Nos. 19CA011563 and
20CA011632
(Consolidated)

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants/Cross-Appellees.

APPEAL FROM THE COMMON PLEAS COURT
LORAIN COUNTY, OHIO,
CASE NO. 17CV193761

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This case is about claims for libel, tortious interference and intentional infliction of emotional distress (IIED) arising out of two events: 1) a lawful student protest during which a Flyer was distributed and senate Resolution posted urging the public and Oberlin administrators to boycott the Bakery; and 2) Oberlin's later decision to partially suspend bakery orders for a brief period, including over winter break. This case is *not* about shoplifting, making Gibson's Bakery "perpetual victims of theft," or students "getting what they deserved" when they pled guilty to shoplifting as part of a plea deal. Appellees' Br. 1, 3, 5, 10, 25-26. Nor is it about coerced statements at the students' sentencing hearing many months later or internal Oberlin texts and emails expressing dismay at those statements (messages Plaintiffs knew nothing about before they were produced in discovery).

Students saw Allyn Gibson Jr. (a white employee and next-in-line to inherit the family Bakery) chase, tackle and place a choke hold on a black student in a manner they believed would not have been used on a white student—shoplifter or not—with the complicity of police holding the employee harmless. The question is not whether that student shoplifted; the question is whether other students had a constitutionally protected right to voice their opinions—not just orally, but also in writing—during the protest, based on their perception that the Bakery's violent enforcement of a "chase-and-detain" policy on a black student aligned with a history of racial discrimination and profiling by the Bakery. Plaintiffs did not appeal the summary judgment for Oberlin on a slander claim, making it law of the case that everything the students said during the protests—including students' "Gibson's is racist" chants—is constitutionally protected speech.

While Plaintiffs insist Oberlin was not held liable for "student speech at a protest," Appellees' Br. 11, that is exactly what happened on the libel claim, encouraged by Plaintiffs' argument that Oberlin had to be the "adult in the room" and rhetoric that being labeled a "racist" is one of the worst things that can happen to a person. Appellants' Br. 10-11. The text of the

Flyer and Resolution were an afterthought at trial. Tellingly, Plaintiffs failed to produce a single witness to testify that they read the allegedly defamatory Flyer or Resolution and thought less of them as a result. They could not do this because, as our current national debate on race has repeatedly shown, personal perceptions and experience make the racist nature of certain practices and behaviors a matter of opinion. And when the context for those opinions is a constitutionally protected protest urging a boycott, the reasonable observer understands associated writings to be a call to action, not factual statements.

As for the remaining claims, Plaintiffs lean heavily on "bullying" rhetoric while ignoring that (i) the jury found *for* Oberlin on Plaintiffs' tortious interference with business relationships claim; and (ii) the Bakery had no IIED claim. Plaintiffs rely on this rhetoric to distract from insufficient evidence and other errors of law (including the trial court's refusal to give effect to a unanimous jury finding of no constitutional actual malice) that led to a historic, grossly excessive and deeply flawed verdict.

II. ARGUMENT

A. Plaintiffs' libel claim and punitive damages awards fail.

1. The student writings are protected speech.

Oberlin did not write the students' Flyer or Resolution, which would be understood by a reasonable reader as opinion speech under the governing four-factor test that looks at context first when, as here, it is far afield from the neutral reporting of facts. Appellants' Br. 12-13.

Plaintiffs ignore the point that context comes first because the law is clear that boycott writings are understood as an effort to persuade others to adopt the author's opinions, not report facts. *See* Appellants' Br. 13, citing *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, ¶ 23-24 (1st Dist.). They also mischaracterize *Jorg*, Appellees' Br. 7, which actually held that accusations (killing and rape) during a boycott were protected opinions *even though* they were verifiable. *Jorg*, 2003-Ohio-3668, ¶ 18, 23-24. Beyond this, Plaintiffs

have nothing to say on context, other than a rhetoric-laden description of the students' boycott and a handful of case cites that do not even address the protections afforded opinion speech. Appellees' Br. 11-12. Plaintiffs' inability to respond confirms that a Flyer and Resolution published during a constitutionally protected protest would be understood by a reasonable reader as protected student opinion speech. Appellants' Br. 12-14.

On the remaining factors, Plaintiffs confuse the issues and avoid the record. They repeat the trial court's error by conflating whether "racist" is "pejorative" with whether it is factual. Appellees' Br. 8. Oberlin explained why this was wrong, Appellants' Br. 15, but Plaintiffs ignore Oberlin's argument. They also ignore that the Resolution's "facts" describe the altercation and were the basis for the opinions that followed, Defs.' Ex. A-3, meaning no "undisclosed" facts were implied. The ongoing disagreement over whether Plaintiffs' business practices were discriminatory confirms that what is a "long account" or "long history" of racism is a matter of opinion on which reasonable people disagree. *See* Appellants' Br. 5, 15. As for the assault allegation, no reasonable reader could think the Flyer accused the individual Plaintiffs of assault. Cross-Appellees' Br. 7. The students were opining about Allyn Jr.'s conduct. Appellants' Br. 15.

Even if this were a close question (and it's not), the Court would have to hold under the innocent construction rule that the Flyer and Resolution expressed constitutionally protected opinions. Appellants' Br. 16. Plaintiffs' misguided resort to waiver doctrine just underscores the weakness of their position. Because Oberlin preserved the *issue* of whether the speech is protected opinion, it can raise any argument in support of that issue on appeal. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, __ Ohio St.3d __, 2020-Ohio-1056, ¶ 21.

2. No publication means no libel claim.

Equally flawed are Plaintiffs' publication arguments, which rely on record distortions refuted elsewhere. *See* Cross-Appellants' Br. 10-14. Raimondo handed the Flyer to Hawk with no reason to know if it contained defamatory falsehoods, and no one else with actual or apparent

authority to act for Oberlin distributed it. Cross-Appellees' Br. 8-9; 1 Restatement of the Law 3d, Agency, Section 3.03, Comment c (2006). That is not publication. 3 Restatement of the Law 2d, Torts, Section 581, Comment c (1977). As for the Resolution, Oberlin played no role in creating a Resolution directed at it and cannot be liable for failing to remove speech it did not know about. Cross-Appellees' Br. 9; *Scott v. Hull*, 22 Ohio App.2d 141 (3d Dist.1970).

3. No constitutional malice means no libel claim or punitive damages.

The jury's six separate findings during the compensatory damages phase of no constitutional actual malice are binding. Appellants' Br. 17. This is not about issue preclusion, Appellees' Br. 17, but whether jurors can decide the same issue twice. Appellants' Br. 17. They cannot do so without violating the right to trial by jury. *Id*. Bifurcation allows separate trials of "separate issues," Civ.R. 42(B), not two trials on one issue.

Plaintiffs' remaining complaints on this subject are not only irrelevant but also revisionist history. Constitutional malice had to be tried during phase one because it governed not only recovery of punitive damages but also presumed compensatory damages. Tr., Vol. XX, 64. Contrary to Plaintiffs' claim, they could (and did) present *constitutional* malice evidence during the first phase—only evidence relating "solely" to punitive damages was barred. R.C. 2315.21(B)(1)(a). Jurors properly (and finally) resolved the issue of constitutional malice during the first phase of trial.

On top of this, the required independent review of the record—applicable whenever "the trier of fact [is] required to make a finding of 'actual malice,'" *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 181 (1987), not just when a plaintiff is a public figure, Appellants' Br. 11—confirms this finding of no malice is correct. Plaintiffs focus on everything but whether Raimondo believed the Flyer to be probably false when she distributed it, which is all that matters given the lack of evidence that anyone else published either writing on Oberlin's behalf.

Plaintiffs thus are wrong to suggest that what happened after the Flyer and Resolution were first published is relevant to constitutional malice. Oberlin showed it is not, Appellants' Br. 18, and Plaintiffs cite no case holding otherwise. *See also Spitzer v. Knapp*, 5th Dist. No. 19 CAE 01 0006, 2019-Ohio-2770, ¶ 26 (no "continuing publication" rule in Ohio). Plaintiffs also are wrong to cite testimony about what other Oberlin administrators supposedly thought. *See also* Cross-Appellees' Br. 10-11. Again, actual malice is about the state of mind of the alleged individual publisher, Appellants' Br. 18, and Plaintiffs cite no case holding otherwise. As for Raimondo, her role as Student Senate advisor cannot support a *reasonable* inference that she wrote a Resolution that (i) she first saw after it was published to the student body and (ii) was *directed at her*. Appellees' Br. 19 n. 3. Plaintiffs ignore that they had the burden of proof, Appellants' Br. 12, and they introduced no evidence that she wrote either the Flyer or Resolution. Finally, Raimondo's awareness of the shoplifting charges, Appellees' Br. 19, is irrelevant to the truth of the students' perceptions that the altercation was racially motivated.

The lack of constitutional malice bars Plaintiffs' libel claim—because they (i) are public figures and (ii) did not prove actual injury—or, at the very least, their punitive damages awards. *See* Appellants' Br. 23. They concede the public figure analysis focuses on the "Oberlin community." Appellees' Br. 14. The Gibson family and Gibson's Bakery are prominent pillars of this community, known to everyone, and they have "general fame or notoriety" in this community—making them general purpose public figures. *See* Appellants' Br. 4, 19. Indeed, both individual Plaintiffs were chronicled repeatedly in the local press and had prominent positions in the Oberlin community. Appellants' Br. 4. Plaintiffs' lack of a meaningful response to this argument confirms they are general purpose public figures. Appellees' Br. 15.

Plaintiffs also are limited purpose public figures, as their efforts at misdirection make plain. They ignore that this legal issue was resolved on summary judgment, *see* Appellants' Br.

3, falsely insinuating that Oberlin should have put on evidence at trial. Appellees' Br. 15. They incorrectly invoke the hearsay rule, even though evidence on a "public controversy" over racially charged incidents at the Bakery is not offered for its truth. Evid.R. 801(C). And they turn a blind eye to Allyn Jr.'s central role in this public controversy, describing him only as a "non-party employee[.]" Appellees' Br. 15. Yet he is Plaintiffs' offspring and next-in-line to inherit the Bakery, and it was his actions during the public altercation that led to the protests. Appellants' Br. 5. What is more, he admitted to ongoing controversy over whether *his* practices *as a Bakery employee* were racist. Allyn Jr. Dep., R. 191, 415-417, 457.

As public figures, Plaintiffs' inability to show constitutional actual malice dooms their libel claim. But even if Plaintiffs were not public figures, their libel claim would still fail because they did not prove the required "actual injury"—no one testified that they read either the Flyer or Resolution, believed it to be true, and thought less of Plaintiffs as a result. Appellants' Br. 21. Plaintiffs point to their experts instead, Appellees' Br. 21, 27, but the experts confirmed they were not addressing causation. Tr., Vol. IX, 66-67; Tr., Vol. VII, 139-140. While *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982), does not "shield" unprotected conduct, Appellees' Br. 20, it *does* require a plaintiff to isolate damages caused by unprotected conduct. Appellants' Br. 21. Since it is law of the case that the chants of "Gibson's is racist" are protected speech, Plaintiffs had to show that what the Flyer and Resolution said—not those chants—harmed them. They could not and did not do so.

Plaintiffs ultimately seek refuge in waiver, Appellees' Br. 20, but cite no case applying it when, as here, constitutional law requires independent appellate review, and, in any event, the verdicts violate basic fairness and are plain error. Appellants' Br. 20-21.

B. Plaintiffs' IIED claim also fails.

Plaintiffs seek to reimagine their IIED claim to establish the required "extreme and outrageous" conduct by Oberlin, relying on irrelevant allegations directed at the Bakery (and

others) but not the two individual Plaintiffs who brought the claim. Appellees' Br. 5. On top of this, most of their allegations concern alleged tortious interference, *id*. at 5, but the jury *found for Oberlin* on that claim. Appellants' Br. 3. Once the irrelevant allegations are cast aside, all that remains is the alleged libel—which is neither extreme nor outrageous and cannot support an IIED claim, as Oberlin has already explained. Appellants' Br. 21-22.

C. Raimondo cannot be liable for tortious interference.

Gibson's Bakery's attempt to avoid JNOV on its tortious interference verdict against *Raimondo* is equally flawed, mischaracterizing *Oberlin's* relationship with Bon Appétit. Appellees' Br. 6. Under that relationship, Bon Appétit acted as Oberlin's exclusive agent for campus dining and Oberlin reimbursed it for all food bought under Bon Appétit's budget. Pls.' Ex. 367 § 1.2, 2.2, 6.1-6.5; Tr., Vol. V, 103-104. Bon Appétit thus was Oberlin's agent and neither Oberlin nor Raimondo could interfere with that relationship as a matter of law. *E.g.*, *Willoughby Hills Dev. & Distrib., Inc. v. Testa*, 155 Ohio St.3d 276, 2018-Ohio-4488, ¶ 27 (agency "turn[s] on the language of the [agent's] management contract"). Plaintiffs' claim that a principal can be liable for interfering with its agent is false. Appellees' Br. 7 (citing cases holding only that an *agent*, like Bon Appétit, could be liable for exceeding its delegated authority).

D. Oberlin is at least entitled to a new trial.

1. Instructional errors warrant a new trial.

Three instructional errors prejudiced Oberlin—by allowing the jury to find it liable for engaging in protected conduct, and to do so without finding that Oberlin acted with fault as to the truth or falsity of the students' speech—and entitle it to a new trial. Appellants' Br. 23-25.

First, on distributor liability, Plaintiffs assert that Oberlin's proffered instruction misstated Ohio law, but they cannot explain how. Appellees' Br. 21. If the lack of evidence that Oberlin was a primary publisher of the Flyer and Resolution did not entitle Oberlin to judgment (and it does), it at least entitled Oberlin to its proffered instruction.

Second, on aiding and abetting, Plaintiffs cannot avoid the import of the Ohio Supreme Court's rejection of civil liability for tortious acts in concert in *DeVries Dairy, L.L.C. v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828. Their proposed line between this rejection and the publication element of defamation is illusory, supported only with citations to inapt pre-*DeVries* cases. Appellees' Br. 22. Plaintiffs' waiver argument also is meritless: Oberlin objected to any instruction on "aiding and abetting" at all, and to the incorporation of criminal law principles in the instruction the trial court ultimately gave. Tr., Vol. XX, 16, 25, 42, 45.

Third, on negligence, Plaintiffs tap dance around the key issue, which is that jurors were not told to focus on truth or falsity when assessing fault. Appellees' Br. 22-23. Their waiver mantra fares no better here: Oberlin objected to the negligence instruction and asked the trial court to give Oberlin's definition, which focused on negligence "in ascertaining the truth or falsity of the alleged libelous statements." Tr., Vol. XX, 26; Defs.' 2d Am. Jury Instr., R. 425, No. 13, p. 15. Examining the instructions "as a whole," Appellees' Br. 22, only confirms prejudice. The only instruction to link fault to truth or falsity is the actual malice instruction, Tr., Vol. XX, 62, and jurors found *for Oberlin* six times under that instruction.

2. Evidentiary errors warrant a new trial.

Plaintiffs also rely on misdirection to respond to the trial court errors that excluded all of Oberlin's state of mind evidence. Oberlin's decision not to take a position on whether its students' opinions were true is irrelevant, as is whether Oberlin objected to testimony on harm allegedly caused by a "hostile environment." Appellees' Br. 23-24, 26.

What matters is that the trial court excluded *all* of Oberlin's state of mind evidence after a colloquy on the record and a discussion in chambers, and Oberlin *did* proffer the evidence on what its administrators learned from the community, including concerns by some that the Bakery's business practices were racist. Tr., Vol. XIII, 9-10; *see also, e.g.*, Tr., Vol. XIV, 115-117

(Krislov not allowed to testify on what Oberlin heard from the community).[1] For all their bluster, Plaintiffs cite no case holding that a defendant cannot introduce evidence on its state of mind, particularly when, as here, state of mind is an essential element of the claim for relief.

E. At the very least, the judgment should be reduced.

First, Plaintiffs' compensatory damages should be remitted or at least properly capped. Plaintiffs' brief confirms no witness testified to *any* harm caused by the *Flyer and Resolution*, *see* p. 6, *supra*, meaning the compensatory awards wrongly compensate for protected activity and should at least be substantially remitted. And, if not remitted below this amount, awards for noneconomic loss should be reduced to $350,000 for David Gibson and $250,000 for Allyn W. Gibson under the noneconomic damages caps. R.C. 2315.18(B)(2). Plaintiffs' argument that more than one claim creates more than one "tort action" conflicts with the plain language of those caps. *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 54-57 (separate claims were one occurrence subject to one limit under the cap).

Second, any punitive damages awards not vacated should be capped at twice the *capped* compensatory awards. As Plaintiffs' argument shows, their position reads the word "recoverable" out of the statute. Appellees' Br. 29. Because a court cannot rewrite a statute, the Court should reduce the punitive damages to twice the *capped* compensatory awards.

Finally, if the punitive damages awards are not vacated (and with them the attorney fees awards), this Court should at least vacate the $2,090,465 enhancement. The factors the trial court cited to support this enhancement, Appellees' Br. 30, are insufficient under a recent binding Ohio Supreme Court decision. *Phoenix Lighting Group, L.L.C.*, 2020-Ohio-1056, ¶ 13, 27-28.

[1] Plaintiffs' claim that Oberlin "agreed" to limit Krislov's testimony on what Aladin told him about the incident, Appellees' Br. 25, is false. Oberlin argued that this evidence should come in because it was not offered for its truth. Tr., Vol. XIV, 105. Jurors had already heard Plaintiffs' version of the altercation, Tr., Vol. III, 147-148, and this evidence would have shown Krislov's awareness of another viewpoint on what happened in Tappan Square.

III. CONCLUSION

This Court should reverse and direct the entry of judgment for Oberlin on all claims, or at the very least remand for a new trial or properly reduce the damages awards and attorney fees.

Respectfully submitted,

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