempt to (1) authenticate Exhibit G, (2) refer to Exhibit G at trial, (3) call any witnesses regarding Exhibit G's putative contents, or (4) proffer Exhibit G at trial, Oberlin Parties filed a motion attempting to unseal Exhibit G. Respondent denied Oberlin Parties' motion, specifically stating "***[a]t trial, [Oberlin Parties] made no attempt to introduce these materials as evidence of the Bakery's reputation in the community.***". (See, Sep. 16, 2019 Journal Entry, p. 2, attached hereto as **Exhibit 4** [emphasis added]). When Oberlin Parties were unsuccessful, WEWS stepped in to attempt to do

the same.

II. LAW & ARGUMENT

A. Intervenor is Entitled to Intervene in this Case as of Right under Ohio R. Civ. P. 24(A).

Pursuant to Ohio R. Civ. P. 24(A)(2), "[u]pon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties." Considering this provision, courts have required four elements to be met for a party to intervene as of right:

(1) the intervenor must claim an interest relating to the property or transaction that is the subject of action;

(2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest;

(3) the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties; and

(4) the motion to intervene must be timely.

Greenman v. Greenman, 5th Dist. Fairfield No. 04CA69, 2005-Ohio-4961, ¶ 16; *see also, State ex rel. Smith v. Frost*, 74 Ohio St.3d 107, 108, 656 N.E.2d 673, 675 (1995). In all cases, Ohio R. Civ. P. 24 "***is to be liberally construed in favor of intervention***." *Freedom Mtge. Corp. v. Milhoan*, 7th Dist. Columbiana No. 13 CO 15, 2014-Ohio-881, ¶ 58 [emphasis added]; *see also, Frost*, 74 Ohio St.3d at 108, 656 N.E.2d at 676.

Each of these elements is met in this case:

First, Intervenor clearly has an interest in the property that is the subject of this mandamus action. Exhibit G contains a grouping of ***unauthenticated, private*** Facebook messages, attached

to an Oberlin Parties litigation attorney's affidavit, that allegedly came from the mirror image of Intervenor's Facebook account. For nearly two years, WEWS has attempted to gain access to the contents of Exhibit G, first before Respondent, then before the appellate court (which appeal was dismissed), and now before this Court. (See, Compl., ¶¶ 14, 24, 25). As the contents of Exhibit G allegedly contain Intervenor's private Facebook messages which were never authenticated, he has an interest in Exhibit G and this action and has the right to intervene in the Complaint to defend that interest.

Second, the disposition of this action would certainly impair or impede Intervenor's ability to protect his interest in such alleged private Facebook messages. Without intervention, if WEWS prevails in this action, then Intervenor would have had no opportunity to defend his interest.

Third, Intervenor's interest in Exhibit G is not adequately represented by the existing parties. Respondent, as the trial court Judge, has a different interest in defending the court's decisions, whereas Intervenor's interest is in Exhibit G itself.

Fourth, this Motion to Intervene is timely. From Intervenor's review of the docket, the Complaint was filed on July 15, 2021, this action was referred to mediation on July 22, 2021, and then returned to the regular docket on August 25, 2021.

Therefore, Intervenor is entitled to appear in this action as a Respondent as a matter of right.

III. CONCLUSION

For the foregoing reasons, Intervenor's Motion should be granted, and Intervenor should be granted permission to file and serve the attached pleadings, or something similar thereto, responsive to WEWS's Complaint.

DATED: September 16, 2021

Respectfully submitted,

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Counsel for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2021, this document was eFiled via the Court's eFile system which shall send notifications of this filing to all counsel of record. Additionally, a true and accurate copy of the foregoing was sent via electronic mail on this 16th day of September, 2021, to the following:

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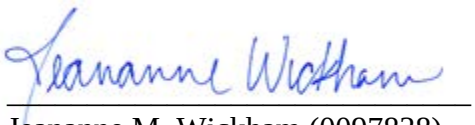

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INTERVENOR ALLYN D. GIBSON'S ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT FOR MANDAMUS

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EXHIBIT
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Intervenor, Allyn D. Gibson ("ADG" or "Intervenor") makes these admissions, denials, and averments in response to the Complaint for Writ of Mandamus ("Complaint") filed by Relator WEWS-TV ("WEWS" or "Relator"):

Answer

1. Intervenor is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 1 of the Complaint and denies the dame.

2. Intervenor admits the allegation in Paragraph 2 of the Complaint.

3. Paragraph 3 of the Complaint constitutes a legal conclusion to which no response is required.

4. In response to the second Paragraph 1 of the Complaint, ADG admits that Gibson Bros. Inc., David R. Gibson, and Allyn W. Gibson ("Gibson Parties") sued Oberlin College and Dr. Meredith Raimondo ("Oberlin Parties") on November 7, 2017 and that a copy of the Gibson Parties' Complaint is attached to the Affidavit of Katie Townsend, but deny the remaining allegations because they misstate the nature of Oberlin College and Dr. Meredith Raimondo's intentional tortious conduct against the Gibson Parties.

5. Intervenor admits the allegations in the second Paragraph 2 of the Complaint.

6. In response to the second Paragraph 3 of the Complaint, Intervenor admits that the parties in the pertinent lawsuit entered into a Stipulated Protective Order dated June 6, 2018 and state that the Stipulated Protective Order speaks for itself.

7. In response to Paragraph 4 of the Complaint, Intervenor states that the Stipulated Protective Order speaks for itself.

8. Intervenor admits the allegations in Paragraph 5 of the Complaint.

9. In response to Paragraph 6 of the Complaint, Intervenor admits the Oberlin Parties attached materials from Intervenor's private Facebook account which the Oberlin Parties obtained from the forensic image of Intervenor's private Facebook account which the Gibson Parties had marked "CONFIDENTIAL" under the Stipulated Protective Order. Intervenor denies the remaining allegations based on lack of knowledge.

10. Intervenor denies the allegations in Paragraph 7 of the Complaint.

11. In response to Paragraph 8 of the Complaint, Intervenor states that the lower court's rulings and the parties' motions and briefs speak for themselves.

12. Intervenor admits the allegations in Paragraph 9 of the Complaint.

13. In response to Paragraph 10 of the Complaint, Intervenor admits that the Oberlin Parties sought to unseal the sealed materials at issue months after the parties' summary judgment motions and briefs and months after the trial. Further answering, Intervenor admits that a copy of Oberlin Parties' motion to unseal is attached to the Townsend Affidavit.

14. In response to Paragraph 11 of the Complaint, Intervenor admits a copy of the trial court's September 16, 2019 order denying Oberlin Parties' untimely and meritless motion to unseal is attached to the Townsend Affidavit and states that the order speaks for itself.

15. In response to Paragraph 12 of the Complaint, Intervenor states the trial court's order speaks for itself.

16. Intervenor denies the allegations in Paragraph 13 of the Complaint.

17. Intervenor admits the allegations in Paragraph 14 of the Complaint.

18. Intervenor admits the allegations in Paragraph 15 of the Complaint.

19. Intervenor admits the allegations in Paragraph 16 of the Complaint.

20. Intervenor admits the allegations in Paragraph 17 of the Complaint.

21. Intervenor admits the allegations in Paragraph 18 of the Complaint.

22. Intervenor admits the allegations in Paragraph 19 of the Complaint.

23. In response to Paragraph 20 of the Complaint, Intervenor states that the order speaks for itself.

24. In response to Paragraph 21 of the Complaint, Intervenor states the order speaks for itself.

25. Intervenor denies the allegations in Paragraph 22 of the Complaint.

26. Intervenor denies the allegations in Paragraph 23 of the Complaint.

27. Intervenor admits the allegations in Paragraph 24 of the Complaint.

28. In response to Paragraph 25 of the Complaint, Intervenor states that the order speaks for itself and denies that lower court dismissed Relator's appeal without a "hearing."

29. Intervenor is without sufficient knowledge or information to form a belief as to the allegations in Paragraph 26 of the Complaint and therefore denies the same.

30. Upon information and belief, Intervenor admits the allegations in Paragraph 27 of the Complaint.

31. Paragraph 28 of the Complaint constitutes a legal conclusion to which no response is required.

32. Paragraph 29 of the Complaint constitutes a legal conclusion to which no response is required.

33. Paragraph 30 of the Complaint constitutes a legal conclusion to which no response is required.

34. Intervenor denies the allegations in Paragraph 31 of the Complaint.

35. Paragraph 32 of the Complaint constitutes a legal conclusion to which no response is required.

36. Paragraph 33 of the Complaint constitutes a legal conclusion to which no response is required.

37. Paragraph 34 of the Complaint constitutes a legal conclusion to which no response is required.

38. Paragraph 35 of the Complaint constitutes a legal conclusion to which no response is required.

39. Paragraph 36 of the Complaint constitutes a legal conclusion to which no response is required.

40. Paragraph 37 of the Complaint constitutes a legal conclusion to which no response is required.

41. In response to Paragraph 38 of the Complaint, Intervenor states that the rule speaks for itself.

42. In response to Paragraph 39 of the Complaint, Intervenor states that the rule speaks for itself.

43. Paragraph 40 of the Complaint constitutes a legal conclusion to which no response is required.

44. Intervenor denies the allegations in Paragraph 41 of the Complaint.

45. Paragraph 42 of the Complaint constitutes a legal conclusion to which no response is required.

46. Paragraph 43 of the Complaint constitutes a legal conclusion to which no response is required.

47. Paragraph 44 of the Complaint constitutes a legal conclusion to which no response is required.

48. In response to Paragraph 45 of the Complaint, Intervenor states that the rule speaks for itself.

49. Intervenor is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 46 of the Complaint and therefore denies the same.

50. In response to Paragraph 47 of the Complaint, Intervenor states that the order speaks for itself.

51. In response to Paragraph 48 of the Complaint, Intervenor states that the order speaks for itself.

52. In response to Paragraph 49 of the Complaint, Intervenor states that the order speaks for itself and denies that the order does not comply with the applicable rule(s).

53. Paragraph 50 of the Complaint constitutes a legal conclusion to which no response is required.

54. Paragraph 51 of the Complaint constitutes a legal conclusion to which no response is required.

55. Paragraph 52 of the Complaint constitutes a legal conclusion to which no response is required.

56. In response to Paragraph 53 of the Complaint, Intervenor states that WEWS filed a meritless appeal within the Ninth District Court of Appeals and denies the remaining allegations.

57. In response to Paragraph 54, Intervenor states that the Ninth District Court of Appeals' order dismissing WEWS's appeal speaks for itself.

58. Intervenor denies the allegations in Paragraph 55 of the Complaint.

59. Intervenor denies the allegations in Paragraph 56 of the Complaint.

60. Intervenor denies the allegations in Paragraph 57 of the Complaint.

61. Intervenor denies that Relator is entitled to any relief sought within its prayer for relief.

Affirmative Defenses

1. Realtor's Complaint fails to state a claim upon which relief may be granted.

2. Relator is not entitled to any relief because (1) Exhibit G was filed along with an affidavit executed by one of Oberlin Parties' attorneys, Cary Snyder, and attached as an exhibit to Oberlin Parties' Joint Reply in Support of Motions for Summary Judgment, (2) the Facebook messages in Exhibit G were not authenticated during the discovery phase of the trial court case, (3) even though he was deposed for several days, Intervenor was not questioned on the contents of Exhibit G during his deposition or asked to authenticate Exhibit G, (4) Intervenor was not called as a witness during trial by the Gibson Parties or Oberlin Parties, and (5) further, Oberlin Parties made no attempt to admit Exhibit G as evidence during the six-week public trial.

3. Relator deserves no relief in this action because Relator was not actively involved in reporting on this case. Indeed, from the Gibson Parties' review, Relator has only carried four stories related to this case over the past four years, and three of the stories were merely picked up from the Associated Press. *See, Oberlin College Appeals Verdict that Awarded Bakery for than $31 Million*, https://www.news5cleveland.com/news/local-news/oh-lorain/oberlin-college-appeals-verdict-that-awarded-bakery-44-million (Oct. 8, 2019) (authored in part by Associated Press and WEWS news staff); *Market Awarded $44M in Racism Dispute with Oberlin College*, https://www.news5cleveland.com/news/local-news/oh-lorain/market-awarded-44m-in-racism-dispute-with-oberlin-college (June 13, 2019) (Associated Press); *Jury Awards $11 Million in*

Lawsuit over Ohio College Dispute, https://www.news5cleveland.com/news/local-news/oh-lorain/jury-awards-11-million-in-lawsuit-over-ohio-college-dispute (June 8, 2019) (Associated Press); *Racial Dispute at Beloved Bakery Roils Ohio Liberal College Town*, https://www.news5cleveland.com/news/local-news/oh-lorain/racial-dispute-at-beloved-bakery-roils-liberal-college-town (Dec. 11, 2017) (Associated Press).

4. Relator deserves no relief in this action because Realtor's parent company, The E.W. Scripps Company, is actively challenging the jury's verdict on behalf of Oberlin Parties.

5. Relator deserves no relief in this action because Relator is not a disinterested media company seeking to report on a legal case; instead, Relator has directly allied itself with Oberlin Parties and its campaign to bully and destroy the Gibson Parties' family, reputation, and brand.

6. Relator's federal and state constitutional arguments are barred because Relator lacked standing to raise those arguments in the Motion to Unseal Exhibit G. Sup.R. 45(F)(1) [emphasis added] ("Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted access ***pursuant to division (E) of this rule***."). Relator failed to properly intervene in the trial court proceedings. *See, Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 491, 758 N.E.2d 286 (1st Dist. 2001) ("permissive intervention is the appropriate procedural device to use when a litigant who is not an original party to an action seeks to challenge protective orders entered in that action.").

7. Relator deserves no relief in this action because Ohio law does not provide a public right of access to discovery papers. *Adams*, 143 Ohio App.3d at 487; *Speece v. Speece*, 11th Dist. Geauga No. 2016-G-0100, 2017-Ohio-7950, ¶ 25. This is particularly true where, as here, the discovery papers are the personal documents of a non-party obtained through a subpoena of that non-party.

8. Relator deserves no relief in this action because under Ohio law, discovery papers do not transform into public documents simply because they are filed with the court.

9. Relator deserves no relief in this action because federal law distinguishes between materials that are not ultimately admitted as evidence and those that are admitted as evidence when deciding whether a right of public access exists. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

10. Relator deserves no relief in this action because the First Amendment does not confer onto the public the right to access inadmissible materials merely because they are attached to motions. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1326 (D.C.Cir.1985).

11. Relator deserves no relief in this action because the trial court complied with Sup.R. 45, including but not limited to:

- Recognizing that the privacy interests of third parties requires restricted access;
- Recognizing that the danger of violence requires restricted access, as demonstrated by death threats targeting Intervenor and violence aimed at Gibson Parties and Gibson's Bakery employees. *See* Allyn D. Gibson Deposition Vol. I, p. 43 and Vol. 2, p. 368, the relevant pages of which are attached hereto as **Exhibits A and B**, Trial Transcript Vol. VII, pp. 29-33 and p. 112, the relevant pages of which are attached hereto as **Exhibit C**, and Trial Transcript Vol. VI, pp. 105-106, the relevant pages of which are attached hereto as **Exhibit D**; and
- That the trial court's order was narrowly tailored.

DATED: September 16, 2021

Respectfully submitted,

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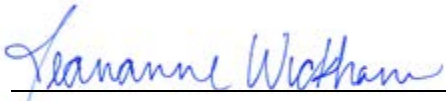

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IN THE COURT OF COMMON PLEAS

OF LORAIN COUNTY, OHIO

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GIBSON BROS., INC., et al.,

Plaintiffs,

vs. Case No. 17CV193761

OBERLIN COLLEGE, etc., et al.,

Defendants.

~~~~~~~~~~~~~~~~~~~~

Videotaped Deposition of

ALLYN D. GIBSON

December 20, 2018
10:37 a.m.

Taken at:

Wickens, Herzer, Panza
35765 Chester Road
Avon, Ohio

Nancy L. Molnar, RPR, CLR

EXHIBIT
A

course that you have not attended?

A. I believe so, yes.

Q. And is there a reason you have not attended the one offered?

A. I tried to stay away from the college. 11:30:45

Q. And why is that?

A. Because people don't treat me well when I'm in that area.

Q. What do you mean by that? How do they not treat you well? 11:31:01

A. I've had people harass me and threaten to hurt me, spit at me, say they're going to kill me, threaten my family.

Q. And does this happen when you go on Oberlin College's campus? 11:31:22

A. Yes.

Q. When is the last time you were on Oberlin College's campus?

A. I don't remember.

Q. Was it in the last year? 11:31:37

A. Yes.

Q. And then during your last visit to Oberlin College's campus, did people harass you, threaten you, threaten to kill your family or spit on you at that time? 11:31:53

CERTIFICATE

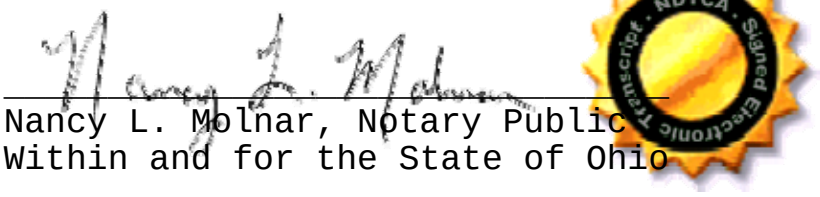
The State of Ohio,)
SS:
County of Lorain.)

I, Nancy L. Molnar, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, ALLYN D. GIBSON, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the above-referenced witness was by me reduced to stenotypy in the presence of said witness; afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony so given by the above-referenced witness.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney for either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Avon Lake, Ohio, on this 4th day of January, 2019.



Nancy L. Molnar, Notary Public
Within and for the State of Ohio

My commission expires July 16, 2023.

IN THE COURT OF COMMON PLEAS

OF LORAIN COUNTY, OHIO

~~~~~~~~~~~~~~~~~~~~

GIBSON BROS., INC., et al.,

Plaintiffs,

vs. Case No. 17CV193761

OBERLIN COLLEGE, et al.,

Defendants.

~~~~~~~~~~~~~~~~~~~~

Videotaped Deposition of

ALLYN D. GIBSON

Volume II

February 26, 2019
9:15 a.m.

Taken at:

Wickens, Herzer, Panza

35765 Chester Road

Avon, Ohio

Nancy L. Molnar, RPR, CLR

EXHIBIT

B

harming?

A. Well, I had some people assault me behind my store on my property. Those were some of them. But they were calling to action violence against me, my family, my family, myself, our business. 12:24:19

Q. How were the protestors calling to action violence against you and your family and your business?

A. They were saying it. 12:24:32

Q. What were they saying?

A. They were saying -- swearing at us, saying, F Allyn Gibson, you know, beat him up, do this, do that. They were threatening us, threatening our actual health and physical. 12:24:44

Q. Did you hear the protestors saying, "Beat up Allyn Gibson"?

A. Yes.

Q. And that was Thursday when you were at the store? 12:24:55

A. Before I left the store that day, yeah.

Q. And then on the page labeled 2276, you post a message, "No reasoning with people. Tried to tell them to treat people as individuals, not as a race, that if a group of people are 12:25:17

CERTIFICATE

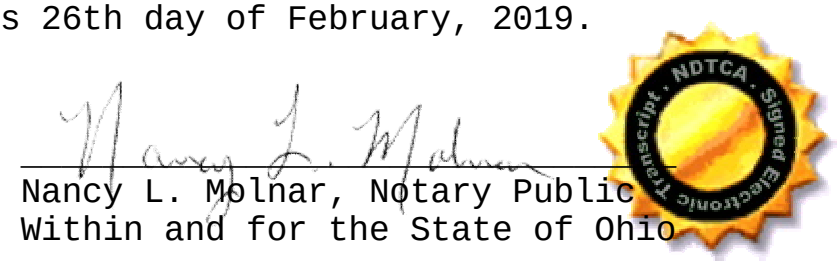
The State of Ohio,)
SS:
County of Lorain.)

I, Nancy L. Molnar, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, ALLYN D. GIBSON, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the above-referenced witness was by me reduced to stenotypy in the presence of said witness; afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony so given by the above-referenced witness.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney for either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Avon Lake, Ohio, on this 26th day of February, 2019.



Nancy L. Molnar, Notary Public
Within and for the State of Ohio

My commission expires July 15, 2023.

STATE OF OHIO,)
) SS:
COUNTY OF LORAIN.)

IN THE COURT OF COMMON PLEAS

GIBSON BROS., INC., ET AL.,)
PLAINTIFFS,)
VS.) NO. 17CV193761
OBERLIN COLLEGE, ET AL.,)
DEFENDANTS.)

* * *

VOLUME VII

A COMPLETE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THURSDAY, MAY 16, 2019, BEFORE THE HONORABLE JOHN R. MIRALDI, PRESIDING JUDGE OF SAID COURT.

* * *

EXHIBIT
C

Q. How about the amount of people coming into the store, has that changed?
A. Oh, yes, they're afraid to come near it. Some are and whatnot. There's been a lot of threats since and whatnot. Some students want to, want to keep coming anyway. They asked if they could, could leave by the back door because they were watching. Face -- they didn't want to be seen.
Q. How has that changed at the bakery, less people coming in, less interaction?
A. We had to cut the production way back.
Q. How has that made you feel?
A. Gosh, it's a real shame, because we were producing products they liked, and also the environment, it was convenient to every -- it was just right for them, actually. And I didn't know the names of each one, but they knew my name. Of course, it's over the door, up on the third floor part of the brick. Why, it had Gibson Brothers.
Q. I'm going to move forward after the protests several months to May, May 2017. Were you living by yourself at your apartment at that time?
A. Yes. My wife had passed away.
Q. And I want to ask you a little bit, if it's okay, about your fall, your injury, okay?

A. Okay.
Q. Can you tell us about that night before your fall?
A. Well, this particular day, I made the deliveries, I had started at 6:30. And it was several hours later I was finished making deliveries, whether it was the hospital or the college, the kitchens or dining rooms. They had some pretty extensive dining rooms, held a lot of people.

After I got that, got in there and so forth, and I said to myself, well, I'm -- I hope to get a nap this afternoon, but it didn't happen. It just wasn't available and so forth. At 10:00, I finally got out of there, and I was going to close the store that night and so forth, and I got someone to cover it for me and so forth.

But then I went home at 10:00 went by my La-Z-Boy and I said I better -- the TV. I better leave that. I better get in bed or I won't get there. Then I said, I'll just stop and watch it. Turned the TV on, sat down in the La-Z-Boy and I never saw the TV come in focus. I was out. I was asleep. And so I woke up at about one o'clock.
Q. What woke you up?
A. There was some pounding on the front window

right by my where I was sitting in my La-Z-Boy. And you know, they went over and pounded on the glass on the window of the --

Q. Was it a light tap?

A. No. No. It was pretty pronounced, plenty of noise with it. I finally said, "Just a moment. I'll be there." I yelled out loud. And it stopped and so forth. So it took me a few --

Q. How did you know what time it was?

A. I looked at my watch right then to see because I didn't know what time it was either. And oh, my gosh, 1:00. Who could that be and so forth? So I will be there in a minute.

So I got down and got around, and I opened the front door and there was nobody there. There was a car parked in the parking lot of the -- for the apartment building that my son and I had taken over one of the apartments there. And I started to make my way towards the car, you know, and I didn't even step down into the -- off the curb to the parking lot. And it was, you know, the car was parked idly.

Q. Were there people in the car?

A. There were people in the car, two people in the car in the front seat.

Q. Did you go all the way up to the car?

A. No, I didn't go -- I didn't into the parking lot.
Q. Why not?
A. Well, I tell you, I got my first shock and I started thinking a little bit. What are they doing here at one o'clock at night? And I didn't recognize the car. I took a look at the license plate. And at that time my memory was a lot better than it is now. And I said, I better go back inside and call the police and let them check it out.
Q. Did you head towards the -- back to the house, to the apartment?
A. Yeah, I started. I tripped and fell there in the doorway of the house and landed on the hard concrete floor that had carpet on the top of it, but that wasn't enough to -- knocked a lot of things out of me.
Q. Did you fall hard?
A. Yeah, I fell pretty hard. I broke --
Q. Were you kind of in the doorway?
A. Yes.
Q. Was someone in the parking lot right outside the doorway, where they would have been able to see you, you think?
A. If they were looking through their rearview mirror, they could have seen me.

Q. Was that car with the people in it still there in the parking lot while you were laying on the floor inside the doorway?
A. It was there for about ten minutes.
Q. Okay. Did they come help?
A. No. They didn't come anywhere near it.
Q. Were you in pain? Were you in pain, Mr. Gibson?
A. Yeah, a lot of pain.
Q. A lot of pain?
A. A lot of pain. And I broke three vertebrae. The fourth one is attached to the bone, the brain, you know, the skull there. Knocked me back, as I said, pretty hard. And trying to reach that, the pain was so much I couldn't reach my cell phone. I had the cell phone on me just like I have right now. And I couldn't reach it; the pain. Finally I got to it about 20 minutes later.
Q. Twenty minutes you are lying there trying to reach your cell phone?
A. Yeah.
Q. Who did you call?
A. The first one I called was my son -- almost my namesake, you might say. He is Allyn D. Gibson.
Q. Your grandson?
A. Huh?

2016 protests. Do you know if there was vandalism at the store?

A. Vandalism, meaning as in like things broken or?

Q. Broken, slashed, damaged, anything like that?

A. Yeah. We had our tires slashed in May, after the protest happened and everything.

Q. Did you have your tires slashed?

A. I did.

Q. How many times?

A. It was multiple times.

Q. And each time this happened, was your car parked behind Gibson's Bakery?

A. It was.

Q. And what was the most recent time that your tires were slashed?

A. Probably June of last year, May, June.

Q. And was that around the time that Mr. G, his accident happened where he fell and broke his neck?

A. Yes.

Q. Being an employee of Gibson's Bakery, I'd like to talk with you about the changes you've seen before and after November of 2016. When you first started at Gibson's Bakery, prior to the protest, would you see Mr. G at the bakery regularly?

A. Yes.

C E R T I F I C A T E

The State of Ohio,)
) SS:
County of Lorain.)

I, Cathlene M. Camp, Official Court Reporter in the Court of Common Pleas, Lorain County, Ohio, duly appointed therein, do hereby certify that this is a correct transcript of the proceedings in this case on May 16, 2019.

I further certify that this is a complete transcript of the testimony.

IN WITNESS WHEREOF, I have subscribed my name this 17th day of May, 2019.

Cathlene M. Camp, RPR
Official Court Reporter
Lorain County, Ohio
225 Court Street, 7th Floor
Elyria, OH 44035
(440) 329-5564

My Commission expires August 3, 2020

STATE OF OHIO,)
) SS:
COUNTY OF LORAIN.)

IN THE COURT OF COMMON PLEAS

GIBSON BROS., INC., ET AL.,)

PLAINTIFFS,)

VS.) NO. 17CV193761

OBERLIN COLLEGE, ET AL.,)

DEFENDANTS.)

* * *

VOLUME VI

A COMPLETE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON WEDNESDAY, MAY 15, 2019, BEFORE THE HONORABLE JOHN R. MIRALDI, PRESIDING JUDGE OF SAID COURT.

* * *

EXHIBIT
D

before and after the protests?

A. Yes.

Q. And what have you observed?

A. Before the protests, we were doing a lot of production, working a lot of hours; and then after the protests, the production had stopped. You know, foot traffic and orders and things had all stopped. A lot less production going on.

Q. Has the number of bakers that the bakery employs dropped since the protests?

A. Yes.

Q. Have the quantities of daily made baked goods changed?

A. Yes.

Q. How have they changed since then?

A. At least by 50 percent decrease.

Q. Decrease?

A. Yes.

Q. How about specialty orders, such as graduation cakes, have they decreased?

A. Yes, those have decreased.

Q. And did all of that occur, based on your observations, after the November 2016 protests?

A. Yes.

Q. Now, after the protests, did you, while working

at Gibson's Bakery, suffer any property damage?

A. Yes. I had a drill bit stuck in the side of my tire.

Q. Where was your car parked at the time?

A. In the off-street parking lot behind the buildings downtown.

Q. Is that in the vicinity of Gibson's Bakery?

A. Yes.

Q. And had similar events like that occurred to you or to your vehicle prior to the protests?

A. No.

MR. ONEST: I have nothing further, Your Honor.

THE COURT: Any cross-examination?

MR. MANDEL: Yes, Your Honor.

CROSS-EXAMINATION OF SHANE CHENEY

BY MR. MANDEL:

Q. Good afternoon, Mr. Cheney. My name is Josh Mandel; I represent the defendants Oberlin College and Dr. Meredith Raimondo. I have a few questions for you. You just mentioned something about foot traffic. You would agree with me, you do not know why the bakery was getting less foot traffic, correct?

A. Would I agree with you? I believe it's because of the protests.

Q. You believe it's because of protests?

C E R T I F I C A T E

The State of Ohio,)
) SS:
County of Lorain.)

I, Cathlene M. Camp, Official Court Reporter in the Court of Common Pleas, Lorain County, Ohio, duly appointed therein, do hereby certify that this is a correct transcript of the proceedings in this case on May 15, 2019.

I further certify that this is a complete transcript of the testimony.

IN WITNESS WHEREOF, I have subscribed my name this 16th day of May, 2019.

_____

Cathlene M. Camp, RPR
Official Court Reporter
Lorain County, Ohio
225 Court Street, 7th Floor
Elyria, OH 44035
(440) 329-5564

My Commission expires August 3, 2020

IN THE SUPREME COURT OF OHIO

STATE ex rel. WEWS-TV, Relator -vs.- **HON. JOHN R. MIRALDI,** Respondent	Case No.: 2021-0875 **ORIGINAL ACTION IN MANDAMUS**

INTERVENOR ALLYN D. GIBSON'S MOTION FOR JUDGMENT ON THE PLEADINGS

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EXHIBIT
2

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Counsel for Intervenor

Intervenor, Allyn D. Gibson ("ADG" or "Intervenor"), respectfully files this motion for judgment on the pleadings, as Relator can prove no set of facts that would entitle it to relief and Relator's Complaint should be dismissed.

I. STATEMENT OF FACTS[1]

On November 7, 2017, Gibson Bros., Inc. ("Gibson's Bakery"), David Gibson ("David"), and Allyn W. Gibson ("Grandpa Gibson") (collectively, the "Gibson Parties") filed suit against Oberlin College and Meredith Raimondo ("Oberlin Parties"). The complaint centered around a campaign of defamation, interference with business relationships, and emotional abuse orchestrated by the Oberlin Parties against the Gibson Parties beginning in November of 2016. In May and June of 2019, the case proceeded to a six-week trial that was open to the public. At the conclusion, the jury returned verdicts against Oberlin Parties for compensatory and punitive damages.

Months after the six-week public trial ended, Relator filed a motion with the trial court seeking to unseal Exhibit G, which was an exhibit to Oberlin Parties' summary judgment reply brief and which was never introduced during the six-week public trial. On April 29, 2020, the trial court correctly denied Relator's motion to unseal Exhibit G.

A. Exhibit G is a Collection of Unauthenticated Social Media Messages that Allegedly Came from a Court-Ordered Mirror-Image of Non-Party Allyn D. Gibson's Private Facebook Account.

Intervenor Allyn D. Gibson ("ADG") was a nonparty to the lawsuit. He was not a plaintiff and was not awarded any damages as part of the jury verdict. During the course of discovery, Oberlin Parties served ADG with a substantially overbroad subpoena and subjected ADG to

[1] The discussion of facts is based on the allegations pled within Relator's Complaint for Mandamus and the materials attached to or referenced within the Complaint, including those materials attached to the affidavit attached to the Complaint.

multiple days of deposition testimony. As part of the subpoena, the trial court ordered ADG to produce to Oberlin Parties a mirror image copy of his Facebook account. [*See* Feb. 21, 2019 Order]. The Facebook account is not connected to Gibson's Bakery, David, or Grandpa Gibson. Instead, it was ADG's private, personal Facebook account. Exhibit G contains a grouping of unauthenticated, private Facebook messages that allegedly came from the mirror image of ADG's Facebook account.

Exhibit G was filed in conjunction with an affidavit executed by one of Oberlin Parties' attorneys, Cary Snyder, and attached as an exhibit to Oberlin Parties' Joint Reply in Support of Motions for Summary Judgment ("Reply Brief"). The Facebook messages contained in Exhibit G were not authenticated during the discovery phase of the case. Even though he was deposed for numerous days, ADG was never questioned on the contents of Exhibit G or even asked to authenticate Exhibit G. ADG was not called as a witness during trial by any party. Further, Oberlin Parties made no attempt to admit Exhibit G as evidence during the six-week public trial.

B. Five Months after Oberlin Parties Filed Exhibit G Under Seal and Two Months after the Trial, Oberlin Parties Filed a Motion to Unseal Exhibit G, which was Correctly Rejected by the Trial Court.

On August 28, 2019, more than two months following the conclusion of trial, and five months after Exhibit G was originally filed under seal, Oberlin Parties filed a motion with the trial court to unseal Exhibit G. This served no purpose in furthering the interests of justice, as Oberlin Parties recognized that Exhibit G was not of evidentiary quality because Oberlin Parties did not (1) attempt to authenticate Exhibit G, (2) refer to Exhibit G at trial, (3) call any witnesses regarding Exhibit G's contents, or (4) proffer Exhibit G at trial.

The Gibson Parties filed their Response in Opposition to Oberlin Parties' motion to unseal on September 11, 2019, pointing out that Oberlin Parties' true purpose was to carry out an abuse of process and retaliatory invasion of non-party ADG's privacy. Oberlin Parties did not file a reply.

On September 16, 2019, the trial court denied Oberlin Parties' Motion, specifically stating "[a]t trial, [Oberlin] made no attempt to introduce these materials as evidence of the Bakery's reputation in the community." [*See* Sep. 16, 2019 J. Entry, p. 2].

C. Although it Feigns Disinterest in the Outcome of the Gibson Parties' Case and Portrays Itself as an Independent Media Company, Relator is Allied with Oberlin Parties. Relator's Parent Company is Challenging the Jury's Verdict on Behalf of Oberlin Parties, and Relator's Former Ten-Year Contributor was Oberlin Parties' Lead Trial Counsel.

On October 21, 2019, Relator filed a motion seeking to unseal Exhibit G. Relator disingenuously claimed below that it filed its motion because it "reported extensively" on this case and wants access to the case documents. But upon closer examination, it appears that Relator is a stalking horse for Oberlin Parties and is seeking to further injure the Gibson Parties. Relator was not actively involved in reporting on this case. Indeed, from the Gibson Parties' review, Relator had only carried four stories related to this case over the past four or five years, and three of the stories were merely picked up from the Associated Press.[2] With its clear antipathy to this case before the jury verdicts, Relator's crusade to access Exhibit G is puzzling until we consider:

First – Relator's parent company, The E.W. Scripps Company, is actively challenging the jury's verdict on behalf of Oberlin Parties. WEWS is owned by The E.W. Scripps Company. The E.W. Scripps Company filed an *amicus curiae* brief in the Ninth District Court of Appeals in favor

[2] *See*, *Oberlin College Appeals Verdict that Awarded Bakery for than $31 Million*, https://www.news5cleveland.com/news/local-news/oh-lorain/oberlin-college-appeals-verdict-that-awarded-bakery-44-million (Oct. 8, 2019) (authored in part by Associated Press and WEWS news staff); *Market Awarded $44M in Racism Dispute with Oberlin College*, https://www.news5cleveland.com/news/local-news/oh-lorain/market-awarded-44m-in-racism-dispute-with-oberlin-college (June 13, 2019) (Associated Press); *Jury Awards $11 Million in Lawsuit over Ohio College Dispute*, https://www.news5cleveland.com/news/local-news/oh-lorain/jury-awards-11-million-in-lawsuit-over-ohio-college-dispute (June 8, 2019) (Associated Press); *Racial Dispute at Beloved Bakery Roils Ohio Liberal College Town*, https://www.news5cleveland.com/news/local-news/oh-lorain/racial-dispute-at-beloved-bakery-roils-liberal-college-town (Dec. 11, 2017) (Associated Press).

of Oberlin Parties that, using faulty legal reasoning, asked the Court to overturn the jury's verdict. [June 8, 2020 Amicus Curiae Br. of Reporter's Committee and 19 Media Organizations, *Gibson Bros., Inc., et al. v. Oberlin College, et al.*, 9th Dist. Case Nos. 19CA011563 & 20CA011632].

Second – Oberlin Parties' lead trial counsel was a ten-year commentator for Relator. In addition to its overt support for Oberlin Parties, Relator also used Oberlin Parties' lead trial counsel, Ronald Holman, II, for ten years as an on-air contributor.[3] [*See* Exh. 1 to Gibson Parties and ADG's Dec. 2, 2019 Br. In Opp. to WEWS' Mtn to Unseal (Exh. H to Relator's Compl.)].

Instead of a disinterested media company seeking to report on a legal case, Relator has directly allied itself with Oberlin Parties and their campaign to bully and destroy the Gibson Parties' family, reputation, and brand.

II. STANDARD OF REVIEW

Under S.Ct.Prac.R. 12.04(C), this Court conducts an independent assessment of the sufficiency of a mandamus complaint. *State ex rel. Evans v. Tieman*, 157 Ohio St.3d 99, 2019-Ohio-2411, 131 N.E.3d 930, ¶ 11. Under Civ.R. 12(C), judgment on the pleadings is "appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931 (1996).

A writ of mandamus is considered an "extraordinary" remedy, "exercised by this court with caution and issued only when the right is clear." *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 11. To obtain a writ of

[3] *See*, https://www.taftlaw.com/people/ronald-d-holman-ii (last visited Oct. 21, 2020).

mandamus, Relator "must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the [Respondent] to provide it, and the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico,* 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 11.

Relator is required to prove that it is entitled to the writ by clear and convincing evidence. *State ex rel. Doner v. Zody,* 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, paragraph three of the syllabus.

III. LAW & ARGUMENT

A. The Trial Court Correctly Denied Relator's Motion to Unseal a Nonparty's Private Social Media Messages.

1. Relator's constitutional arguments for unsealing Exhibit G are incorrect.

The starting point for Relator's claim is that it and the general public have a constitutional right to access Exhibit G because it was attached to a summary judgment reply brief. That assumption is wrong for two reasons: (1) Relator lacked standing to even assert the constitutional arguments because it failed to intervene as a party before the trial court; and (2) neither the federal nor Ohio constitutions provide a right of access to private discovery papers.

a. Relator lacks standing to assert constitutional arguments when seeking to unseal Exhibit G.

The trial court could not address Relator's federal and state constitutional arguments because Relator lacks standing to raise those arguments.

Ohio R. Sup. 45(F)(1) provides standing to any person to seek access to sealed documents under the procedures and factors outlined by the Ohio Rules of Superintendence. But, Rule 45(F)(1) ***does not grant standing to nonparties to assert state or federal constitutional challenges to a trial court decision restricting access to case documents***. Sup.R. 45(F)(1) [emphasis added] ("Any person, by written motion to the court, may request access to a case document or information

in a case document that has been granted restricted access pursuant to division (E) of this rule."). When seeking access to court records on constitutional grounds, parties must file a motion to intervene under Civ.R. 24. *See Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 491, 758 N.E.2d 286 (1st Dist. 2001) ("permissive intervention is the appropriate procedural device to use when a litigant who is not an original party to an action seeks to challenge protective orders entered in that action."). Relator is not a party in the underlying litigation and never moved to intervene in the trial court case. As a result, Relator lacked, and still lacks, standing to challenge the parties' stipulated protective order, including the propriety of designations made thereunder, under the Ohio and federal constitutions.

Thus, the trial court could not address Relator's constitutional arguments and neither should this Court.

b. Even if Relator has standing (it does not), the United States Constitution and Ohio Constitution do not provide a right of access for inadmissible discovery papers like Exhibit G.

i. There is no public right of access to discovery papers.

Under both Ohio and federal law, discovery materials have "historically never been open to the public." *Adams*, 143 Ohio App.3d at 487; *Speece v. Speece*, 11th Dist. Geauga No. 2016-G-0100, 2017-Ohio-7950, ¶ 25.

While discussing discovery within the criminal context, this Court specifically held that discovery materials should not be subject to public access: "[w]e agree ... that discovery should be encouraged and that public disclosure would have a chilling effect on the parties's [sic] search for and exchange of information pursuant to the discovery rules." *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354, 1997-Ohio-271, 673 N.E.2d 1360 (1997). The *Lowe* Court, relying on First Amendment precedent from the United States Supreme Court, further expounded on the dangers to be posed by presuming discovery materials are accessible to the public by stating:

> The Supreme Court noted that the danger of abusing the liberal pretrial discovery rules by publicly releasing information that is irrelevant and could be damaging to reputation and privacy is great and thus the court held that the governmental interest in preventing such abuse is substantial. *** The court also noted that pretrial discovery is not a public component of a trial and any controls on the discovery process do not prevent the public dissemination of information gathered through means other than discovery. *** Accordingly the court held that the limitation on " 'First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved,' " *** and thus the protective order did not violate the First Amendment. [Internal citations omitted.].

Id., *citing Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

The reasoning underlying *Lowe* is fully applicable to civil litigation. *Adams*, 143 Ohio App.3d at 489 ("While *Lowe* concerned only discovery in a criminal case, the logic of *Lowe* would appear to apply with equal, if not more, force to civil discovery in a private lawsuit. Discovery exchanged by a prosecutor in a criminal case is clearly a governmental activity to which the Act would otherwise appear to apply, whereas discovery in a private lawsuit does not involve any government activity other than judicial supervision.").

ii. There is no carte blanche constitutional right of access to discovery papers even if they are attached to summary judgment briefs.

a. Under Ohio law, discovery papers do not transform into public documents simply because they are filed with the court.

Ohio constitutional law does not provide a right to access discovery materials merely because they are filed with the court:

> In sum, there appears to be no clear, unqualified public right to inspect pretrial discovery materials, *even when they are filed with the trial court*, under either the First Amendment, the common law, the "open courts" provision of the Ohio Constitution, or the Ohio Public Records Act.

Adams at 490 (emphasis added).

b. Under federal law, the United States Supreme Court distinguishes between those materials that are not ultimately admitted as evidence and those that are admitted as evidence when deciding whether a right of public access exists.

In *Seattle Times Co. v. Rhinehart*, the United States Supreme Court reviewed a defamation lawsuit where the lower court restricted the defendants-newspapers' ability to disseminate materials it obtained during discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, the lower court's order restricted the dissemination of the plaintiffs' financial information, the names and addresses of numerous nonparties, and various contributors and clients associated with the plaintiffs' religious organization. *Id*. at 27.

Discussing discovery materials, generally, the Supreme Court first acknowledged that a party gains discovery material solely through the civil justice system's discovery processes. *Id*. at 32. Because of this, the First Amendment does not protect a litigant's right to obtain or otherwise access materials for purposes of litigating its case. *Id*., *citing Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). Given the long history of keeping discovery materials away from public view, discovery materials which are obtained by a party *but which are not yet admitted as evidence in the trial* are not subject to public access. *Id*. at 33 (emphasis added) ("Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, *restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information*.").

c. The admitted versus not admitted standard properly balances competing interests during discovery.

To permit the public to obtain discovery materials merely because they are filed is indeed a slippery slope:

> It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay

> and expense; *discovery also may seriously implicate privacy interests of litigants and third parties*. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.

Id. at 35-36 (emphasis added). As a result, the trial court does not lose the ability to restrict public access merely because a discovery document was filed in the case. *Id*. at fn. 19 ("Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court."). In fact, the threshold issue is whether the materials attached to a filed motion are in fact admissible evidence.

In re Reporters Committee for Freedom of the Press, a libel case, discussed at length whether documents attached to a dispositive motion were presumptively accessible to the public. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1326 (D.C.Cir.1985). In *In re Reporters Committee*, like this case, the appellants were not parties to the lawsuit but were members of the press who sought access to certain exhibits filed under seal in the case, including those attached to a summary judgment motion. *Id*.

The court first determined that there has never been a practice of permitting the public to access prejudgment records, *i.e.* those records submitted to the court before a final judgment is rendered:

> Because of their sparseness, the authorities discussed above are perhaps weak support for a general common law rule of nonaccess to pre-judgment records in private civil cases. But when laid beside our inability to find any historical authority, holding or dictum, to the contrary, they are more than enough to rule out a general tradition of access to such records.

Id. at 1335-36.

Most importantly, the court held that the First Amendment does not confer onto the public the right to access inadmissible materials merely because they are attached to motions before the court:

> It is true that in the present case the reporters were only seeking those pretrial materials that could have been considered by the court in its disposition of the Rule 56(c) motion—what they call the "summary judgment record." Chief Justice Burger's analysis[4] does not make any such distinction, though it would be an obvious one to make if it were relevant. ***We are certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre-trial motions. If such a tradition existed, public files would presumably be filled with complaints stricken as scurrilous and with proffered evidence ruled inadmissible. The passage of Seattle Times which cites Chief Justice Burger's analysis with approval evidently considers the admission of evidence the touchstone of a First Amendment right to public access***: "Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." 104 S.Ct. at 2208 (emphasis added). ***Even if one were to expand this perception to include all admissible evidence, it would still lead to the conclusion that material placed before the court in connection with summary judgment motions is not constitutionally required to be open to the public—unless we are to subject trial courts to the constitutional necessity of ruling, either pre-trial or post-trial, on the admissibility of voluminous material that is filed, and perhaps even referred to in the summary judgment motion, but not sought to be introduced.***

Id. at 1337 (emphasis added).

d. Because Exhibit G is nothing more than inadmissible pretrial discovery materials from a nonparty, Relator is not entitled to a presumptive right of access.

Exhibit G is nothing more than discovery materials attached to one brief. Exhibit G consists of *hearsay* messages from a *nonparty's private* Facebook account. Exhibit G was *inadmissible* at the summary judgment stage of proceedings for two separate reasons: (1) Oberlin Parties *failed to authenticate* Exhibit G and instead attached it to an affidavit *executed by one of Oberlin Parties'*

[4] Referring to Chief Justice Burger's concurring opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

attorneys; and (2) Exhibit G is entirely made up of hearsay statements *without exception*. Attaching a document to a summary judgment motion does not transform the document into admissible evidence. In fact, summary judgment evidence must meet the same standards of admissibility as trial evidence. *Knoth v. Prime Time Marketing Mgt., Inc.*, 2nd Dist. Montgomery No. 20021, 2004-Ohio-2426, ¶ 13 ("It is fundamental that the evidence offered by affidavit in support of or in opposition to a motion for summary judgment must also be admissible at trial, albeit in a different form, in order for the court to rely on it."); *Buckeye Lake Firebells v. Leindecker*, 5th Dist. Licking No. 2010-CA-100, 2011-Ohio-1792, ¶ 34 (holding that inadmissible hearsay evidence submitted on summary judgment must be disregarded); *Carter v. Gerbec*, 9th Dist. Summit No. 27712, 2016-Ohio-4666, ¶ 42 (holding that inadmissible hearsay evidence is prohibited in the summary judgment context).

Oberlin Parties made no effort to overcome these evidentiary hurdles during summary judgment. And perhaps more importantly, Oberlin Parties made no effort to introduce Exhibit G during trial and even failed to call ADG as a witness at trial. Therefore, Exhibit G was not "evidence" for purposes of summary judgment, was not later admitted into evidence at trial, and neither the Ohio nor the federal constitutions provide a right of access to Exhibit G.

e. WEWS' cited cases do not undermine the holdings and analysis of *Seattle Times* and *In re Reporters Committee for Freedom of the Press*.

Unlike the on-point federal precedent cited herein, Relator's federal precedent is distinguishable.

Brown & Williamson Tobacco Corp. v. F.T.C., is distinguishable because it involved a district court sealing the entire record of the case, as opposed to a single inadmissible exhibit attached to a single summary judgment brief. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177–81 (6th Cir.1983). Moreover, the concerns about the consequences caused by

restricting the public's access to a trial expressed by the *Brown & Williamson* court are not present here. For instance, the court was concerned with the possibility that witnesses may be more willing to perjure themselves if the public is not able to attend the trial. *Id*. at 1178. No such concerns are present before this Court because the parties had a six-week long jury trial that was open to the public, Oberlin Parties never attempted to introduce Exhibit G, and the relevant person (ADG) was not called as a witness at trial.

The court was also concerned with the "community catharsis" which comes from the public watching and participating in the trial. *Id*. at 1179. Once again, in this case the public, including Relator, was permitted to watch and participate in the open trial. Indeed, reporters from two media outlets were present for nearly every day of trial. Relator, on the other hand, ignored this case until after the jury's verdicts during the compensatory phase of trial. Moreover, the *Brown & Williamson* court was concerned with the possibility that "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id*. Relator cannot reasonably claim that keeping a single exhibit from a summary judgment brief filed months before trial somehow masks alleged impropriety, incompetence, or corruption. Additionally, keeping this single exhibit sealed would not insulate a participant in the litigation because ADG is not a party and did not testify at trial.

Finally, Exhibit G actually meets one of the exceptions to access discussed by the *Brown & Williamson* court, specifically the protection of "privacy rights of participants or *third parties*…" *Id*. To permit Exhibit G, which consists solely of private social media information from a nonparty, to be unsealed would serve no purpose other than to harass and potentially defame a nonparty. It most certainly would invade ADG's protected privacy rights. As a result, *Brown & Williamson* does not support Relator's position.

Rudd Equip. Co., Inc. v. John Deere Construction & Forestry Co. is distinguishable because the party alleging potential harm from the unsealing of records was the plaintiff. *Rudd Equip. Co., Inc. v. John Deere Construction & Forestry Co.*, 834 F.3d 589, 594 (6th Cir.2016). In our case, Exhibit G consists solely of materials from a nonparty. Moreover, much like *Brown & Williamson*, the court originally sealed the entire case, as opposed to certain documents within the record. *Id*. at 591. And perhaps most importantly, the plaintiff failed to "point to any trade secret, or ***privacy right of third parties***, that a seal might legitimately protect." *Id*. at 594 (emphasis added). As detailed above, the privacy rights of a third-party are directly impacted by Exhibit G.

In re Knoxville News-Sentinel Co., Inc. is likewise distinguishable because the district court had sealed the entire record. 723 F.2d 470, 471-72 (6th Cir.1983). Eventually, the record was unsealed, with the exception of two exhibits which contained information about various loans between a bank and numerous private citizens, both of which were ordered to be removed from the court's records and separately maintained for the appellate court's potential review. *Id*. Ultimately, the appellate court upheld the district court's restriction on access to the two exhibits because those exhibits contained private information for nonparties. It relied on the fact that the records involved nonparties, thereby creating a compelling government interest which justifies sealing the records. *Id*. ("Unlike the protected party in *Brown & Williamson*, who sought to deny public access because of the adverse business effect disclosure might cause, the individuals protected by the closure order here are third parties who were not responsible for the initiation of the underlying litigation. These individuals possessed a justifiable expectation of privacy that their names and financial records not be revealed to the public."). The interests of third-parties justify limiting public access to records relating to the third-parties. *Id*. at 478.

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan is distinguishable because it

involves a class action which affected more than 60% of the Michigan commercial health insurance market. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir.2016). The litigation ultimately settled, but numerous members of the class objected to the proposed settlement, citing, in part, the heavy redactions to the documents in the record. *Id*. at 304. The district court had "sealed most of the parties' substantive filings from public view, including nearly 200 exhibits and an expert report upon which the parties based a settlement agreement that would determine the rights of those millions of citizens." *Id*. at 302.

Ultimately, the appellate court found the district court had not undertaken a vigorous enough review before sealing the vast majority of the record. The court relied, in part, on the fact that "[a]s a practical matter, therefore, both the general public and the class were able to ***access only fragmentary information*** about the conduct giving rise to this litigation, and next to nothing about the bases of the settlement itself." *Id*. at 306. In our case, the public's rights were not adjudicated in the litigation and the public was not restricted from seeing most of the record and Relator complains about a single summary judgment exhibit which Oberlin Parties concede had no evidentiary value at trial. Additionally, the *Shane Group* court reaffirmed the importance of protecting the private information of nonparties: "Finally, the point about third parties is often one to take seriously; 'the privacy interests of innocent third parties should weigh heavily in a court's balancing equation.'" *Id*. at 308, *quoting United States v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995). Exhibit G consists of information from the private social media account of a nonparty, thereby weighing heavily in favor of restricting public access.

f. Because the vast majority of records from this case are unsealed, including the entire trial record, there is no concern about a lack of public access.

The lack of public access and participation are the overriding concerns and bases for analysis in the cases cited by Relator. *See e.g., Brown & Williamson*, 710 F.2d at 1178 ("Without

access to the proceedings, the public cannot analyze and critique the reasoning of the court."). As this Court acknowledged, the purposes served by open court proceedings is "(1) ensuring that proceedings are conducted fairly, (2) discouraging perjury, misconduct of participants, and unbiased decisions, (3) providing a controlled outlet for community hostility and emotion, (4) securing public confidence in a trial's results through the appearance of fairness, and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 43 (2002), *citing Richmond Newspapers*, 448 U.S. at 580.

But these are not present in this case. The vast majority of the records from the case, including the entire record from the six-week trial, are available for public consumption. Newspaper and other reporters and members of the public were present for nearly every day of trial. Indeed, the trial court even permitted camera crews in the courtroom. This is not a scenario where the trial court has sealed a large portion of the record. Instead, Relator complains and seeks access to a few pages of discovery materials that were attached to Oberlin Parties' summary judgment reply brief and which were never admitted into evidence at trial.

c. Even if Relator's constitutional arguments were valid (they are not), the trial court made specific findings sufficient to support restricted access.

Relator makes several allegations complaining that the trial court's decision was conclusory and did not make specific on the record findings. But that assessment is incorrect.

As an initial matter, WEWS cites often to *Press-Ent. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), to discuss preservation of "higher values" and restriction being "narrowly tailored." But even before discussing higher values and narrow tailoring, *Press-Ent.* identifies two considerations: (1) whether the place and process have historically been open to the press and general public; and (2) whether public access plays a

significant positive role in the functioning of the particular process in question. *Id.* at 8, citing *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Relator cannot show that either of these considerations are met in this case. As discussed above, neither federal nor Ohio law provide an unqualified right to access discovery materials *merely because they are filed with the court*. *See, e.g., Adams*, 143 Ohio App.3d at 490. It is undisputed that Exhibit G contains inadmissible discovery papers that were not proper for summary judgment and not used at trial. Thus, Exhibit G is not the type of document that has been open to the press and general public. Further, public access will not play a significant role in the functioning of this case considering the completely open six-week trial and Relator's blatant support of Oberlin Parties.

But even if the standard outlined in *Press-Ent* applied (it does not), when discussing the public right of access to judicial proceedings, records must be sealed "when **interests of privacy outweigh the public's right to know**." *In re Knoxville News-Sentinel Co., Inc.,* 723 F.2d at 474 [citations omitted] [emphasis added]. Indeed, the United States Supreme Court specifically recognized that "access has been denied where court files might have become a vehicle for improper purposes" such as being "used to gratify private spite or promote public scandal" or where they "serve as reservoirs of libelous statements for press consumption[.]" *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306 (1978) [citations and quotation marks omitted].

Relator complains that the trial court did not make specific findings supporting restricted access. But that is not true. The trial court specifically found that Exhibit G must remain sealed based on "the risk of injury to persons, individual privacy rights and interests, and the fairness of the adjudicatory process." This conclusion was compelling and narrowly tailored:

First – the trial court recognized that privacy interests of third parties requires restricted access to Exhibit G. Courts have consistently recognized that the privacy rights of third parties supersede the public right of access. *See, e.g. In re Knoxville News-Sentinel Co.*, 723 F.2d at 477-78 (restricting access to third party bank records). ADG is a nonparty to this litigation, and he was not awarded any damages by the jury. ADG was served with a subpoena by Oberlin Parties and forced to comply under penalty of contempt. *See* Civ.R. 45(E) ("Failure by any person ... to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued."). Thus, ADG was forced to *produce private and personal social media content*. Courts have recognized that social media contains extremely personal information not designed for public consumption. *See, e.g. Lawson v. Love's Travel Stops & Country Stores, Inc.*, M.D. Penn. No. 1:17-cv-1266, 2019 WL 5622453 at *6 (Oct. 31, 2019) [emphasis added] ("social media is at once both ubiquitous and often intensely personal, with persons sharing through social media, and storing on electronic media, the most intimate personal details on a host of matters").[5] The trial court correctly recognized that ADG's right to privacy in his private and personal social media messages was a higher interest than the right to privacy.

Second – the trial court recognized that the danger of violence required restricted access to Exhibit G. Courts recognize that the potential of violence or danger to a party's employees requires restricted access to court records. *See In re Nat. Broadcasting Co., Inc.*, 653 F.2d 609, 620 (D.C. Cir. 1981); *BNSF Railway Company v. C.A.T. Construction, Inc.*, 679 Fed.Appx. 646,

[5] Indeed, the U.S. Supreme Court has recognized a strong privacy interest not only in social media but in all forms of electronic media storage and communication. *See, Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473 (2014) (substantially restricting warrantless searches of smartphones due to the fact that "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives – from the mundane to the intimate.").

659 (10th Cir. 2017). The Gibson Parties were subjected to significant threats of violence during and after Oberlin Parties' defamation campaign. ADG specifically was the victim of vicious threats of harm and actual physical injury. During his deposition, ADG testified that after the protest, he was the target of death threats:

> A. I tried to stay away from the college.
> Q. And why is that?
> A. Because people don't treat me well when I'm in that area.
> Q. What do you mean by that? How do they not treat you well?
> A. I've had people harass me and threaten to hurt me, spit at me, say they're going to kill me, threaten my family.
> Q. And does this happen when you go on Oberlin College's campus?
> A. Yes.

[A. D. Gibson Dep. Vol. I, p. 43, filed by Oberlin in February 2019]. In addition to verbal threats, ADG was assaulted behind Gibson's Bakery during Oberlin Parties' defamation campaign. [Id. Vol. II, p. 368].

And ADG was not the only person subject to assaults during and after Oberlin Parties' libelous campaign. Numerous other individuals were subjected to threats of violence, damaged property, and actual physical injury:

- Gibson's Bakery employee Constance Rehm's tires were slashed in the parking lot behind Gibson's Bakery (Tr. Vol. VII, p. 112);
- Gibson's Bakery head baker Shane Cheney's car tires were punctured while it was parked in the Gibson's Bakery parking lot (Tr. Vol. VI, pp. 105-06); and

- Worst of all, individuals pounded on Grandpa Gibson's front door in the middle of the night and, after he fell and broke his neck, left him lying in the doorway of his apartment with a life altering injury (Tr. Vol. VII, pp. 29-33).

Third – the trial court's order was narrowly tailored. As discussed in detail above, this case's six-week trial was available for public consumption and regularly attended by two media entities (but not Relator). Additionally, the vast majority of the records filed with the trial court are available to the public, including dozens of discovery motions, dispositive motions, and motions *in limine*, numerous deposition transcripts, and the entire record from trial. The trial court's limited decision sealing Exhibit G based on (1) the privacy rights of a third-party and (2) the potential for violence was narrowly tailored considering the public's unrestricted access to the entirety of the trial record.

Therefore, even if the *Press-Ent* test applied to this case, the trial court's decision to restrict access to Exhibit G was supported by compelling reasons (privacy of third persons and potential of violence) and narrowly tailored.

2. The trial court correctly restricted access to Exhibit G under Sup.R. 45.

a. The trial court correctly applied Sup.R. 45(F)(2).

Sup.R. 45 has a burden shifting procedure depending on the status of a document filed with the clerk of court. When a document is initially filed under seal, it must be shown by clear and convincing evidence the presumption of openness is outweighed by a competing higher interest. *See* Sup.R. 45(E)(2). But when a document has already been sealed, a court may only permit public access "if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest." Sup.R. 45(F)(2). Relator alleges that the trial court should have applied Sup.R. 45(E)(2). That argument is clearly wrong because Exhibit G was ordered sealed by the trial court before Relator filed its motion.

A brief timeline of events is required. Exhibit G was marked Confidential under the Gibson Parties and Oberlin Parties' stipulated protective order. It was improperly attached as an exhibit to Oberlin Parties' reply in support of its motion for summary judgment and filed under seal on March 22, 2019. From that point, no action was taken with respect to Exhibit G for **five months**. Then, on August 28, 2019, Oberlin Parties' filed a Motion to unseal Exhibit G. On September 16, 2019, the trial court denied Oberlin Parties' motion and sealed Exhibit G. On October 31, 2019, nearly two months after the trial court sealed Exhibit G, Relator filed its motion to unseal with the trial court. Therefore, because Exhibit G was already sealed, **the trial court was obligated to apply Sup.R. 45(F)(2), not Sup.R. 45(E)(2), to Relator's motion**. Any other outcome would contradict the clear and express terms of Sup.R. 45.

Instead of recognizing the clear terms of Sup.R. 45, Relator fixates on one line from the trial court's April 29, 2020 order. In the last paragraph, the trial court, **paraphrasing Sup.R. 45(F)(2)**, states that it "must consider whether the original reason for restricting public access no longer exists[.]" [April 29, 2020 J. Entry, p. 2]. Relator claims that there was no "original reason" to restrict public access because Exhibit G. That argument is wrong. The stipulated protective order, which was signed by the trial court, specifically contemplated that documents marked Confidential during discovery were to be filed under seal. [June 6, 2018 J. Entry, pp. 6-7]. Then, when Oberlin Parties moved to unseal Exhibit G, the trial court denied the Motion and sealed Exhibit G based on the terms of the stipulated protective order. [See, Sep. 16, 2019 J. Entry].

Regardless, Relator's fixation on this line from the order is completely irrelevant. In the very next sentence, the trial court stated that "*having considered all of the factors in Sup.R. 45(E)* ... the continued restriction of public access [to Exhibit G] is warranted." [April 29, 2020 J. Entry, p. 2]. In other words, the trial court identified additional profound reasons for restricting public

access to Exhibit G other than those identified in the stipulated protective order and the order denying Oberlin Parties' motion to unseal.

b. Regardless of the standard applied, access to Exhibit G was properly denied under the factors outlined in Sup.R. 45.

Even assuming that Relator is right (it is not) and that the trial court should have applied Sup.R. 45(E)(2), the trial court properly restricted public access to Exhibit G. Under Sup.R. 45(E)(2), the trial court:

> **[S]hall** restrict public access to information in a case document ... if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:
>
> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access;
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process. (Emphasis added.).

In its order, the trial court specifically stated that it considered each of these factors and that they outweighed the presumption of public access. [April 29, 2020 J. Entry, p. 2]. The trial court's decision is clearly supported by the record evidence:

First – public policy requires restricted access to Exhibit G. Relator is seeking unrestricted access to a nonparty's private information based solely on the fact that Oberlin Parties, the party that issued the subpoena, attached the private documents as an exhibit to a summary judgment motion. Considering the extremely broad scope of civil discovery,[6] under such a rule, there would

[6] While Exhibit G was produced in response to a subpoena, the "'scope of discovery under a subpoena is the same as the scope of discovery under Rule 26.'" *Tcyk, LLC v. Does*, No. 2:13-cv-688, 2013 WL 12130354 at *3 (S.D. Ohio Nov. 25, 2013), *quoting Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011). While not limitless, the scope of discovery is extremely broad. *See Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 904 (6th

be no limit to the invasive and public airing of private information. The scope of discovery is much broader than the scope of admissible evidence. Civil litigation creates an upside-down funnel effect. Discovery begins at the top of the funnel and makes up the majority of the funnel because the scope of discovery is extremely broad. *See* Civ.R. 26(B)(1). The bottom of the funnel and the smallest portion of the funnel is the scope of trial evidence, which requires all evidence to meet numerous hurdles for admissibility, including hearsay and relevancy. The point here is that parties receive significant portions of discovery materials which ultimately are inadmissible at trial. And the reason most civil cases do not take decades to complete is that discovery is intended to be agreeable and reciprocal, i.e. a voluntary free flow of responsive information without the need for constant court intervention. *See* 1994 Staff Notes to Civ.R. 37 ("The purpose of the amendment is to endorse and enforce the view that, in general, discovery is self-regulating and should require court intervention only as a last resort.").

Accepting Relator's position that all discovery materials filed with the court are thereby accessible by the public undercuts the current structure of discovery. Parties and non-parties would need to decide whether to: (1) produce materials during discovery and thereby risk the public's access merely because the other party may file the materials in court; or (2) file for protective orders at every turn. This would create a chilling effect on discovery by causing parties to not produce responsive materials and would grind the courts' dockets to a halt by exponentially increasing the number of discovery motions.

Cir. 2009) ("[T]he scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad, [and] the limits set forth in Fed. R. Civ. P. 26 must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.").

This case provides a prime example for why Relator's interpretation of federal and Ohio law is incorrect and potentially dangerous. If Relator's overreach were the rule, it would give third-parties receiving discovery subpoenas a strong incentive to be obstructionist or otherwise face the risk that their private materials (even when ultimately inadmissible at trial) could be disseminated to the world and splashed across the media. This is not and should not be the rule in Ohio. This is particularly true where there are no restrictions on the documents a litigant may include in summary judgment briefing.

Second – risk of injury and privacy interests weigh strongly in favor of restricted access to Exhibit G. As discussed in substantial detail above, the Gibson family has already been exposed to violent threats and harm. *See, supra* Sec. II(B)(2)(c). Additionally, ADG has an extremely high privacy interest in his personal and private social media content. *See, supra* Sec. II(B)(2)(c). Both of these factors weigh strongly in favor of restricted access.

Third – fairness of the adjudicatory process. Relator claims that "it is difficult to fathom how restricting access to [Exhibit G] could be essential to preserving" the adjudicatory process. [Relator Memo., p. 14]. As discussed above, Exhibit G was clearly inadmissible at the summary judgment stage of this case because it was unauthenticated and contained clear hearsay statements. *See, supra* Sec. II(B)(2)(b)(ii)(d). Exhibit G should not have been attached as an exhibit to Oberlin Parties' reply brief and was not "evidence" for purposes of the trial court's decision on Oberlin Parties' motion for summary judgment. Further, Oberlin Parties did not attempt to admit Exhibit G as evidence or even call ADG as a witness at trial. In other words, Exhibit G was completely irrelevant to the outcome of Oberlin Parties' dispositive motions and had no bearing at trial.

Considering these factors, the trial court correctly decided that Exhibit G must be restricted from public access pursuant to Sup.R. 45.

IV. CONCLUSION

Therefore, for all of the foregoing reasons, this Court should affirm the decision of the trial court by granting judgment on the pleadings to Respondent and ADG.

DATED: September 16, 2021

Respectfully submitted,

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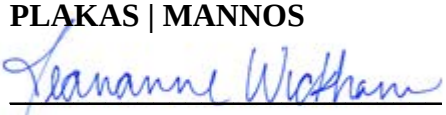

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2021, this document was eFiled via the Court's eFile system which shall send notifications of this filing to all counsel of record. Additionally, a true and accurate copy of the foregoing was sent via electronic mail this 16th day of September, 2021, to the following:

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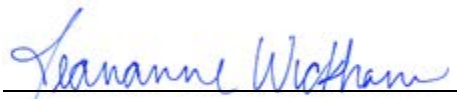

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APPENDIX

a. Appendix A: April 29, 2020 Judgment Entry

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 4/29/20 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON NON-PARTIES' MOTION FOR ACESS TO SEALED CASE DOCUMENT

This matter comes before the Court upon non-parties WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government's Motion for Access to Sealed Case Document, seeking an order unsealing Exhibit G to the Affidavit of Attorney Cary M. Snyder, counsel for Oberlin College and Meredith Raimondo in the above-case. The above case has concluded, and an appeal of the judgment is pending before the Ninth District Court of Appeals.

Following the conclusion of the trial in this matter, the Defendants filed a similar motion which the Court denied on September 8, 2019. Now, the above-mentioned non-parties have filed a motion arguing that under Sup. R. 45, the Court should unseal the exhibit. The exhibit at issue contains unauthenticated Facebook postings purportedly belonging to non-party Allyn D. Gibson. After the movants initial motion, the Court asked the parties to brief the issue of jurisdiction in light of the pending appeal. Each party then submitted a short brief regarding jurisdiction over the unsealing in addition to their briefing on the movants initial motion to unseal.

Ohio Sup. R. 45 addresses public access to Court records in a variety of different contexts. Ohio Sup. R. 45(F) states:

1. Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to

APPENDIX
A

the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion

2. A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

Here, access was originally restricted to Exhibit G under the parties' Mutual Protective Order. That order was agreed-to by the parties and approved and entered by the Court on June 8, 2018. The contents of Exhibit G and their admissibility was at issue during pretrial motions in limine, at which time, a preliminary ruling was issued that these materials could not be utilized as character evidence, but the Court withheld ruling on their admissibility for other purposes. The Defendants made no attempt to introduce the contents of Exhibit G for any reason, nor did they call or attempt to call non-party Allyn D. Gibson as a witness during trial.

At this juncture, the Court, under Ohio Sup. R. 45(F)(2) must consider whether the original reason for restricting public access no longer exists, and whether any new circumstances identified in Sup. R. 45(E) have arisen which would require the continued restriction of public access. The Court, having considered all of the factors in Sup. R. 45(E), hereby finds that the continued restriction of public access is warranted. Of particular importance is Sup. R. 45(2)(c), which includes the risk of injury to persons, individual privacy rights and interests, and fairness of the adjudicatory process. Because of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 4/29/20 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

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Defendant

JOSH M MANDEL
Defendant's Attorney ()-

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EXHIBIT
3

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IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 9/16/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS' MOTION TO UNSEAL EXHIBIT G OF DEFENDANTS' COMBINED SUMMARY JUDGMENT REPLY BRIEF

This matter comes before the Court upon the filing of the Defendants, Oberlin College and Meredith Raimondo's Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief and the Plaintiffs, Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson's Response in Opposition. In making this ruling, the Court has reviewed the parties' briefs, their attached exhibits – including the relevant provisions of the Parties' Stipulated Protective Order, and applicable precedent.

The Defendants bring their motion under Paragraph 12 of their Stipulated Protective Order which provides:

> **Action by the Court**. Applications to the Court for an order relating to any documents designated as Confidential Material shall be done by motion. Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make any orders that may be appropriate with respect to the use and disclosure of any documents produced or used in discovery or at trial.

Here, the Defendants are asking the Court, post-judgment, to unseal Exhibit G to their March 22, 2019 Combined Reply Brief in Support of Summary Judgment. The exhibit is comprised entirely of material from non-party Allyn D. Gibson's Facebook account that largely pre-dates the events giving rise to the above-captioned matter. As noted by the Plaintiffs, this material was the subject of one of Plaintiffs' pre-trial motions in limine.

EXHIBIT
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Specifically, on May 8, 2019, the Court issued a preliminary ruling excluding the presentation of Allyn D. Gibson's Facebook content as character evidence, but withheld ruling on the question of whether it could be introduced to reflect the reputation of Gibson's Bakery in the community. At trial, the Defendants made no attempt to introduce these materials as evidence of the Bakery's reputation in the community. With this procedural context and at this juncture, the Court is not persuaded by the Defendants' arguments that it should make a post-trial order regarding materials that the Defendants opted to file under seal nearly six months ago in accordance with an agreed protective order that they drafted and stipulated to.

For the foregoing reasons, the Defendants' Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief is hereby denied.

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties