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' BRIEF
[REDACTED]
ORAL ARGUMENT REQUESTED

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying motions for summary judgment (R. 194, 195, 281) and for judgment notwithstanding the verdict filed by Defendants-Appellants Oberlin College and Dean of Students Meredith Raimondo (collectively, Oberlin) (R. 485, 500).

2. The trial court erred and abused its discretion by denying Oberlin's motion for a new trial or remittitur (R. 486, 501), and by failing to cap the damages as requested (R. 449, 454).

3. The trial court erred and abused its discretion by enhancing Plaintiffs-Appellees' attorney fees award (R. 469, 474, 476, 477, 478, 480).

STATEMENT OF ISSUES FOR REVIEW

1. Libel requires a false statement of fact, published with the requisite degree of fault by the defendant. As a matter of constitutional law, both student publications contained opinions, and Oberlin did not publish them, let alone do so with malice. Did the trial court err by denying Oberlin's motions for summary judgment and judgment notwithstanding the verdict (JNOV)?

2. When an intentional infliction of emotional distress (IIED) claim arises out of the same facts as a libel claim, it fails if the libel claim fails. The libel claim fails here, and Plaintiffs introduced no evidence of extreme or outrageous conduct by Oberlin, an essential element of an IIED claim. Did the trial court err by denying Oberlin's summary judgment and JNOV motions?

3. A tortious interference claim can only be asserted against a person who is not a party to the business relationship. Both Defendants were parties to the relationship with the bakery, because Bon Appétit made purchases from the bakery as Oberlin's agent and Raimondo is Oberlin's employee. Did the trial court err by denying Raimondo's JNOV motion?

4. To recover punitive damages for libel and IIED, Plaintiffs had to establish constitutional actual malice. At the end of the compensatory damages phase of trial, the jury found no actual malice, precluding trial from proceeding to a punitive damages phase for either claim. Did the trial court err by denying Oberlin's JNOV motion on the punitive damages awards?

5. Jury instructions must accurately state the law and apply to the facts. The trial court gave improper, incomplete and irrelevant instructions on the publication and fault elements of the libel

claim. Did the trial court err by denying Oberlin's motion for a new trial?

6. Evidence relevant to a party's state of mind is not hearsay. The trial court excluded Oberlin's evidence of what it learned about the altercation underlying the alleged libel and conflicting views about the Bakery's treatment of non-white customers on this basis. Did the trial court err and abuse its discretion by excluding this evidence and denying Oberlin's motion for a new trial?

7. Courts have power to control excessive judgments. The massive judgments flow from Plaintiffs' "hostile environment" theory, which fails to distinguish between protected speech and unprotected conduct. Did the trial court abuse its discretion by failing to remit the judgments?

8. Ohio statutes require trial courts to cap non-economic damages per *claimant* and cap punitive damages at twice the *capped* compensatory award. The trial court capped non-economic damages per *claim* and applied the punitive damages cap to *uncapped* compensatory awards. Did the trial court erroneously apply Ohio's damages caps?

9. A court may not enhance attorney fees based on factors subsumed in the lodestar. The trial court granted such an enhancement. Did the trial court's fee enhancement abuse its discretion?

I. INTRODUCTION

This appeal arises out of a protest by Oberlin students of a well-known bakery bordering the campus on Tappan Square. Believing that Allyn Gibson Jr.'s public altercation with a black student—stemming from the bakery's chase-and-detain policy—was racially motivated, the students called for a boycott. The bakery and its owners sued Oberlin, claiming it should have censored its students' speech.

The trial court ruled on summary judgment that student chants during the protests alleging racism were non-actionable opinions, but incongruously concluded that a protest flyer and student senate resolution similarly alleging racism were actionable. A cascade of errors at trial followed, leading to an unprecedented $31 million judgment against Oberlin for student

speech about public figures on a matter of public concern and Oberlin's temporary suspension of some of its bakery orders to defuse campus tensions.

The resulting precedent not only encourages colleges around the country to censor lawful student speech, but also rewrites established libel law. Combined with incorrect and one-sided evidentiary rulings, improper jury instructions, and trial court directives to revisit critical jury findings, the incongruous summary judgment rulings made an adverse verdict all but inevitable. After a constitutionally-required independent review of the evidence, this Court should enter judgment for Oberlin and confirm our nation's profound commitment to the principle that debate on public issues must be "uninhibited, robust and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). At a minimum, this Court should order a new trial or dramatically remit the damages.

II. STATEMENT OF THE CASE

Plaintiffs sued Oberlin and its Dean of Students, Meredith Raimondo, for "facilitating" an "economic boycott of Gibson's." Compl. at 9, 11. The trial court disposed of some claims on summary judgment, ruling that chants at the protests were constitutionally protected. But the trial court allowed Plaintiffs' libel and IIED claims to go to trial based on similar language in protest documents created by students (the Flyer and Resolution). 4/22/19 JE, R. 281, Appx. A-6-20, 21-22. Plaintiffs also were (incorrectly) found not to be public figures. *Id*. at 5.

Trial was bifurcated into compensatory and punitive damages phases, with three claims going to the jury. The compensatory phase resulted in findings against both Defendants on the libel claim, but only against Oberlin on the IIED claim and only against Raimondo on the tortious interference claim; the damages awards totaling $11,074,500, however, were not apportioned by claim. *See* Defs.' JNOV Mot., R. 485, Ex. 16; 6/27/19 JE, R. 453. The jury also found that Oberlin and Raimondo did not act with constitutional actual malice, a finding that barred presumed *and* punitive damages. *Id.*

But the trial court allowed, over Oberlin's objections (Tr., Vol. XXII, 4-13; Tr., Vol. XXIV, 16-17, 20-21), a punitive damages phase on all claims, requiring jurors to (i) revisit constitutional actual malice and (ii) apportion the compensatory damages after hearing punitive damages evidence. The jury then awarded $33,223,500 in punitive damages. 6/27/19 JE, R. 453.

An incorrect application of damages caps led to a total judgment of $5,174,500 in compensatory damages and $19,874,500 in punitive damages. 6/27/19 JE, R. 454, Appx. A-30-32. The trial court awarded enhanced attorney fees of $6,271,395 and litigation expenses totaling $294,136.79. 7/17/19 JE, R. 480, Appx. A-33-39. All other post-trial motions were denied. 9/10/19 JE, R. 500, Appx. A-40; 9/10/19 JE, R. 501, Appx. A-41. A stipulated order entered on a limited remand from this Court after the filing of the initial appeal confirmed the finality of these rulings. 2/26/20 JE, R. 524, Appx. A-42-44.

III. STATEMENT OF FACTS

A. A well-known bakery in the middle of a public controversy.

The Gibson family has operated Gibson's Bakery in Oberlin for over 130 years. Pls.' Compl. ¶¶ 6-8. Public officials describe the bakery as "an institution in the city of Oberlin," Defs.' MSJ, R. 195, Ex. 30, 37, and the history of the bakery and Gibson family, including Plaintiffs Allyn Sr. and his son David, has been chronicled repeatedly in the local press. *See, e.g.*, Defs.' MSJ, R. 195, Ex. 2(a). Family members describe Allyn Sr. as "well known in the community" through the bakery. Tr., Vol. VI, 153. Witnesses were "very familiar with" Gibson's Bakery from living in Oberlin, and its so-called "chase and detain" policy was "common knowledge." Tr., Vol. III, 89; Tr., Vol. VII, 61. David—who prominently served as a member of the City of Oberlin and Lorain County planning commissions for 30 years—acknowledged that the Gibsons' "brand" was well known in the Oberlin community. *E.g.*, Tr., Vol. X, 197; Tr., Vol. IX, 59.

But along with the notoriety has come controversy. As far back as 1990, there were reports of protests of Gibson's Bakery because of perceived racial bias. *See* Defs.' Mot. for JNOV, R. 485, Ex. 5. Allegations of racially charged incidents include a former bakery employee, after her husband came to visit her at work, being told not to "have your N-word friends coming to your job"; a young girl told to let white customers be served first; and another young woman "followed" and "closely watched" when shopping at Gibson's Bakery. Reed Dep., R. 188, 17-22. While some minority residents reported favorable experiences, *see* p. 9, *infra*, others reported poor treatment as bakery customers, including a black associate dean who felt "uncomfortable" in the bakery and heard similar concerns from students of color, as well as online reviews opining that "students who are not white" are "treated rudely and regarded with suspicion." Tr., Vol. XV, 75-78, 80; Defs.' MSJ, R. 195, Ex. 2(b); *see also* Raimondo Dep., R. 187, 16-18 (she heard from people who described their treatment at the bakery as "racist").

In recent years, racial controversy has also swirled around non-party Allyn Gibson Jr., the son of David, grandson of Allyn Sr., and "next in line" to inherit the bakery. [redacted] He [redacted] admitted to [redacted] accusations of racism, including a month before the incident at issue. Allyn Jr. Dep., R. 184, 417, 457.

B. Eyewitness reports of a violent altercation outside Gibson's Bakery spark a protest the next day.

The day after the 2016 presidential election, during a national debate over alleged police brutality directed at African Americans, a physical altercation between Allyn Jr. and an unarmed black Oberlin student, Jonathan Aladin, occurred outside the bakery. Tr., Vol. III, 147-148; Def's MSJ, R. 195, Ex. 2(C). While ringing up purchases, Allyn Jr. saw Aladin concealing two bottles

of wine and trying to buy a third with a fake ID. *See* Pls.' MSJ Opp., R. 369, Ex. 9(1) (police report). The police report adopted Allyn Jr.'s version of events: he tried to detain Aladin, but Aladin became violent and escaped, and when he tried to detain Aladin again outside the store, Aladin knocked him to the ground and began punching him. *Id.* at p. 2. According to Allyn Jr., two black female students began punching and kicking him while he was on the ground. *Id.*

Several eyewitnesses, however, told the police a very different story: while still in the store, Allyn Jr. pushed Aladin to the ground and continued to attack him even after Aladin complained that Allyn Jr. was hurting him. Def's MSJ, R. 195, Ex. 2(C) (N. Baxter-Green); *see also id.* (R. Perry). Aladin eventually broke free and ran outside, pursued by Allyn Jr. across the street on to Tappan Square, where Allyn Jr. tackled him and put him in a chokehold. *See id.* (N. Baxter-Green, R. Perry, S. Medwid). Two black female college students then tried to pry Allyn Jr. off Aladin. *Id.* (A. Goelzer, S. Medwid). A businessman who saw events unfold from an upstairs office wrote to police that "[t]he dark skinned person looked like he was defending himself." *Id.* (S. Medwid). Despite these conflicting accounts, Oberlin police arrested Aladin and the other black students, but not Allyn Jr. *Id.* (A. Goelzer, S. Medwid).

Oberlin students reacted swiftly. That evening, they organized a protest, telling other students: "**TOMORROW WE ARE BOYCOTTING GIBSONS AND ALLYN GIBSONS RACISM!!!!!!!! * * * DO NOT GIVE THEM ANY OF YOUR MONEY!**" Defs.' Ex. U-24.

C. As an academic institution, Oberlin has to respect the speech rights of its students.

Oberlin policy recognizes the free speech rights of students, affirming the "right of all its members to protest and demonstrate." Defs.' Ex. O-18 at 59. The College, however, "deems inappropriate any actions that intrude upon the rights of other members of the community, including reasonable expectations of peace and privacy, and tactics or behavior that include coercion, intimidation, or harassment." *Id.* The Dean of Students serves as Oberlin's

representative at student protests and is responsible for promoting safety and lawful conduct. *Id.*; Tr., Vol. XIV, 108.

Raimondo, Oberlin's Dean of Students, attended the protest.[1] Tr., Vol. XIII, 14, 133-134; Tr., Vol. XIV, 73. When she arrived, a student handed her a copy of a student-created Flyer. Tr., Vol. XIII, 14. The Flyer began with large text stating, "**DON'T BUY.**" Pls.' Ex. 263 (emphasis in original). Underneath, the students wrote:

> This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION. Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement.

Id. (emphasis in original). The bottom asked the reader to "**PLEASE STAND WITH US**." *Id.* (emphasis in original). Smaller writing, on the other side, said that "[a] member of our community was assaulted by the owner of this establishment yesterday." Pls.' Ex. 263. The description that followed tracked several eyewitness accounts. *Compare* Pls.' Ex. 263 *with* Defs.' MSJ, R. 195, Ex. 2(C).

Late that evening, Oberlin's Student Senate passed a Resolution supporting the boycott:

> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by police officers.

[1] Raimondo did not join the students' chants during the protests, or create or hold signs. Tr., Vol. III, 122. She used a megaphone to introduce herself, telling students she was there to make sure the protest remained safe and lawful and advising them where they could rest and get food and beverages. *Id.* at 126-127; Tr., Vol. XIII, 62-63.

> Gibsons has a history of racial profiling and discriminatory treatment of students and residents alike. Charged as representatives of the Associated Students of Oberlin College, we have passed the following resolution.

Defs.' Ex. A-3; Tr., Vol. XIII, 20. The Resolution called on students to "immediately cease all support, financial and otherwise, of Gibson's Food Market and Bakery," and called on Oberlin "President Marvin Krislov, Dean of Students Meredith Raimondo, all other administrators and the general faculty to condemn by written promulgation the treatment of students of color by Gibson's." *Id.*

After the Senate emailed the Resolution to the entire student body, one Senator forwarded a copy to Raimondo, who also served as its Faculty Advisor, and then-President Krislov. *Id.* A student later posted the Resolution in the student senate's encased and locked bulletin board in the basement of Wilder Hall; neither Raimondo nor Krislov knew it was there before Plaintiffs sued Oberlin. *See* Tr., Vol. V, 8-9; Tr., Vol. XIII, 21-23; Tr., Vol. XIV, 128-129.

D. Oberlin works to ease tensions and facilitate reconciliation.

On the afternoon of the second day of the student protests, Oberlin's President and the Dean of Students sent an email to Oberlin students, sharing that the College would seek to "determin[e] the full and true narrative, including whether this is a pattern and not an isolated incident." Tr., Vol. XIV, 113-114; Defs.' Ex. R-19.

Fairly quickly, Oberlin heard "very different, differing views from a number of people" about the treatment of minority bakery customers—people "were coming out of the woodwork." Tr., Vol. XIV, 115; *see also id.* at 119 ("[W]e learned from people who were currently at Oberlin, people who were formerly at Oberlin, some people contacted us."). Krislov, for example, had "heard from very credible people of all races and colors that there was real concern that there had been unfair treatment" of minorities at the bakery. Krislov Dep., R. 181, 429. Oberlin VP of Communications Ben Jones learned that many high school students were at the

protests, leading him to conclude that "this was not an isolated incident but a pattern." Pl.'s Ex. 63. Other examples of past racial incidents at Gibson's Bakery were shared with Oberlin administrators. *See* p. 5, *supra*.

Based on this information, and because it appeared that the students had a reasonable basis for the opinions they expressed, Oberlin declined Gibson's later demand that it apologize for its students' speech. Tr., Vol. XIV, 153, 209. At the same time, Oberlin made clear it does not condone shoplifting. Tr., Vol. XIV, 145, 188-189.

Meanwhile, some students objected to having Gibson's Bakery products served in Oberlin's dining halls. Tr., Vol. XIII, 72-74. Oberlin's administration ultimately decided to temporarily suspend dining hall orders, while continuing to allow departments and students to use Oberlin funds and Obie dollars to buy from Gibson's Bakery. Tr., Vol. XIII, 88-89; Tr., Vol. XIV, 141-143, 212-213. This meant that Bon Appétit Management Co., the entity managing campus food services on Oberlin's behalf, did not buy Gibson's Bakery products for the dining halls from November 14 through the last week of January 2017. Tr., Vol. V, 152; Tr., Vol. XIII, 99-100. Oberlin and Bon Appétit had a contract specifying that "Bon Appétit shall act as agent for Oberlin in the management of the Food Service operation" and requiring Oberlin to pay Bon Appétit for purchases from the bakery and other entities. Pls.' Ex. 367 §§ 1.2, 6.5; Tr., Vol. V, 98-99, 103. Bon Appétit had no relationship with Gibson's Bakery other than the purchases it made as Oberlin's agent under this contract. Tr., Vol. V, 164-165.

E. Despite finding protest chants constitutionally protected, the trial court allowed a trial about the protests.

At trial, the court hamstrung Oberlin's defense in two significant ways. *First*, while Plaintiffs called friends who testified that they did not believe the Gibsons were racist, the trial court barred all evidence of the conflicting views Oberlin learned about the bakery's business practices and their impact on black customers. *E.g.*, Tr., Vol. XIII, 7-10; Tr., Vol. XIV, 115-117;

Tr., Vol. XV, 75-78; Tr., Vol. XVII, 4-42, 78. Even though this evidence concerned Oberlin's state of mind, the trial court excluded it under a flawed interpretation of the hearsay rule and because Oberlin did not argue that the students' opinions were "true." *Id.* Similarly, while Plaintiffs presented their version of the altercation, the trial court barred Oberlin from introducing the conflicting information it had received, ostensibly because doing so would "relitigate" Aladin's criminal case. Tr., Vol. XIV, 116, 134, 138.

These rulings meant not only that jurors heard just one side of the story, but also that they lacked critical context for evaluating a litany of emails and text messages exchanged by Oberlin employees *after* the Flyer and Resolution were published. For example, Plaintiffs focused on an email chain in which a senior administrator, upon hearing that some members of the community (including people of color) believed the Gibsons were not racists, said it "doesn't change a damned thing for me." Pls.' Ex. 63. But this administrator was not allowed to describe racial discrimination at the bakery that motivated her statement. T. Reed Dep., R. 188, 17-22.[2]

Second, despite ruling that all oral statements at the protests were constitutionally protected, the trial court still allowed Plaintiffs to make the trial about whether those protests created a "hostile environment" that caused Plaintiffs harm and whether Oberlin (as the "adult in the room") was at fault for not having stopped them. *E.g.*, Tr., Vol. VI, 104-106, 136, 149-153; Tr., Vol. VII, 28, 112-114; Tr., Vol. IX, 37-38, 49. Indeed, Plaintiffs introduced no evidence that the Flyer or Resolution, as opposed to the protests, caused them any harm. The trial court compounded its error by refusing to instruct the jury that the protest chants were constitutionally protected. Tr., Vol. XX, 26, 63-64.

Plaintiffs' counsel exploited these rulings during closing argument by repeatedly telling jurors that Oberlin heard no complaints of racism by Plaintiffs and arguing that Oberlin failed to

[2] Plaintiffs introduced many other irrelevant emails and texts sent after the student writings were published, which Oberlin was unable to put in context. *E.g.*, Pls.' Ex. 86, 135, 140, 145, 211.

stop the protests or apologize for them. Tr., Vol. XIX, 11-12 (arguing that, if Oberlin sent a letter stating it had "no indication or record of any complaints or history of racism or racial profiling by the Gibsons," "we wouldn't be here"); *id.* at 26 ("Oberlin has no history or record" of racist conduct by Plaintiffs); *id.* at 27 (Oberlin got "all this information" that "[t]here is no history of racial profiling."); *id.* at 28 (administrators all "[r]ecognize there's no history of racism"); *id.* at 86-87 (Oberlin "had the ability to do the right thing and to be the adult in the room").

With inadequate guidance and one-sided evidence, and after being told to reconsider their finding that Oberlin acted without constitutional actual malice, jurors eventually returned verdicts for over $44 million. After an incorrect application of damages caps and the addition of attorney fees, the trial court's judgment now stands at over $31 million.

IV. ARGUMENT AND LAW

A. The trial court erred by failing to grant Defendants judgment as a matter of law.

1. Standard of review

Unlike most civil appeals, cases involving speech on matters of public concern require this Court to conduct an independent appellate review of the whole record to make sure the jury's verdict does not infringe on constitutionally protected speech. *See Sullivan*, 376 U.S. at 285; *City of Urbana ex rel. Newlin v. Downing*, 43 Ohio St.3d 109, paragraph five of the syllabus (1989). Ohio courts also apply an "innocent construction rule" when deciding whether speech is protected, requiring a court to adopt an "innocent" (nonactionable) construction of language reasonably capable of different meanings. *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372 (1983), *abrogated on other grounds by Welling v. Weinfield*, 133 Ohio St.3d 464, 2007-Ohio-2451. All constitutional issues are thus reviewed de novo based on the entire record, with a thumb on the scale in favor of finding speech protected.

Other issues are analyzed under traditional appellate standards of review. A trial court's denial of a JNOV motion is reviewed de novo, "test[ing] whether the evidence, construed most

strongly in favor of appellees, is legally sufficient to sustain the verdict." *Envtl. Network Corp. v. Goodman Weiss Miller, LLP*, 119 Ohio St.3d 209, 2008-Ohio-3833, ¶¶ 22-23. Non-constitutional issues not raised below are subject to plain error review. *Bass-Fineberg Leasing, Inc. v. Modern Auto Sales, Inc.*, 9th Dist. Medina No. 13CA0098-M, 2015-Ohio-46, ¶ 24.

2. Plaintiffs cannot establish a libel claim as a matter of law.

To establish libel, Plaintiffs must prove a false and defamatory statement of fact, published by the defendant with fault, which proximately causes a plaintiff actual injury. *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, ¶ 77. Plaintiffs' libel claim should not have gone to trial because the statements at issue are constitutionally protected opinions, not statements of fact. Even if the students' statements were factual, Oberlin still was entitled to judgment because it did not "publish" either student document, let alone do so with actual malice, and any such publication did not cause Plaintiffs' claimed injuries.

a. The Flyer and Resolution contain constitutionally protected opinions.

Oberlin cannot be liable in the first instance because the student Flyer and Resolution are constitutionally protected expressions of opinion. The Ohio Constitution "provides a separate and independent guarantee of protection for opinion," even broader than the First Amendment. *Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 281, 1995-Ohio-187; *Wampler v. Higgins*, 93 Ohio St.3d 111, 120-125, 2001-Ohio-1293. Whether speech is opinion is a question of law for the court. *Id.* at 127; *see also id.* at 115 (courts have a duty "as a matter of constitutional adjudication" to distinguish fact from opinion). Since an "opinion as a matter of law cannot be proven false," *id.* at 127 n. 8, it cannot support a libel claim; the trial court thus erred when it refused to hold that opinions always are "non-actionable." 4/22/19 JE, R. 281, Appx. A-8.

The trial court also misapplied the factors governing whether speech is opinion. Those factors include "the specific language used, whether the statement is verifiable, the general

context of the statement, and finally, the broader context in which it appears." *Vail*, 72 Ohio St.3d at 282. The weight given to each factor will "vary depending on the circumstances presented." *Id.* But when the broader context of the speech is far afield from the objective reporting of facts, it is analyzed first. *Id.* at 282-283 (first analyzing the broader context of a "forum" column published during a political campaign).

The Context. Different writings have "widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Scott v. News Herald*, 25 Ohio St.3d 243, 253 (1986) (internal quotation omitted). As in *Vail*, the context of the Flyer and Resolution is so far afield from objective reporting that it should be analyzed first.

Writings associated with a boycott are understood as an effort to persuade others to adopt the author's opinions, not to report facts. *See Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, ¶ 23. In *Jorg*, for example, a letter urging a boycott described an incident in which a police officer "killed [an] unarmed" man. 2003-Ohio-3668, ¶ 4. The letter then accused city police of "killing, raping, [and] planting false evidence" and said city officials were "destroying the general sense of self-respect for black citizens." *Id.* While the letter contained "accusations of crimes" that in a different context would seem factual, *id.* ¶ 16, in the context of an "appeal for action," the letter's accusations were "unlike a typical news article" and properly viewed "as opinions and not as facts." *Id.* ¶¶ 23-24.

As in *Jorg*, and as even the trial court recognized, the students' Flyer and Resolution were published in the context of an appeal for members of the community to act. *See* 4/22/19 JE, R. 281, Appx. A-11 ("The purpose of the flyer was to inform people *and to persuade them into action.*"); *id.* at A-16 (Resolution was "a 'declaration' *demanding a call to action*") (emphases added). Because this call to act is "easily assumed" to be "a persuasive piece of advocacy," *Jorg*, 2003-Ohio-3668, ¶ 23, the trial court turned the law on its head when it found that the call to

boycott somehow made "the reasonable reader * * * *less inclined* to believe that the statements were opinions rather than fact." 4/22/19 JE, R. 281, Appx. A-12 (emphasis added); *see also id.* at A-16-17.

The Flyer and Resolution as a Whole. The trial court's analysis of the Flyer and Resolution as a whole is equally flawed. Courts examine writings as a whole "because the language surrounding the averred defamatory remarks may place the reasonable reader on notice that what is being read is the opinion of the writer." *Wampler*, 93 Ohio St.3d at 130. The allegedly defamatory statements in both the Flyer and the Resolution were surrounded by language calling for a boycott, *see* Pls.' Ex. 263 ("**DON'T BUY**"; "**PLEASE STAND WITH US**"); Defs.' Ex. A-3 (Resolution urged students to "immediately cease all support, financial and otherwise, of Gibson's"), as well as hyperbole (such as the Flyer's reference to "a particularly heinous event"). *See also* pp. 7-8, *supra.* This, too, should have led to a finding that the Flyer and Resolution were properly viewed as expressing opinions. *Jorg*, 2003-Ohio-3668, ¶ 23.

The Challenged Statements Are Not Verifiably False. The First Amendment protects statements that cannot be proven false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). Thus, terms that are "'loosely definable' or 'variously interpretable' cannot in most contexts support an action for defamation." *Wampler,* 93 Ohio St.3d at 128. Verifiability matters because "a reader cannot rationally view an unverifiable statement as conveying actual facts." *Id.* at 129 (internal quotation omitted).

Neither a "long account of racial profiling and discrimination" (Flyer) nor a "history of racial profiling and discriminatory treatment" (Resolution) is provable as false. Allegations of "racist" behavior are subjective and unverifiable descriptions of one's experiences and perceptions. *E.g., Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶ 31; *Condit v. Clermont Cty. Rev.*, 110 Ohio App.3d 755, 760 (12th

Dist.1996) (many "courts have concluded that * * * accusations of ethnic bigotry are not actionable") (citing cases). Combining many experiences (into a long account or history) does not make them verifiable. Indeed, differing experiences and perceptions led to ongoing disagreement over whether Plaintiffs' business practices were discriminatory (*see* p. 5, *supra*), and Plaintiffs' own witnesses confirmed that whether someone is "racist" is a matter of opinion on which reasonable people frequently disagree. *See* Defs.' MSJ, R. 195, Ex. 20, at 23; *id*. at Ex. 22, at 19-20; *id.* at Ex. 23, at 76-77; Tr., Vol. III, 94; Tr., Vol. IV, 37.

The trial court erred by asking whether "racist" is "pejorative," rather than whether it is factual. 4/22/19 JE, R. 281, Appx. A-9, A-19. Whether a statement is negative—and thus defamatory—has nothing to do with whether it is a verifiable statement of fact. An accusation of racism is a *viewpoint*, not a data point. Indeed, in the context of a protest in which students and other community members shared their subjective experiences, these accusations are classic expressions of opinion.

The same is true of the students' references to an "assault." The trial court wrongly assumed "assault" inherently is a crime and thus verifiable, despite observing that "the details of the physical altercation are in dispute." 4/22/19 JE, R. 281, Appx. A-9. Assault refers to any physical attack, not just a crime. *E.g.*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/assault (last accessed June 4, 2020). The term is thus inherently imprecise, especially when used by students to describe an altercation that no one disputes took place. The trial court erred by concluding that the students were claiming that Allyn Jr. committed the crime of assault, rather than opining about his conduct.[3]

In sum, the trial court should have concluded that the Flyer and Resolution expressed the students' opinions. *See Jorg*, 2003-Ohio-3668, ¶¶ 16-18, 24 (accusations of rape and planting

[3] A reasonable reader would understand that this opinion was directed at non-party Allyn Jr.

false evidence were protected opinions under "totality of the circumstances"). Even if this were a close question, any doubts about whether the challenged statements were nonactionable would have to be resolved in favor of Oberlin under the innocent construction rule. *Yeager*, 6 Ohio St.3d at 372. The trial court erred by failing to grant Oberlin's motions for summary judgment and JNOV. If this Court finds the student speech is protected, it need not reach whether a lack of evidence on other elements separately entitles Oberlin to judgment on the libel claim.

b. Oberlin did not publish the Flyer and Resolution, much less do so with constitutional "actual malice."

i. Plaintiffs cannot establish libel because Oberlin did not publish either document.

Plaintiffs did not prove at trial that Oberlin "published" either a Flyer it at most distributed, or a Resolution students posted in a locked student bulletin board. *See Scott v. Hull*, 22 Ohio App.2d 141, 144-145 (3d Dist.1970) (no liability for failing to remove speech); 3 Restatement of the Law 2d, Torts, Section 581, Comment c (1977) (no liability for distributing a writing unless distributor had reason to know of defamatory falsehoods); *see* p. 18, *infra* (no evidence that any Oberlin administrator saw the Flyer before it was published). Plaintiffs' hodgepodge of vicarious liability theories—including making email servers and copiers available and "aiding and abetting" the students—are not recognized under the law. 3 Restatement, Section 581, Comment b (no liability for making equipment and facilities available); *DeVries Dairy, LLC v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828 (no liability for aiding and abetting); 47 U.S.C. 230(c), (f)(3) (barring liability for provider of email service). And this inability to prove publication entitles Oberlin to judgment.

The jury's finding of no constitutional "actual malice" also entitles Oberlin to judgment on the libel claim because: (i) public figures like Plaintiffs cannot recover without proof of actual malice; and (ii) Plaintiffs could not recover presumed damages without proving malice and they failed to prove an actual injury caused by publication of the Flyer or Resolution.

ii. The jury found no malice and the record confirms its absence.

The jury's finding of no malice is binding. In the trial's compensatory phase, the jury found in response to six separate interrogatories that Plaintiffs did not prove by clear and convincing evidence that Oberlin published the student writings with constitutional "actual malice." Defs.' JNOV Mot., R. 485, Ex. 16. This finding is binding. A trial judge cannot resubmit an issue of fact to the jury, unless the verdict is unclear or inconsistent. *Bradley v. Mansfield Rapid Transit, Inc.*, 154 Ohio St. 154, 166 (1950). "Where the answer given may be construed as an answer to the interrogatory, it is the duty of the court to accept the same." *Elio v. Akron Transp. Co.*, 147 Ohio St. 363, 370 (1947).

Here, the findings of no malice were clear and consistent with the verdicts. Tr., Vol. XXII, 9-10. The trial court thus had to accept those findings and could not send the issue of constitutional malice to the jury a second time. *Bradley*, 154 Ohio St. at 166; *Elio*, 147 Ohio St. at 370. Doing so violated Oberlin's right to trial by jury, which entitles it to jury findings without "outside interference." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶¶ 34-35. Making a jury reconsider what it already resolved is impermissible outside interference and conveys to the jury that it got it wrong the first time. *See* Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv.L.Rev. 669, 681-683 (1918). The trial court's duty to accept the findings of no constitutional malice means those findings are binding here.

An independent review of the record confirms the lack of constitutional malice. An independent review of the record confirms the jury's original findings of no malice were correct. On appeal, the Ohio Constitution and the First Amendment require "an independent examination of the record to ensure against forbidden intrusions into constitutionally protected expression." *Varanese v. Gall*, 35 Ohio St.3d 78, 80 (1988). An independent review reveals no evidence—let alone clear and convincing evidence—that Oberlin published either writing with the requisite

"high degree of awareness of probable falsity." *McKimm v. Ohio Elections Comm'n*, 89 Ohio St.3d 139, 148, 2000-Ohio-118; *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Even if *Oberlin* "published" the Flyer or Resolution, it cannot be deemed to have done so with constitutional malice where, as here, (a) students wrote and prepared both documents; (b) no Oberlin administrator saw either writing before students widely published it; and (c) Plaintiffs presented no evidence that any Oberlin official, including Raimondo, believed either writing to be probably false before it was broadly disseminated.

Indeed, Plaintiffs' evidence consisted entirely of views made known to Oberlin only *after* the statements at issue were published. *See* pp. 9-11, *supra*. This post-publication evidence is irrelevant to the constitutional malice inquiry. *Sullivan*, 376 U.S. at 286 (actual malice is measured "at the time of the publication"); *Gall*, 35 Ohio St.3d at 80 (same). The lack of evidence of Oberlin's state of mind at the time of publication cannot be salvaged by testimony that some Oberlin employees and community members disagreed with portions of the challenged publications. *See, e.g.*, Tr., Vol. III, 24; Tr., Vol. IV, 14-15; Tr., Vol. VI, 45-49. Since actual malice is about the subjective state of mind of the individuals engaged in publishing, the law does not impute to an institution the collective knowledge of its employees. *Sullivan*, 376 U.S. at 287 (evidence that others at the *Times* knew statements were false is insufficient to establish actual malice of those involved in publication). Likewise, Oberlin's alleged post-publication failure to apologize for its students' speech is not probative of actual malice. *Id.*

Nor was Oberlin required to investigate the views of others in the community about Plaintiffs' business practices or the altercation that precipitated the protests. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). This obligation only arises—if at all—where there is "obvious reason to doubt" the source of information in a publication. *St. Amant*, 390 U.S. at 732. Oberlin had no reason, let alone an obvious one, to doubt the beliefs of the student authors and,

in any event, a pre-publication investigation, even if possible, would have revealed conflicting views within the community. *See* pp. 9-10, *supra.* Oberlin did not act with constitutional malice.

iii. The lack of malice dooms the libel claim both because Plaintiffs are public figures and because they suffered no injury from the alleged publication.

Plaintiffs cannot recover because they are public figures. A "public figure" bringing a libel claim cannot recover under the First Amendment without proof that the defendant published with constitutional malice. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967). Whether Plaintiffs are "general purpose" or "limited purpose" public figures is a question of law for the court. *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 735 (9th Dist.2001).

Plaintiffs are general purpose public figures. The Gibson family and Gibson's Bakery are prominent pillars of the community, known to everyone, and they have precisely the kind of "general fame or notoriety" in the Oberlin community that renders them general purpose public figures. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974); *see also* p. 4, *supra.* The trial court found Plaintiffs were not general purpose public figures because it believed far-reaching fame or notoriety was required. 4/22/19 JE, R. 281, Appx. A-5-6. But prominence in the local "community" where the plaintiff was defamed is what matters. *See, e.g.*, *Gilbert*, 142 Ohio App.3d at 738 (focusing on "Akron legal community"); *Total Exposure.Com., Ltd. v. Miami Valley Broad. Corp.*, 2d Dist. Montgomery No. 21062, 2006-Ohio-484, ¶¶ 65-72 (focusing on "the Miami Valley area"). Plaintiffs are prominent in the Oberlin community. Indeed, David Gibson's belief that the "Gibson brand has been smeared throughout the community," Tr., Vol. X, 197, is based on the premise that the Gibson "brand" was widely known in the community in the first place.

By voluntarily injecting themselves into a particular public controversy, Plaintiffs also became limited purpose public figures under the governing three-factor test. *Total*

Exposure.Com., 2006-Ohio-484, ¶ 74. First, "a public controversy exists," *id.*, because the issue of perceived racial bias at Gibson's Bakery has been a topic of public interest since at least the 1990s. *See* p. 5, *supra.* Second, the Gibsons played "a sufficiently central role in the controversy," 2006-Ohio-484, ¶ 74, publicly defending their business practices, including the chase-and-detain policy that led to the Tappan Square altercation, whenever questions were raised. *E.g.*, Defs.' Mot. for JNOV, R. 485, Ex. 5 (David Gibson's statements); Defs.' MSJ, R. 195, Ex. 3 (Allyn Jr. Facebook posts); [redacted] Finally, "a nexus exists between the alleged defamation and the plaintiff's role in the controversy," *id.*, because the Flyer and Resolution focus on what many community members perceived to be racially motivated business practices. *See* Robert D. Sack, *Sack on Defamation* § 5:3.11 (5th ed.2018) (explaining that "a person who voluntarily commits an act the foreseeable consequence of which is publicity is to be treated as a public figure.").

No Plaintiff can avoid limited public figure status by attempting to minimize their role in this controversy. The actions of a business and its owners are routinely considered together. *See, e.g.*, *Kassouf v. City Magazines, Inc.*, 142 Ohio App.3d 413, 422 (11th Dist.2001) ("appellant and his business" were public figures); *Total Exposure.Com., Ltd.*, 2006-Ohio-484 ¶¶ 65-72 (owners were public figures based on operation of their business). Because Plaintiffs are public figures and did not establish actual malice by clear and convincing evidence, Oberlin is entitled to judgment as a matter of law on their libel claim.

Plaintiffs also cannot recover because they did not prove actual injury proximately caused by the student writings. The lack of constitutional malice dooms Plaintiffs' claim for another reason. When, as here, the alleged libel addresses a matter of public concern, even private figure plaintiffs are constitutionally required to prove actual malice to recover presumed damages. Plaintiffs thus were not entitled to presumed damages and instead had to prove "actual

injury" proximately caused by the challenged publications. *Gertz*, 418 U.S. at 349; *Gosden v. Louis*, 116 Ohio App.3d 195, 208-210 (9th Dist.1996); *Gilbert*, 142 Ohio App.3d at 745.

The required independent appellate review of the record shows *no* evidence that a single person: (1) read either the Flyer or Resolution, (2) believed it to be true, and (3) thought less of Plaintiffs or stopped shopping at the bakery as a result. Thus, Plaintiffs have failed to prove the required actual injury to their reputations caused specifically by either document.

Plaintiffs' evidence instead focused on injury allegedly flowing either from the protests outside the bakery or the "hostile environment" the protests purportedly created, neither of which is relevant. After finding an analogous boycott protesting discrimination *protected* under the First Amendment, the United States Supreme Court emphasized that plaintiffs must isolate damages allegedly caused by any *unprotected* conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982). Failing to do so is an impermissible use of "state power * * * to compensate [litigants] for the direct consequences of nonviolent, constitutionally protected activity." *Id.* Plaintiffs' focus on alleged injury stemming from the constitutionally protected protests is thus misplaced. Because Plaintiffs failed to establish this essential element of their libel claim, Oberlin is entitled to judgment as a matter of law. *See, e.g., Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶ 42 (affirming summary judgment where plaintiff had no evidence of actual injury or actual malice). Although this constitutional issue is subject to independent appellate review, it also constitutes plain error; massive, unconstitutional verdicts violate basic fairness and undermine the legitimacy of the judicial process. *See Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus.

3. Plaintiffs cannot "back door" an IIED claim to circumvent the constitutional protections that bar a libel claim.

The trial court also erred by failing to grant summary judgment or JNOV on Plaintiffs' IIED claim. The gist of this claim is the alleged libel. Tr., Vol. XIX, 88-89. Because Plaintiffs

failed to establish libel, they also failed to establish IIED as a matter of constitutional law. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-57 (1988); *Bacon v. Kirk*, 3d Dist. No. 1-99-33, 2000 WL 1648925, at *16 (Oct. 31, 2000) (when alleged libel is constitutionally protected speech, IIED claim fails); *Rich v. Thompson Newspapers, Inc.*, 11th Dist. No. 2003-A-0065, 2004-Ohio-1431, ¶ 47 (finding that speech was protected doomed both libel and IIED claims).

Oberlin also is entitled to judgment because there is no evidence that it engaged in the requisite "extreme and outrageous conduct." This is a high standard. Merely tortious, malicious, or criminal conduct is not "extreme and outrageous." *Reamsnyder v. Jaskolsky*, 10 Ohio St.3d 150, 153 (1984); *see Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (First Amendment forbids use of IIED to punish speech on matters of public concern). Characterizing Plaintiffs' business practices as racist thus cannot be "extreme and outrageous conduct." *Lennon*, 2006-Ohio-2587, ¶ 23. Nor can Oberlin be liable for allegedly "supporting" a constitutionally protected boycott. *Claiborne Hardware Co.*, 458 U.S. at 916-918.

4. Raimondo cannot be liable for tortious interference.

Raimondo is entitled to JNOV on the bakery's tortious interference claim because the tort requires interference with *someone else's* business relationships, not one's own relationships. *Boyd v. Archdiocese of Cincinnati*, 2d Dist. Montgomery No. 25950, 2015-Ohio-1394, ¶ 31.

First, the relevant relationship is between *Oberlin* and Gibson's Bakery. As a matter of law, Oberlin is a party to the relationship with Gibson's that is managed by Oberlin's agent, Bon Appétit. *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, ¶ 23, citing 2 Restatement of the Law 3d, Agency, Sections 6.01, 6.02, and 6.03 (2006); *see also* p. 9, *supra* (describing agency relationship). *Second*, as Oberlin's employee, Raimondo is a party to Oberlin's relationship with the bakery, unless she acted *solely* in an individual capacity *and* personally benefitted from the alleged interference. *Miller v. Wikel Mfg., Inc.*, 46 Ohio St.3d 76, 79-80 (1989); *Boyd*, 2015-Ohio-1394, ¶ 31. She did not. The decision to temporarily suspend

Oberlin's dining hall orders from Gibson's was made on behalf of the college and did not benefit Raimondo personally, Tr., Vol. XIII, 88-89; Tr., Vol. XIV, 212-213, entitling her to judgment.

5. At a minimum, the punitive damages awards must be vacated.

Besides requiring judgment for Oberlin, *see* pp. 19-21 *supra*, the jury's finding in the trial's compensatory phase that Oberlin had not published with constitutional malice barred: (1) trial from proceeding to a punitive damages phase on speech-related claims, *see id.*; and (2) Plaintiffs from recovering punitive damages for libel or IIED. *Gertz*, 418 U.S. at 349 ("[T]he States may not permit recovery of * * * punitive damages" where "liability is not based on a showing of" actual malice); *Hustler Magazine*, 485 U.S. at 55-57; *Woods*, 2009-Ohio-5672, ¶ 35. Thus, at a minimum, Oberlin is entitled to JNOV on the punitive damages awards.

B. In the alternative, errors and irregularities at trial made Plaintiffs' verdict virtually inevitable and entitle Defendants to a new trial.

1. Standards of review.

Denial of a new trial motion based on an error of law is reviewed de novo. *Rohde v. Farmer*, 23 Ohio St.2d 82, paragraph two of syllabus (1970). Whether a jury instruction is correct and warranted is reviewed de novo. *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, ¶ 22. Other grounds for a new trial are reviewed for abuse of discretion. *Rohde*, paragraph one of syllabus.

2. Errors in the libel instructions wrongly allowed jurors to hold Oberlin liable for constitutionally protected activity.

The trial court erred by giving, over objection (Tr., Vol. XX, 16, 23-24, 25, 44-45), incorrect libel instructions. *First*, the trial court's belief that Oberlin could be responsible for speech its students had written and already widely published required a jury instruction on distributor liability. A mere distributor of a defamatory writing authored by someone else is not liable unless the distributor knew or had reason to know of the writing's falsity when she delivered it. 3 Restatement, Section 581, Comment c; Keeton, Dobbs, Keeton & Owen, *Prosser*

and Keeton on the Law of Torts, Section 113, 811 (5th ed.1984). At most, Oberlin distributed the Flyer and the trial court erred in failing to give the distributor liability instruction Oberlin requested. *See* Defs.' Proposed 2d Am. Jury Instructions, R. 425, No. 9, p. 11, citing 3 Restatement, Section 581; Tr., Vol. XX, 23.

The trial court compounded this error by giving an "aiding and abetting" instruction on publication that allowed jurors to find that Oberlin "published" the Flyer and Resolution. Tr., Vol. XX, 61 (instructing that one who "aids and abets another to publish libelous statements is liable as well as the publisher"). *Any* instruction on aiding and abetting was improper under Ohio law. *See DeVries Dairy, LLC v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828 (declining to adopt 4 Restatement 2d of Torts § 876 (1979)). But the trial court's *criminal law* "aiding and abetting" instruction (*see* Tr., Vol. XX, 15, 42)—which equated encouraging or facilitating the students with publishing their speech, *id.* at 61—allowed jurors to find that Oberlin published both student writings by engaging in constitutionally protected activity. *See Claiborne Hardware Co.*, 458 U.S. at 916-918 (no liability for facilitating constitutionally protected protest and boycott).

Second, the trial court's incorrect belief that Plaintiffs were private figures required an instruction that Plaintiffs had to prove "by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity" of the publications at issue. 4/22/19 JE, R. 281, Appx. A-20-21. But the trial court refused to give this instruction. Tr., Vol. XX, 26; Defs.' Proposed 2d Am. Jury Instructions, R. 425, No. 13, p. 15. It instead told jurors that Plaintiffs only had to show "the defendant acted with negligence," Tr., Vol. XX, 60, defined as a lack of "reasonable care to avoid causing injury to others or their property," *id.* at 62. This was error. A focus on truth or falsity is required by Ohio law and the First Amendment. *See Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180 (1987); *Gertz, supra.*

These errors were prejudicial and warrant a new trial. They allowed Plaintiffs' counsel to argue that Oberlin "aided-and-abetted" its students by, among other things, offering to pay for gloves and pizza for the protesters, allegedly blocking people from taking photos of students at the protests, using a bullhorn, and purportedly "orchestrating" and "escalating" the protests. Tr., Vol. XIX, 32-36, 84, 87-88. None of this showed Oberlin actually published either the Flyer or Resolution; rather, these arguments sought to hold Oberlin liable for facilitating a constitutionally protected protest. They also allowed Plaintiffs' counsel to argue that Oberlin was at fault for failing to stop the protests as the "adult in the room" or to condemn its students' speech, even though neither argument addressed whether Oberlin had reason to know of the alleged falsity of the students' speech when it was published. *See* Tr., Vol. XIX, 32-34, 35-36, 84, 87-88.

3. The erroneous exclusion of evidence of the conflicting views Oberlin heard from community members warrants a new trial.

First, the trial court erred and abused its discretion by excluding Oberlin's evidence on what it learned about the altercation between Aladin and Allyn Jr. This testimony is not hearsay, because a "statement is not hearsay when introduced to show its effect on the listener." *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶ 122. Yet the trial court barred Oberlin from presenting this evidence during its case-in-chief based on an incorrect and one-sided interpretation of this hearsay principle. For example, during former President Krislov's testimony, he was cut off while explaining what he learned about the altercation from Aladin, who "looked very beaten up." Tr., Vol. XIV, 103. The trial court excluded this testimony as "hearsay," *id.* at 104-107, but allowed *Plaintiffs* to introduce statements about the altercation, including what Oberlin administrators heard, to show state of mind. *E.g.*, Tr., XVII, 72-75.

Equally flawed is the trial court's theory that evidence about what Oberlin learned from others would "relitigate" the shoplifting charge. Tr., Vol. XIV, 116, 134, 138. This evidence did

not seek to relitigate whether Aladin shoplifted, and Oberlin could not be precluded from introducing it on that ground in any event.[4] *See State ex rel. Jefferson v. Russo*, __ N.E.3d __, 2020-Ohio-338, ¶ 9 (collateral estoppel only applies to issues actually and necessarily litigated in a prior proceeding against the party sought to be bound). It can both be true that Aladin was guilty of shoplifting (the only issue necessarily adjudicated in the criminal proceeding) and that he was physically assaulted in a manner that a white shoplifter would not have been. Plaintiffs' efforts to convince the jury that Oberlin acted with fault by failing to repudiate its students' beliefs made Oberlin's testimony on what it learned about that day critical.

Second, the trial court erred and abused its discretion by barring evidence of what Oberlin heard from members of the community about experiences at the bakery that they believed to be racially discriminatory, while allowing Plaintiffs' friends to testify that they did not believe Plaintiffs had ever behaved in a racially discriminatory way. *See* pp. 9-10, *supra* (discussing excluded evidence). The trial court barred this evidence because "my gut is telling me you are trying to backdoor the truth." Tr., Vol. XIII, 7-8. But evidence of what Oberlin learned about the altercation and the bakery's business practices towards minorities was critical to its ability to defend itself against Plaintiffs' contention that it acted negligently.

These errors were devastating because Plaintiffs both introduced extensive evidence opining that they had not engaged in discriminatory practices during their case-in-chief and repeatedly argued that Oberlin received no information to the contrary. *See* pp. 10-11, *supra*. The jury could not know this argument was false because Oberlin's witnesses were not allowed to describe the differing views within the community they had heard. As a result, "the trial court

[4] The local prosecutors, the students involved, and the Gibsons initially agreed to a plea bargain in which the students would plead guilty to misdemeanors. But the plea was rejected by the municipal court judge, putting the students at risk of jail time. Ultimately, the students avoided that risk only by accepting a plea bargain that also required them to allocute in open court that the incident was not racially motivated. *See* Def.'s MSJ, R. 195, Ex. 30, at 31-33.

deprived [Oberlin of its] right to a fair jury deliberation." *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-171 ¶ 74; *see also id.* ¶¶ 65, 74, 96 (evidentiary error emphasized by opposing counsel during closing argument was an abuse of discretion warranting a new trial).

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

1. Standards of review.

Statutory interpretation is reviewed de novo. *State ex rel. Natl. Lime & Stone Co. v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348, ¶ 14. The denial of a remittitur is reviewed for abuse of discretion, *Jemson v. Falls Village Retirement Community, Ltd.*, 9th Dist. Summit No. 20845, 2002-Ohio-4155, ¶ 26, although "[t]his court has the same unlimited power and control of verdicts and judgments as the trial court." *Burke v. Athens*, 123 Ohio App.3d 98, 101-102 (9th Dist.1997) (internal quotation omitted). A trial court's enhancement of an attorney fees lodestar calculation is reviewed for an abuse of discretion, but "a trial court's discretion to enhance the award of attorney fees is limited." *Phoenix Lighting Grp., LLC v. Genlyte Thomas Grp., LLC*, __ Ohio St.3d __, 2020-Ohio-1056, ¶ 18.

2. The compensatory damages must be remitted.

Even though Plaintiffs' claims involved no physical injury or time off work, the jury awarded $11,074,500 in compensatory damages and, even as (incorrectly) capped, the award remains an exorbitant $5,174,500. That is beyond the range supportable by proof of harm caused by the *Flyer and Resolution*. No witness testified to *any* losses caused by either publication. Rather, Plaintiffs' alleged injuries stemmed from a "hostile environment" created by the protests and the belief of their experts that economic loss caused by this protected activity would continue *for 30 years*. *See* p. 10, *supra* (discussing "hostile environment" evidence); *see also, e.g.*, Tr., Vol. IX, 24, 26-28 (speculative damages testimony presuming harm would continue for 30 years). The compensatory damages thus are "speculative at best," *Burke*, 123 Ohio App.3d at 102, wrongly compensate for protected activity, and must be substantially remitted.

3. All awards not remitted must be properly capped.

The trial court also erred by misapplying damages caps. *First*, the noneconomic damages awards must be capped *per plaintiff*. R.C. 2315.18(B)(2) instructs that the amount recovered "shall not exceed the greater of [$250,000]" or "three times the economic loss, as determined by the trier of fact, *of the plaintiff* in that tort action, to a maximum of [$350,000] *for each plaintiff*." (Emphasis added.) Because these limits apply *per plaintiff*, the trial court erred by capping noneconomic losses *per claim.* 6/27/19 JE, R. 454, Appx. A-31. The awards for noneconomic loss should at least be reduced to $350,000 for David Gibson and $250,000 for Allyn W. Gibson.

Second, punitive damages must be capped at twice the *capped* compensatory damages award. R.C. 2315.21(D)(2)(a) caps punitive damages at twice "the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section." R.C. 2315.21(B)(2), in turn, contemplates that the jury's interrogatory answers will "specif[y] the total compensatory damages *recoverable* by the plaintiff from each defendant." (Emphasis added.) But recoverable in this context embraces not just the verdict but also caps on recovery established by law, as the General Assembly notes when stating that the noneconomic damages cap establishes "the maximum *recoverable* amount that represents damages for noneconomic loss[.]" R.C. 2315.18(E)(1) (emphasis added). Because punitive damages are limited to twice the "recoverable" compensatory damages, the trial court erred by capping punitive damages at twice the *uncapped* compensatory damages award. 6/27/19 JE, R. 454, Appx. A-31-32.

4. Enhanced attorney fees are improper.

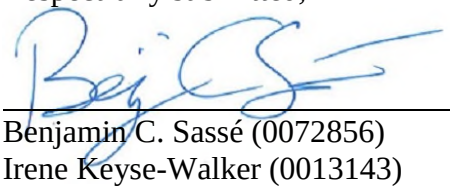
Finally, if the punitive damages awards are not vacated (which would vacate the attorney fees award), this Court should vacate the $2,090,465 enhancement added to the $4,180,930 attorney fees lodestar. The trial court erred and abused its discretion by enhancing the fees award based on Prof. Cond. R. 1.5(a) factors. *See* 7/17/19 JE, R. 480, Appx. A-38. The Ohio Supreme

Court's recent decision in *Phoenix Lighting Group* holds that multipliers based on those factors are improper. 2020-Ohio-1056, ¶¶ 13, 17, 19, 28. Because the trial court identified no objective and specific evidence that could warrant a lodestar enhancement, *see id.* at ¶ 19, the enhancement should be vacated.

V. CONCLUSION

This Court should reverse and direct the entry of judgment for Oberlin on all claims. Alternatively, this Court should remand for a new trial on all remaining issues, or at least remit and properly cap the excessive damage awards and vacate the attorney fees enhancement.

Respectfully submitted,



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I hereby certify that a copy of the foregoing was served on June 5, 2020, via email, pursuant to App.R. 13(C)(6) of the Appellate Rules of Civil Procedure, upon the following:

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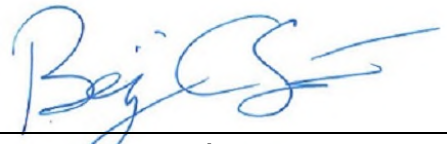

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LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 4/22/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JEANANNE M AYOUB
Plaintiff's Attorney (330)455-6112

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS OBERLIN COLLEGE AND MEREDITH RAIMONDO'S MOTIONS FOR SUMMARY JUDGMENT

This matter came to be heard upon Defendants Oberlin College and Meredith Raimondo's Motions for Summary Judgment; Plaintiffs Gibson Brothers Inc., David R. Gibson, and Allyn W. Gibson's Combined Response in Opposition; and Defendants' Combined Reply Brief. After considering the above filings, their attached or referenced exhibits, and for the reasons that follow, Defendants' Motions for Summary Judgment are granted in part and denied in part.

I. Factual Background

Though the Court is not required to make specific findings of fact in ruling on Defendants' Motions for Summary Judgment, the Court believes that the factual landscape is an important foundation to the analysis herein. *See* Ohio Civ. R. 52.

On the afternoon of November 9, 2016, an incident took place involving three African-American Oberlin College Students – Jonathan Aladin, Cecelia Whettstone, and Endia Lawrence, and Allyn D. Gibson – an employee of Plaintiff Gibson Bros. Inc., the entity that operates Gibson's Food Market and Bakery ("Gibson's"). Allyn D. Gibson suspected that Mr. Aladin was attempting to steal wine from Gibson's while purchasing other wine with fake identification. After confronting Mr. Aladin in the store, Mr. Gibson pursued Mr. Aladin out of the store into nearby Tappan Square, and at some point, engaged in a physical altercation with Mr. Aladin. The details of the physical altercation are in dispute, but as a result of the physical altercation, Mr. Gibson detained Mr. Aladin until Oberlin Police officers arrived on scene.

The three students were the only individuals arrested. On August 11, 2017, Mr. Aladin pled to attempted theft, aggravated trespass, and underage consumption in Lorain County Common Pleas Case No. 17CR096081. On the same date, Ms. Lawrence and Ms. Whettstone both pled to attempted theft and aggravated trespass in Lorain County Court of Common Pleas Case Nos. 17CR096083 and 17CR096082 respectively.

On the evening of November 9, 2016, efforts were made to organize a protest outside Gibson's Food Market and Bakery the following day. Members of Oberlin College Staff and Administration were made aware of these efforts, and Dean of Students and named Defendant, Meredith Raimondo communicated with other faculty and staff members about having a meeting on November 10, 2016 in advance of the scheduled protests. Some of the individuals included in that communication were present at the protests. The morning of November 10, 2016, Oberlin College community affairs liaison, Tita Reed, notified the Oberlin Police Department and other local businesses of the coming protests.

The protests began on November 10, 2016 at approximately 11:00 AM and proceeded for approximately two days. Present at the protests were members of the media and general public, police officers, and an estimated crowd of a few hundred people that included Oberlin College students as well as some members of Oberlin College's faculty, staff, and administration. Included among those present was Dean Meredith Raimondo, a party to this lawsuit.

During the protest, protesters held signs, chanted, and distributed a flyer that stated in part that Gibson's is "a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Some of the specific facts regarding distribution of the flyer are in dispute, but deposition testimony was presented indicating protesters and Oberlin College staff distributed copies of the flyer and/or utilized college copy machines to make additional copies of the flyer. Also during the protests, Meredith Raimondo handed a copy of the flyer to Jason Hawk, a reporter from the Oberlin News Tribune.

On November 10, 2016 members of the Oberlin Student Senate released a written resolution that stated in part that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike [...]." The resolution called upon Oberlin College students to stop supporting Gibson's Food Market and Bakery. It also called upon then college President Marvin Krislov and Dean of Students Meredith Raimondo to "condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery [...]." Following its release, the resolution was posted in Wilder Hall on Oberlin College's Campus for a period of at least one year.

sought to inform and rally the reader to act, this Court finds that the reasonable reader would be less inclined to believe that the statements were opinions rather than fact.

This Court, having construed the evidence in a light most favorable to the non-moving party, has analyzed the flyer utilizing the four factors as required by *Scott, supra*. The result of the Court's analysis is that many factors weigh in favor of actionability. Based on a totality of the circumstances and construing the evidence in the light most favorable to Plaintiffs, the non-moving party, it is this Court's view that the statements made in the flyer are not constitutionally protected opinion.

3. The Student Senate Resolution

a. There are issues of fact regarding the falsity of the Student Senate Resolution

Defendants challenge Plaintiffs ability to prove the falsity of the statements in the resolution. Where a plaintiff is a private individual and the matter is of public concern, the plaintiff bears the burden of proving the falsity of the statements by preponderance of the evidence. *See Gilbert*, at 740 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)). Here, though Plaintiffs are private figures, the nature of the controversy – allegations of racial profiling and discrimination – are matters of public concern, and Plaintiffs must therefore prove the falsity of the purported statements by preponderance of the evidence. The relevant portions of the senate resolution include:

> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by police officers.
>
> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike."

***

On November 11, 2016, Marvin Krislov and Meredith Raimondo sent a joint statement via email to all Oberlin College students that outlined the administration's plan to address the events of November 9, 2016.

On November 12, 2016 the then-department head for Oberlin College Department of Africana Studies published a Facebook Post on the department's Facebook page that read: "Very Very proud of our students! Gibson's has been bad for decades, their dislike for Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"

From November 14, 2016 through January 30, 2017 Oberlin College suspended all business with Gibson's. This included a prohibition of purchasing Gibson's items with any college funds, and prohibited business between Gibson's and Oberlin College Dining Services or Bon Appetit Management Company, a separate food service provider for Oberlin College.

On January 30, 2017, Oberlin College resumed business with Gibson's until the instant lawsuit was filed on November 7, 2017.

Plaintiffs eight (8) count complaint asserted the following causes of action against Oberlin College and Meredith Raimondo, the College's Vice President and Dean of Students:

Count 1: Libel

Count 2: Slander

Count 3: Tortious Interference with Business Relationships

Count 4: Tortious Interference with Contracts

Count 5: Deceptive Trade Practices

Count 6: Intentional Infliction of Emotional Distress

Count 7: Negligent Hiring, Retention, and Supervision

Count 8: Trespass

After voluminous discovery, Defendants filed Motions for Summary Judgment seeking judgment in their favor on all the above claims.[1]

[1] Defendant Meredith Raimondo separately filed a Motion for Summary Judgment that shares exhibits with Oberlin College's motion. In fact, though filed separately, Oberlin College's motion actually incorporates Raimondo's motion by reference. The arguments of both Defendants' motions are addressed herein.

II. Summary Judgment Standard

In *Ponder v. Culp*, 2017-Ohio-168, ¶¶ 9-10 (Ohio Ct. App. 9th Dist.), the Ninth District Court of Appeals set forth the standard in ruling on motions for summary judgment:

> Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party.
>
> Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial.
>
> (Internal citations omitted).

Additionally, Civ.R. 56(C) provides that the court may only consider pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact timely filed in the action.

III. Application of Law

A. Count One: Libel

A defamation claim is comprised of five elements: "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory *per se* [...] or caused special harm to the plaintiff." *See Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 735 (Ohio Ct. App. 9th Dist. 2001).

When ruling on a motion for summary judgment in a defamation action, "[...] the court must apply the standard of clear and convincing evidence as to the element of fault [...] but the standard of proof for all of the other elements of a private plaintiff's defamation claim is preponderance of the evidence." *See Id. at* 734–35 (*internal citations omitted).*

Plaintiffs offer four (4) allegedly libelous statements – 1) a protest flyer handed out at the protests outside Gibson's Bakery in November of 2016; 2) a November 11, 2016 Oberlin College Student Senate Resolution addressing the incidents of November 9, 2016, 3) a November 11, 2016 email responding to the Student Senate Resolution sent by then-Oberlin College President, Marvin Krislov and Vice President and Dean of Students, Meredith Raimondo; and 4) a November 12, 2016 Facebook Post published by then-Oberlin College Africana Studies Department Chair on the Africana Studies Department's Facebook page.

1. **Plaintiffs' Status under Ohio Defamation Law**

As part of the summary judgment analysis, Court must determine Plaintiffs' status under Ohio Defamation Law. Plaintiffs' status is a question of law for the Court's determination. *See Id.* at 735 (*internal citations omitted).*

Plaintiffs have participated in a local bakery business located in Oberlin, Ohio for over 100 years. Plaintiffs have not achieved the level of pervasive fame, notoriety, power, and/or influence required to find they are general purpose public figures. *See Gilbert*, at 736 ("In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."); *see also Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 122 Ohio App.3d 499, 508 (Ohio Ct. App. 1st Dist. 1997) ("A general purpose public figure is one who occupies a position 'of such persuasive power and influence' and 'pervasive fame or notoriety' in the community that he assumes 'special prominence in the resolution of public questions' and 'in the affairs of society.'").

Likewise, Plaintiffs are also not limited-purpose public figures. If a plaintiff voluntarily injects themselves or is drawn into a particular public controversy, they become a limited-purpose public figure for a limited range of issues. *See Gilbert*, at 738 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) and citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.")).

Defendants argue Plaintiffs became limited-purpose public figures when Allyn D. Gibson – a non-party employee of Plaintiff Gibson Bros., Inc. and relative of the individual Plaintiffs Allyn W. Gibson and David R. Gibson – publically pursued an individual he believed committed a theft offense while Gibson was working at the family's store. The pursuit resulted in a physical altercation in the town square involving Allyn D. Gibson and the alleged shoplifter(s) on November 9, 2016. Defendants argue Allyn D. Gibson acted on behalf of *all Plaintiffs* and thereby voluntarily injected all of them into a public

controversy. Plaintiffs argue they are not limited-purpose public figures because they believe the Defendants' actions created or facilitated the public controversy.

In deciding if an individual is a limited-purpose public figure, the Ninth District Court of Appeals considers a plaintiff's *voluntary* participation in the controversy and whether they have obtained general notoriety in the community based on that participation. *See Gilbert*, at 738-39; *see also Young v. Morning Journal*, 129 Ohio App.3d 99, 103 (Ohio Ct. App. 9th Dist.). Allyn D. Gibson, an employee of the plaintiffs, reasonably believed that a theft offense had been committed within the store. He pursued the alleged offender in order to thwart a criminal offense. Plaintiffs, through the act of their employee, did not voluntarily inject themselves into the public controversy that arose out of the events of November 9, 2016. Accordingly, the Court finds that they are not limited-purpose public figures.

2. The Protest Flyer

a. There are issues of material fact regarding whether Defendants published the flyer.

Defendants argue that Plaintiffs have presented no evidence that either Oberlin College or Meredith Raimondo published the flyer. Under Ohio law, publication constitutes "[a]ny act by which the defamatory matter is communicated to a third party [...]." *Gilbert*, at 743 (quoting *Hecht v. Levin*, 66 Ohio St.3d 458, 460 (Ohio 1993)).

"As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication. Hence, one who requests, procures, or aids or abets, another to publish defamatory matter is liable as well as the publisher." *Cooke v. United Dairy Farmers, Inc.*, 2003-Ohio-3118, ¶ 25 (Ohio Ct. App. 10th Dist.) (citing *Scott v. Hull* (1970), 22 Ohio App.2d 141, 144, 259 N.E.2d 160 and 53 Corpus Juris Secundum 231, Libel and Slander, Section 148). "Thus, liability to respond in damages for the publication of defamation must be predicated on a positive act." *Id.* "Nonfeasance, on the other hand, is not a predicate for liability. Mere knowledge of the acts of another is insufficient to support liability." *Id.*

Here, it is undisputed that Meredith Raimondo presented at least one individual, Jason Hawk, with a copy of the protest flyer. The remaining evidence surrounding the distribution of the flyer, and the explanations for doing so, are in dispute. But Plaintiffs have presented testimony from individuals who say they observed Raimondo and other Oberlin College employees handing out flyers at the protest. Further, Plaintiffs offered evidence that Defendants permitted the protesters to make copies of the flyer on the Oberlin College Conservatory's Office's copy machine during the protests and provided protesters with refreshments and gloves for use during the protests. Weighing all of this

evidence in Plaintiffs' favor, the Court finds there are genuine issues of material fact regarding whether Defendants published the flyer.

b. There are issues of material fact regarding the falsity of the statements in the flyer.

Defendants briefly allege that they are entitled to summary judgment on account of the flyer restating a matter of public knowledge that Plaintiffs cannot prove to be false. More succinctly stated, when allegedly defamatory statements made about a private individual involve a matter of public concern, the plaintiff bears the burden of proving the falsity of the statements by preponderance of the evidence. *See Gilbert*, at 740 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)).

In this case, the allegations of racial profiling with a long account of discrimination are matters of public concern. But in support of their argument, Defendants only pointed to Exhibits GG and LL of Allyn D. Gibson's deposition and a single Yelp review. This evidence is insufficient to meet Defendants' initial burden of pointing to evidence tending to show there are no issues of material fact regarding the falsity of the statements in the flyer. Even if Defendants had met their burden, Plaintiffs offered witness testimony disputing the allegations that they are a "racist establishment with a long account of racial profiling and discrimination", and that evidence would be sufficient to create an issue of material fact.

c. The protest flyer statements are not protected opinions

Defendants argue that Plaintiffs cannot rely on the contents of the protest flyer as evidence of their libel claim because the flyer statements are protected opinions. The Court disagrees.

A "totality of the circumstances" approach is utilized to determine whether a statement is opinion or fact. *See Scott v. News-Herald*, 25 Ohio St.3d 243, 251 (1986). Ohio courts are to analyze the following four (4) factors to determine whether a statement is opinion or fact:

- The specific language used;
- Whether the statement in question is verifiable;
- The general context of the statement; and
- The broader context in which the statement appeared. Id

The required "perspective" for analysis of these factors is that of a "reasonable reader." A court should not isolate a specific statement if, only by doing so, such isolation causes

a statement of opinion to appear factual. *See McKimm v. Ohio Election Comm'n*, 89 Ohio St.3d 139, 145 (2000) (internal citation omitted). The four-pronged analysis does not constitute a "bright-line test. Each of the four factors should be addressed and the weight to be given to any one will vary depending on the circumstances presented." *Sturdevant v. Likley*, 2013-Ohio-987, ¶¶ 8-9 (Ohio Ct. App. 9th Dist.) (*citing Scott*).

Concluding that a statement is an opinion does not automatically make it non-actionable. Expressions of opinion may often imply an assertion of objective fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 2706 (1990) (overruled by *Scott* on other grounds). If a reader could reasonably conclude that the communication is stating a fact that could be verified, the communication will not be considered an opinion, especially if it is sufficiently derogatory to hurt the subject's reputation. In addition, a communication that is presented in the form of an opinion may be considered defamatory if it implies that the opinion is based on defamatory facts that have not been disclosed. *See Id.* at 2705-06 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").

FACTOR ONE: SPECIFIC LANGUAGE:

The specific language of the protest flyer was:

> DON'T BUY. This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION. Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement. PLEASE STAND WITH US. A member of our community was assaulted by the owner of this establishment yesterday. A nineteen y/o young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S. Main.

The flyer begins with the following statement and the following words in all capital letters: "DON'T BUY. This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION." To the average reader, this is the headline of the flyer. The specific language that "[Gibson's] is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" is pejorative. The specific language factor weighs in favor of actionability. *See Lennon v. Cuyahoga Cty. Juvenile Court*, 2006 WL 1428920 at ¶ 30 (Ohio Ct. App. 8th Dist. 2006) ("One co-worker told another co-worker that appellant was a racist [...] we cannot think of a scenario in which these words are not pejorative.").

The flyer also states that the owner was involved in a "particularly heinous event, when a member of our community was assaulted by the owner of this establishment." The flyer goes on to describe the assault to include the choking of another person until the assailant was forced to let go. Assault is a crime (O.R.C. 2903.13) and thus the flyer asserts that the owner of Gibson's committed a crime by choking the victim. Written words accusing a person of committing any crime are libelous *per se. Akron–Canton Waste Oil v. Safety–Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601, 611 N.E.2d 955, 962, citing *State v. Smily* (1881), 37 Ohio St. 30.

The flyer continues with: "After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene." Thus, the flyer indicates that after the initial assault of choking by Allyn, a second assault occurred when Allyn tackled the young man and restrained him until the police arrived. The three (the alleged student thief and two acquaintances) were racially profiled on the scene. The flyer does not specifically exclude Allyn from participation in the racial profiling. Although the reasonable reader could infer that the police were also involved in the racial profiling, the accusation in the flyer against Gibson's includes "...a long account of racial profiling."

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

With respect to factor two: the Supreme Court of Ohio in *Scott* stated that "[i]f an author represents that he has private, first-hand knowledge which substantiates the opinion he expresses, the expression of opinion becomes as damaging as an assertion of fact." *Scott*, at 251-252. The Supreme Court of Ohio also stated in *Scott* that "[w]here the statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." *Id.* at 252. Stated differently, the method of verification must be plausible.

In analyzing the statement "with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION," "account" is defined in part in Webster's dictionary as: "a

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 9/10/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS' MOTION FOR NEW TRIAL OR REMITTITUR

This matter comes before the Court upon the Defendants Oberlin College and Meredith Raimondo's Ohio Civ. R. 59 Motion, in the Alternative to Judgment Notwithstanding the Verdict, for a New Trial or Remittitur, filed August 14, 2019. The Plaintiffs Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson filed a Response in Opposition on August 28, 2019.

Ohio Civ. R. 59(A) empowers a trial court to grant a new trial when a party has been awarded "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice". *Tesar Indus. Contractors, Inc. v. Republic Steel*, 2018-Ohio-2089, ¶¶ 31 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

Having considered the parties respective briefs and arguments and applicable precedent, the Court finds that the amount awarded is not manifestly excessive nor does it appear to be influenced by passion or prejudice. Accordingly, Defendants' Motion for a New Trial or Remittitur is denied.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

description of facts, conditions or events." A noted synonym for account is the word history: defined in part in Webster's as "an established record." Here, the accusation that Gibson's has a "*long account* of racial profiling and discrimination" goes beyond implication and directly tells the reasonable reader that the author's previous statement that "[Gibson's] is a racist establishment" is supported by a lengthy and potentially documented record of racial profiling and discrimination. To the average reader, the statement of a LONG ACCOUNT OF RACIAL PROFILING AND DISCRIMINATION suggests that the publisher has knowledge of a documented past history of such activity. The "LONG ACCOUNT" language implies to the reasonable reader that the publisher's statement is based on defamatory facts that have not been disclosed. *See Id.* at 251-52. The implication of the undisclosed facts supporting the statements of the flyer make them as damaging as an assertion of fact. *See Scott*, at 251-52.

A letter from the Defendants also supports verifiability. On November 11, 2016, and in response to the events at Gibson's Bakery on November 9, 2016, Marvin Krislov, then-President of Oberlin College and Meredith Raimondo, Dean of Students, issued a joint statement. In the context of the alleged racially charged incident, they said: "We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident." The Defendants indicate a willingness to "commit every resource" to determine "if this [racial discrimination] by the plaintiffs is "a pattern and not an isolated incident." The Defendants' willingness to commit resources is probative of their belief that a pattern of racial discrimination by the Plaintiffs is in fact verifiable. In this Court's view, a "pattern of racial discrimination" and "a long account of racial discrimination" are synonymous and plausibly verifiable.

The statements alleging criminal conduct (criminal assault) by the owner of Gibson's (Plaintiffs) are verifiable. *See Scott*, at 252 (A statement that an individual committed perjury is "[...] certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing."); *see Condit v. Clermont Cty. Review*, 110 Ohio App.3d 755, 761 (Ohio Ct. App. 12th Dist. 1996) ("A classic example of a statement with a well-defined meaning is an accusation of a crime because such statements are laden with factual content that may support an action for defamation.");

FACTOR THREE: THE GENERAL CONTEXT

General context involves an analysis of the larger objective and subjective context of the statement. Objective cautionary terms, or "language of apparency" places a reader on notice that what is being read is the opinion of the writer. Terms such as "in my opinion" or "I think" are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse. *See Scott*, at 252.

Nowhere in the flyer is there any language of apparency. The only term that could be construed as opinion is the term racist and heinous. However as previously discussed, racist was used in conjunction with "a long account of racial profiling and discrimination."

In analyzing a statement's context, the Court must also consider the gist and general tone of the statement. The general tone of the statement is that Plaintiffs are racists and that they have a long account of racial profiling and discrimination. That statement is followed by a perceived factual account of an incident that is intended to support the previous statement. The account includes statements that an owner of this business assaulted a member of the Oberlin College Community and supports it with the following statements:

> A nineteen year old young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S. Main.

The general context of this flyer is that the Plaintiffs are racists with a long account of racial profiling and discrimination, and the events that happened yesterday substantiate the general context of the statement.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (citing *Natl. Assn. of Letter Carriers, supra,* 418 U.S. at 286, 94 S.Ct. at 2782).

The previously discussed statements appeared in a written flyer. The purpose of the flyer was to inform people and to persuade them into action. The information conveyed was that the plaintiff business owners were racist with a long account of racial profiling and discrimination. The action sought was unity in the form of a boycott of the business; "DON'T BUY...shop elsewhere...STAND WITH US." Because this flyer

> Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible [...].

Defendants believe Plaintiffs cannot prove the statements are false because the statements are consistent with selected witness statements provided by individuals that witnessed the events of November 9, 2016. In response, Plaintiffs have submitted statistics and deposition testimony from several witnesses they believe prove the statements are false. Weighing the evidence in Plaintiffs' favor, there is an issue of material fact with regard to the falsity of the statements.

b. There are issues of fact regarding whether Defendants published the Student Senate Resolution.

Proof of publication of defamatory matter is also an essential element to defamation that must be proven by clear and convincing evidence. Publication is "communication intentionally or by a negligent act to one other than the person defamed." *Gilbert*, at 743. Raimondo separately argues that Plaintiffs cannot show she created or published the resolution. But as described in the preceding paragraph, Plaintiffs have shown circumstantial evidence of Defendants' participation in the creation, circulation, and public posting of the resolution in Wilder Hall, a prominent central hub of student activity on Oberlin College's Campus for a significant period of time. (See Plaintiffs' Opp., p. 53; citing Krislov Vol. I, Ex. 10). Weighing this evidence in Plaintiffs' favor, there is an issue of material fact regarding whether Defendants published the resolution.

c. The Student Resolution Statements are not protected opinions

Defendants argue that Plaintiffs cannot rely on the contents of the Student Senate Resolution as evidence of their libel claim because the statements are protected opinions. The Court disagrees.

The Court will engage in a "totality of the circumstances" approach to analyze the following four (4) factors and determine whether or not the statement is an opinion or fact. *See Scott v. News-Herald*, 25 Ohio St.3d 243 (1986). (Though Defendants did not specifically analyze the November 10, 2016 Oberlin College Student Senate Resolution under the applicable framework, they did allege generally that it was a protected opinion. The resolution is therefore subject to the same analysis).

FACTOR ONE: SPECIFIC LANGUAGE:

The specific language of the resolution states:

> Dear Oberlin Community,
>
> It is with great regret that we write you expressing deep abhorrence towards violence against students. Oberlin is no stranger to acts of hatred, bigotry, and anti-Black violence. As stewards of justice, we are called to acknowledge, repudiate, and actively reject violence in all forms, especially as it affects our own.
>
> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College Students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by officers.
>
> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike. Charged as representatives of the Associated Students of Oberlin College, we have passed the following resolution:
>
> WHEREAS, Oberlin College Students regularly engage and support the commerce of the City of Oberlin; and
>
> WHEREAS, Oberlin College Students stand boldly against racialized violence in the United States, abroad, and in our own community; and
>
> WHEREAS, Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible; therefore be it

> RESOLVED that the Students of Oberlin College immediately cease all support, financial and otherwise, of Gibson's Food Market and Bakery; and be it further
>
> RESOLVED that the students of Oberlin College call on President Marvin Krislov, Dean of Students Meredith Raimondo, all other administrators and the general faculty to condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery; and be it further
>
> RESOLVED that the students of Oberlin College further work toward creating a community in which all students are respected, not met with hate due to the color of their skin.
>
> Here, the specific language used includes a statements that "A Black student was chased and assaulted at Gibson's after being accused of stealing [...] Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike [...] Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible", an inference that Plaintiffs engaged in "racialized violence", and an implication that students are "met with hate due to the color of the skin" at Gibson's bakery.

Much like the protest flyer, the resolution statement alleges criminal conduct of assault by Plaintiffs. Written words accusing a person of committing any crime are libelous *per se*. *See Akron–Canton Waste Oil, supra,* at 601 (citing *State v. Smily* (1881), 37 Ohio St. 30.). The accusations of racism, racialized violence, and a history of discrimination along with the implication that students of color are met with hate are pejorative. *See Lennon, supra.* These statements are placed in paragraphs after the introduction of the resolution. A reasonable reader would conclude that the pejorative statements and allegations of criminal conduct come after the Student Senate conducted a "further review" of the incident.

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

The statement that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike" implies that the authors have additional information supporting their accusation. As previously discussed the word "history" is defined and implies a proven record of such conduct. Furthermore, these statements follow the introduction of the resolution. A reasonable reader would conclude that the pejorative statements and allegations of criminal conduct come after the Student Senate

conducted a "further review" of the incident. This review included speaking with the students involved, reviewing witness statements, and reading the police report. As a result a few key facts will be shared with the reader. Here, the author represents that he/she has private, first-hand knowledge which substantiates the opinion expressed, specifically racial profiling and hate toward people of color. As a result, the expression of opinion becomes as damaging as an assertion of fact." *Scott*, at 251-252.

In addition, a letter from the Defendants supports verifiability. See this Court's reference to the November 11, 2016 joint statement of Marvin Krislov, President of Oberlin College and Meredith Raimondo, Dean of Students, contained in the verifiability analysis of the flyer.

FACTOR THREE: THE GENERAL CONTEXT

The general context was a formal senate resolution that was drafted and adopted by the Student Senate and then electronically sent to the school president, dean of students, and the entire student body. The purpose of the statement was to be persuasive – to convince college leadership and the student body to join them in ceasing all support of Plaintiffs' business because Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike; Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible; because Gibson criminally assaulted a black member of our community; and because students are met with hate at Gibson's due to the color of their skin.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have [...] widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra,* at 979.

As discussed, these statements were contained in a formal Student Senate resolution following "further review" by the Student Senate of the incident in question. This was not an opinion piece by the student newspaper. This was a "declaration" demanding a call to action and alleging first-hand knowledge of facts to support their actionable pejorative statements toward the Plaintiffs.

This Court, having construed the evidence in a light most favorable to the non-moving party, has analyzed statements in the senate resolution utilizing the four factors as required by *Scott, supra*. The result of the Court's analysis is that many factors weigh in

favor of actionability. Based on a totality of the circumstances and construing the evidence in the light most favorable to the non-moving party, it is this Court's view that the statements made in the Student Senate resolution are not constitutionally protected opinions.

4. **Marvin Krislov and Meredith Raimondo's November 11, 2016 joint statement**

    a. **There are no issues of material fact regarding whether the joint statement contains false statements**

On November 11, 2016 and in response to the events at Gibson's Bakery on November 9, 2016, then college president, Marvin Krislov and Meredith Raimondo, dean of students, issued a joint statement. The statement was issued in both their names on November 11, 2016, sent to students and staff from the College Communications Department email address, and was also published in the *Oberlin Review* – a student run Oberlin College newspaper. The entirety of the statement reads:

> Dear Students,
>
> This has been a difficult few days for our community, not simply because of the events at Gibson's Bakery, but because of the fears and concerns that many are feeling in response to the outcome of the presidential election. We write foremost to acknowledge the pain and sadness that many of you are experiencing. We want you to know that the administration, faculty, and staff are here to support you as we work through this moment together.
>
> Regarding the incident at Gibson's, we are deeply troubled because we have heard from students that there is more to the story than what has been generally reported. We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident. We are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments.
>
> Accordingly, we have taken the following steps: 1) Dean Meredith Raimondo and her team have worked to support students and families affected by these events, and will continue to do so. 2) Tita Reed, Special Assistant for Government and Community Relations, has reached out to

> Mr. Gibson to engage in dialogue that will ensure that our broader community can work and learn together in an environment of mutual respect free of discrimination. We will continue to work on these matters in the coming days to make sure that our students, staff, and faculty can feel safe and secure throughout our town.
>
> We are grateful for the determination of our students and for the leadership demonstrated by Student Senate. Thanks to all who have contacted us with suggestions and concerns.
>
> Marvin Krislov
> President
>
> Meredith Raimondo
> Vice President and Dean of Students

Defendants argue that Raimondo and Krislov's Joint Statement was not defamatory because it contains, at most, implied statements that Plaintiffs are racists and/or engaged in discrimination, and Ohio does not recognize actionable defamation based on implied statements. In support, Defendants cite *Krems v. Univ. Hosp. of Cleveland*, 133 Ohio App.3d 6, 12 (Ohio Ct. App. 8th Dist. 1999). While *Krems* does state "Ohio does not recognize libel through implied statements", the Court in *Krems* cited *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App.3d 359, 588 N.E.2d 280 as support for that holding. But *Ashcroft* actually makes no mention of implied statements. Instead, the *Ashcroft* Court found that unspecific allegations based on "rumors by way of the grapevine" were insufficient to survive summary judgment. *See Ashcroft*, at 365.

Plaintiffs take issue with two statements in the joint statement. The first is the statement "[w]e are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments." Plaintiffs view this statements as an implication that they are racist. But this statement outlines Krislov and Raimondo's expectations of *all* community businesses and friends. The fact that it was released in the context of the days following the protests does not make it apply only to Plaintiffs.

The second statement is "[w]e are grateful for the determination of our students and for the leadership demonstrated by Student Senate." Plaintiffs see this statement as an implied endorsement of the statements in the Student Senate Resolution. Plaintiffs read the joint statement in conjunction with the resolution, but the average reader may not even know the resolution existed. Krislov and Raimondo's vague, general

applauding of the Student Senate is not a false statement, and the resolution cannot make the otherwise non-defamatory joint statement defamatory.

Even weighing the evidence in Plaintiffs' favor, the Court finds the joint statement is not defamatory.

5. The Statements in the Department of Africana Studies Facebook Post are Protected Opinions

Defendants have challenged Plaintiffs ability to utilize a Facebook post published by a faculty member on the Department of Africana Studies's Facebook Page because it is a protected opinion. The Court agrees.

The Court will engage in a "totality of the circumstances" approach and analyze the following four (4) factor to determine whether or not the statement is an opinion or fact: *See Scott v. News-Herald*, 25 Ohio St.3d 243, 251 (1986).

FACTOR ONE: SPECIFIC LANGUAGE:

The post was published online November 12, 2016 and the specific language was: "Very Very proud of our students! Gibson's has been bad for decades, their dislike for Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"

The specific language about being "bad for decades" and the "food is rotten" weigh toward opinion speech. The only questionable language is the portions stating that Plaintiffs dislike black people and profile black students. These statement are pejorative.

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

Unlike the flyer or the student resolution, the Facebook post would not lead the reasonable reader to conclude that the author had first-hand actual knowledge of facts, or undisclosed facts to support the opinion. There is no reference to a "long account" or "history" of racial profiling. There is no allegation of criminal conduct and the term racist is not used. The statement does indicate that the Plaintiffs "dislike" black people. The statement that the Plaintiffs "profile black students" may be verifiable. See this Court's reference to the November 11, 2016 joint statement of Marvin Krislov, President of Oberlin College and Meredith Raimondo, Dean of Students, contained in the verifiability analysis of the flyer.

FACTOR THREE: THE GENERAL CONTEXT

General context involves an analysis of the larger objective and subjective context of the statement. This Facebook post appeared on November 12, 2016, after the flyer and protest, the senate resolution, and a day after the joint statement by Marvin Krislov and Meredith Raimondo. The context of the post can generally be construed as a stamp of approval regarding the previous activity.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have [...] widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra,* at 979 (internal citation omitted).

These statements appeared in a Facebook post. Under current social conventions, a statement on Facebook generally signals to the reasonable reader that it is the author's opinion rather than a fact.

All of the factors and totality of the circumstances weigh in favor of finding that the Facebook Post is an opinion. The specific language is vague and hyperbolic. The allegation that Gibson's "profile[s] Black students" is certainly pejorative, but the entirety of the post includes the hyperbolic and vague claim that the food is "rotten" and the protest or rallying cry language of "NO MORE" would lead a the reasonable reader to believe they were reading the author's subjective opinion. The general and broader context are indicative that the post is a statement of opinion.

Even weighing all of this evidence in Plaintiffs' favor, the totality of the circumstances weighs in favor of finding the statements in the Facebook post are protected opinions.

6. Clear and Convincing Evidence of Fault:

In a private-figure defamation action such as this, the plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180-181 (Ohio 1987). Clear and convincing evidence is that which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Id.* at 180-181 (citing *Cross v. Ledford*, 161 Ohio St. 469 (Ohio 1954)).

This Court has concluded that the flyer and student resolution contained actionable defamatory statements made about Plaintiffs. Specifically that the Plaintiffs are racists,

that the Plaintiffs have a long account and a history of racial profiling and discrimination; and statements that the Plaintiffs committed crimes of assault.

A question of fact exists as to whether or not the defendants acted reasonably in attempting to discover the truth or falsity or defamatory character of their publications. Defendants failed to offer any evidence that they considered the law of protection of property before they alleged that the owner of plaintiffs' business committed the crime of assault. With respect to the statements that the plaintiffs are racists and that they have a long account and a history of racial profiling and discrimination, the November 11, 2016 from President and Dean of Students sets forth their commitment "to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident." Perhaps this is something they should have done prior to publishing the defamatory statements concerning the plaintiffs.

B. Count Two: Slander

Plaintiffs slander claim is based on chants of "[expletive] the Gibsons" and "Gibson's is racist" directed at Plaintiffs and their employees during the protests, and statements allegedly made about Plaintiffs by Oberlin College Tour Guides during new student tours. Because the chants are protected opinions and the hearsay evidence relating to the alleged tour guide statements is too tenuous to sustain a claim for slander, Defendants are entitled to judgment as a matter of law as to Count 2 of Plaintiffs' Complaint.

1. The Protest Chants are Opinions

The protest chants directed at Plaintiffs included statements like "[expletive] the Gibsons" and "Gibson's is racist." Applying the *Scott* factors and considering the totality of the circumstances, the chants are protected opinions. The content is pejorative and weighs in favor of actionable defamation. Verifiability weighs in favor of finding the statements are opinions. The key distinction between the statements in the flyer and the resolution is that the former contained implications of additional information or factual support for the statements. Here, there is no such implication tending to make the statements sound more verifiable. Likewise, the context and tone of the chants are more likely to be perceived by the average listener to be expressions of opinion. Even when weighing the above evidence in Plaintiffs' favor, there are no issues of fact regarding whether the protest chants are protected opinions.

2. The Alleged Statements of Tour Guides are Insufficient to maintain a claim for slander

Plaintiffs likewise cannot rely on the alleged statements of unidentified tour guides as evidence of its defamation claims against Defendants. The hearsay evidence

surrounding these statements is insufficient, and the attempt to tie these statements to Defendants is too tenuous. Even if there were additional details or evidence related to these statements, they are likely protected opinions for the same reasons that the protest chants and Facebook post are protected opinions.

The only evidence of these statements is the testimony of Oberlin College employee, Ferdinand Protzman. Mr. Protzman also testified that he recalled hearing from unknown persons that unidentified student tour guides had told incoming or prospective students on Oberlin College tours not to shop at Gibson's and/or that Gibson's racially profiled and discriminated against minorities. Mr. Protzman states that he heard this might have happened two to three times, and that Oberlin College Senior Staff took action to prevent it from happening in the future. (Protzman Dep. pp. 232, lines 11-13; 233, lines 4-10). Mr. Protzman also testified in his deposition that tour guides are paid by Oberlin College and receive minimal training that includes suggested routes and talking points (Protzman Dep. pp. 228, lines 5-17; 230-231). This evidence standing alone is insufficient to maintain a claim for slander.

Plaintiffs also cannot avoid summary judgment on their slander claims by simply stating that "Plaintiffs are by no means saying that [the statements of protesters and tour guides] are the only statements which form the basis of Plaintiffs' slander claim." Pltf. Opposition, p. 90. Summary judgment is a burden-shifting framework, and Defendants have met their burden of pointing to evidentiary materials showing there is not an issue of material fact with regard to Plaintiffs' slander claim. By only presenting evidence related to the protected protest chants and unspecific, rumored tour guide statements, Plaintiffs have failed to meet their reciprocal burden.

After weighing the evidence in Plaintiffs' favor, there are no genuine issues of material fact with regard to Plaintiffs' slander claims. Defendants are entitled to judgment as a matter of law as to Count Two of Plaintiffs' Complaint.

C. Counts Three and Four: Tortious Interference with Contract and/or Business Relationships

The elements of tortious interference with contract are "1) the existence of a contract, 2) the wrongdoer's knowledge of the contract, 3) the wrongdoer's intentional procurement of the contract's breach, 4) the lack of justification, and 5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 1999-Ohio-260 (Ohio 1999). Tortious interference with a business relationship occurs when a wrongdoer's interference, rather than procuring a contract breach, causes a third party to not enter into or continue a business relationship. *See Deems v. Ecowater Sys., Inc.*, 2013-Ohio-2431 at ¶ 26 (Ohio Ct. App. 9th Dist.) (internal citations omitted). Defendants argue there are no issues of material fact with regard to the first, second, and fourth elements.

The Existence of a Contract and/or Business Relationship

Defendants first argue the lack of a written contract between Bon Appetit and Plaintiffs is fatal to Plaintiffs' claim. But at least one Ohio court has held that an action for tortious interference can be maintained on a valid oral contract. *See Martin v. Jones*, 2015-Ohio-3168, ¶ 64 (Ohio Ct. App. 4th Dist.). As evidence of a contract between Bon Appetit and Plaintiffs, Plaintiffs presented witness testimony and affidavits showing that Gibson's Bakery had an annual "standing order" of items it wished to receive from Plaintiffs on a daily basis throughout the year, and that they were utilized by Bon Appetit as a vendor or provider of goods for decades. Weighing the evidence in Plaintiffs' favor, there is an issue of material fact regarding the existence of a contract between Bon Appetit and Plaintiffs.

Alternatively, Defendants argue they cannot be liable because they would be a party to any contract or business relationship with Plaintiffs by means of Bon Appetit being an agent of Oberlin College. *See Boyd v. Archdiocese of Cincinnati*, 2015-Ohio-1394, ¶ 31 (Ohio Ct. App. 2nd Dist.) (citing *Dorricott v. Fairhill Ctr. for Aging*, 2 F.Supp.2d 982, 989–990 (N.D.Ohio 1998), and *Miller v. Wikel Mfg. Co., Inc.*, 46 Ohio St.3d 76, 79, 545 N.E.2d 76 (1989) (The wrongdoer in a tortious interference with contract or business relationship claim cannot be a party or agent of the party to the contract or business relationship.) But under Ohio law, the existence of an agency relationship is a question of fact. *See Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 661 (6th Cir. 2005).

Here, the parties' respective interpretations of the agreement and relationships between Plaintiffs, Bon Appetit and Oberlin College reflect the existence of issues of material fact.

Defendants' Knowledge of the Contract and/or Business Relationship

There is likewise an issue of material fact as to whether Defendants knew about the purported contract and/or business relationship between Plaintiffs and Defendants. Defendants claim that "no one at Oberlin College ha[d] knowledge of any such contract" with Plaintiffs. But Plaintiffs presented evidence that Meredith Raimondo and Marvin Krislov knew enough about the relationship between Bon Appetit and Gibsons to order Bon Appetit to cease engaging all business with Plaintiffs. Weighing Defendants' actions, the longevity of the purported contract and/or business relationship, and the evidence in Plaintiffs' favor, there is at least an issue of material fact as to whether Defendants had knowledge of a contract and/or business relationship between Bon Appetit and Plaintiffs.

Lack of Justification

Ohio law imposes the burden of proving 'lack of privilege' or 'improper interference' on the plaintiff. *See Kenty v. Transamerica Premium Ins.*, 72 Ohio St.3d 415, 417, 650 N.E.2d 863, 866 (1995). In determining whether Defendants' purported interference lacks justification – or was done without privilege – the Court must apply the following factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

Deems v. Ecowater Sys., Inc., 2016-Ohio-5022, ¶ 27 (Ohio Ct. App. 9th Dist.).

Applying the above factors to this case is extremely difficult because of the amount of factual disputes that riddle each factor. Both Plaintiffs and Defendants summarize and describe Defendants' conduct and motive in completely opposite ways. They also describe Plaintiffs' interests and the social interests at stake in completely opposite ways. Given this disputed factual landscape, there are clearly issues of material fact that make it impossible to find as a matter of law at this juncture that Defendants were justified in their purported interference with Plaintiffs' contract and/or business relationship.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' tortious interference claims. Therefore Defendants' Motion for Summary Judgment on Counts Three and Four of Plaintiffs' Complaint is denied.

D. Count Five: Deceptive Trade Practices

Plaintiffs' Ohio Deceptive Trade Practices Act claim is a separate cause of action based on the same statements at issue in Plaintiffs' defamation claims. Specifically, Plaintiffs allege a violation of Ohio Revised Code § 4165.02(A)(10) which states: (A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following: [...] 10) Disparages the goods, services, or business of another by false representation of fact.

Though the elements are similar, Ohio Courts have made important distinctions between the two causes of action. For example, in *Blue Cross & Blue Shield of Ohio v.*

Schmidt, 1996 WL 71006 at *3 (Ohio Ct. App. 6th Dist. 1996) (unreported), the Court stated "[a] deceptive trade practices claim is a separate tort from defamation. When the *integrity or credit* of a business has been impugned, a claim may be asserted under a defamation theory; when the *quality* of goods or services has been demeaned, a commercial disparagement claim may be asserted." *See also Fairfield Mach. Co., Inc. v. Aetna Cas. and Sur. Co.*, 2001 WL 1665624 at *6, 2001-Ohio-3407 (Ohio Ct. App. 7th Dist. 2001) (citing and quoting *Blue Cross* in making the same distinction in a different factual context).

Further, protected opinions are not actionable under the Deceptive Trade Practices Act. *See White Mule Co. v. ATC Leasing Co., LLC*, 540 F.Supp.2d 869, 895 (N.D. Ohio 2008) (Applying *Scott* factors to determine if statement supporting Deceptive Trade Practices Act claim was an actionable false assertion of fact or a protected statement of opinion).

Here, all of the purportedly defamatory statements except for one speak to Plaintiffs' integrity, rather than the quality of their goods, services, or business. The exception is the Department of Africana Studies Facebook Post that included the statement "[t]heir food is rotten [...]". But the Court previously held this statement was a protected opinion, and the same analysis precludes Plaintiffs from relying on it as evidence of a violation of the Deceptive Trade Practices Act. *See White Mule Co., supra* at 895.

After weighing the evidence in Plaintiffs' favor, there are no genuine issues of material fact with regard to Plaintiffs' Deceptive Trade Practices Act claims. Therefore Defendants' Motion for Summary Judgment on Count Five of Plaintiffs' Complaint is granted.

E. Count Six: Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress ("IIED") is comprised of the following elements:

> (1) [t]he defendant intended to cause emotional distress, or knew or should have known his actions would result in serious emotional distress, (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community, (3) the defendant's actions proximately caused psychic injury to the plaintiff, and (4) the plaintiff suffered serious mental anguish of the nature no reasonable [person] could be expected to endure.
>
> *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, ¶ 28 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

In their respective briefs, the parties dispute the applicability of *Yeager v. Local Union 10, Teamsters, Chauffers, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369 (1983) and *Vail v. The Plain Dealer Publ'g Co.*, 1995-Ohio-187, 72 Ohio St.3d 279 (Ohio 1995).

Plaintiffs believe *Yeager* establishes that IIED claims are not contingent upon the survival of related defamation claims and that the holding in *Vail* should not apply. In *Yaeger*, the Supreme Court of Ohio affirmed an appellate court's decision granting summary judgment on a defamation claim, but reversed and remanded the court's simultaneous award of summary judgment on a claim for IIED. *Yeager*, at 375-76. But the key distinction in *Yeager* is that the IIED claim survived because it arose out of different events than the defamation claim. Specifically, the Court held: "[w]e reverse the court of appeals in part and remand the cause to the trial court for further proceedings on the cause of action for intentional infliction of emotional distress *arising from the alleged incident in appellant's office on March 31, 1978.*" *Id.* at 370, 375-76 (Earlier, in the *Yeager* opinion, the Court had identified that the statements at issue in the defamation claim happened at a separate incident on June 5, 1979.).

Defendants argue that *Vail* requires dismissal of IIED claims where the statements underlying the IIED claims do not constitute actionable defamation. In *Vail*, the Court reasoned that where the only statements supporting defamation and IIED claims were determined to be protected opinions, summary judgment on both claims was appropriate. *See Vail*, at 283. But *Vail* is also distinguishable to this case because this Court has only found that *some* of the statements underlying Plaintiffs' defamation claims are protected opinions. Because Defendants have not been awarded judgment as a matter of law on Plaintiffs' defamation claims, *Vail* does not require summary judgment on Plaintiffs' IIED claim.

Whether Plaintiffs can prove each of the elements of their IIED claim at trial depends on resolution of questions of fact. But at this juncture all of the evidence presented regarding Defendants' conduct and Plaintiffs resulting damages has to be weighed in Plaintiffs' favor.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' intentional infliction of emotional distress claims. Therefore Defendants' Motion for Summary Judgment on Count Six of Plaintiffs' Complaint is denied.

F. Count Seven: Negligent Hiring, Retention, Supervision

To prove a claim of negligent hiring and retention, Plaintiffs must show "(1) [t]he existence of an employment relationship; (2) the employee's incompetence; (3) the

employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the Plaintiffs' injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of Plaintiffs' injuries." *Zanni v. Stelzer,* 2007-Ohio-6215, ¶ 8 (Ohio Ct. App. 9th Dist.) (internal citations omitted). Additionally, Plaintiffs must prove that the employee's actions were reasonably foreseeable to Defendants – i.e. Oberlin College knew or should have known of the employee's "propensity to engage in similar criminal, tortious, or dangerous conduct." *See Jevack v. McNaughton,* 2007-Ohio-2441, ¶ 21 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

As an initial matter, Defendants have argued that there are no issues of material fact regarding Plaintiffs' claim for negligent hiring, retention, and supervision against Meredith Raimondo because she is not "an employer". This was not disputed by Plaintiffs, who focused their briefing on the claim against Oberlin College for negligent hiring, retention, and supervision of its employees – including Meredith Raimondo, Tita Reed, and Julio Reyes. Because it is undisputed that Meredith Raimondo is not an employer, Defendants are entitled to summary judgment on Count Seven as it relates to Meredith Raimondo only.

Applying the above elements to Oberlin College, Plaintiffs have met their burden of establishing there are issues of material fact that preclude summary judgment for Oberlin College on Count Seven of Plaintiffs' Complaint.

Defendants only challenge and analyze the third element – Oberlin College's actual or constructive knowledge of their employees' incompetence. In support, Defendants point to Plaintiffs' deposition testimony wherein Plaintiffs indicated they had no knowledge of Dean Raimondo's background before she was employed at Oberlin College. Defendants argue that Plaintiffs have not shown any evidence of any incident involving any of Defendants' employees prior to November 10, 2016 that would put Defendants on notice that the acts complained of were reasonably foreseeable.

Defendants see the actions subsequent to November 10, 2016 as one action. But Plaintiffs pointed to pending lawsuits that contain allegations related to Raimondo's competence. Further, Plaintiffs have alleged and presented evidence showing that a number of separate actions were taken by Meredith Raimondo, Oberlin College, and/or Oberlin College employees subsequent to November 9, 2016. While it may be that the majority of evidence post-dates November 10, 2016, weighing the evidence in Plaintiffs' favor at this juncture, there is sufficient evidence to create an issue of material fact regarding whether Oberlin College employees were incompetent and whether Oberlin College had actual or constructive knowledge of that incompetence.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' negligent hiring, retention, and supervision claims. Therefore

Defendants' Motion for Summary Judgment on Count Seven of Plaintiffs' Complaint is denied.

G. Count Eight: Civil Trespass

Plaintiffs' trespass claim involves a parking lot adjacent to Gibson Bros. Inc. that was the site of the protests. Plaintiffs' complaint summarizes the trespass as "[a]ll of Defendants actions on the parking lot since Plaintiff acquired rights to use [the parking lot]" which includes "permitting faculty, administrators, and students to park in the lot even though they are not permitted to do so and by parking large construction equipment on the lot in such a manner to block the entrance to the lot", and that these actions were "approved and ratified" by the Oberlin College and "calculated to facilitate or promote the business, interests, and agenda of Oberlin College." Pltfs. Compl. ¶¶ 163-64.

To prove a trespass claim, Plaintiffs must show that: (1) they had a possessory interest in the property; and (2) the offending party entered the property without consent or proper authorization or authority. *Bell v. Joecken*, 2002-Ohio-1644, 2002 WL 533399, *2 (Ohio Ct. App. 9th Dist.); *see also City of Kent v. Hermann*, 1996 WL 210780 at *2 (Ohio Ct. App. 11th Dist. Mar. 8, 1996) (Describing trespass as "an invasion of [...] possessory interest [...] not an invasion of title" and that property owners sacrifice their possessory interest to tenants).

With regard to the first element, Plaintiffs have established through deposition testimony that there is an issue of fact as to whether they have a possessory interest in the parking lot. It is undisputed that Off Street Parking, Inc. – a non-party entity – is the owner of the parking lot. But Plaintiffs have asserted that they and other businesses have been granted usage of the parking lot as tenants, thereby giving them a possessory interest in the parking lot. Plaintiffs maintain that they utilize the parking lot year round in conjunction with other tenants. Importantly, Ohio law does not require Plainitiffs' possessory interest to be exclusive. *See Northfield Park Assocs. V. Ne. Ohio Harness*, 36 Ohio App.3d 14, 18 (Ohio 1987) (Where various lessees of a racing track had the right to operate a track during specific times of the year, only the lessee with permission to use the track during the time of the alleged trespass had the right to bring a trespass action because it was the only tenant with a possessory interest at that specific time).

To survive summary judgment Plaintiffs must also present evidence showing there is an issue of material fact as to whether Defendants intentionally entered their land or caused another thing or person to do so. *See Bonkoski v. Lorain Cty.*, 2018-Ohio-2540, ¶ 14 (Ohio Ct. App. 9th Dist.); *see also Biomedical Innovations Inc. v. McLaughlin*, 103 Ohio App.3d 122, 127 (Ohio Ct. App. 10th Dist. 1995) ("Generally, a person is not liable for trespass unless it is committed by that person or by a third person on his orders.").

In support, Plaintiffs cite the deposition testimony of David Gibson during the Gibson Bros. Inc. 30(b)(5) deposition and the deposition testimony of Henry Wallace – a long-time Oberlin Police Department Auxillary Officer that patrolled and enforced parking violations in the parking lot. This testimony collectively asserted that the parking lot has been wrongfully utilized by Oberlin College employees, Oberlin College students, and contractors doing construction for Oberlin College. It does not conclusively establish that Defendants intentionally instructed, ordered, or caused these individuals to intentionally invade Plaintiffs' purported possessory interest, but at this juncture, it is sufficient to create an issue of material fact that precludes summary judgment in Defendants' favor.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' trespass claims. Therefore Defendants' Motion for Summary Judgment on Count Eight of Plaintiffs' Complaint is denied.

7. Conclusion

Defendants are entitled to judgment as a matter of law on Count Two (Slander) as to both Defendants; Count Five (Deceptive Trade Practices) as to both Defendants; and Count Seven (Negligent Hiring, Retention, Supervision) as to Defendant Meredith Raimondo only. Plaintiffs' remaining claims will proceed subject to the above limitations.

IT IS SO ORDERED.

VOL____PAGE____

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 6/27/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

JUDGMENT ENTRY

Pursuant to Ohio Revised Code Section 2315.18 (Compensatory Damages in Tort Actions) and Ohio Revised Code Section 2315.21 (Punitive or Exemplary Damages) the Court hereby reduces the jury's verdicts to judgment as follows:

On June 6, 2019, the parties stipulated and agreed that Oberlin College would be vicariously, jointly, and severally liable for any verdict or judgment rendered against Meredith Raimondo, regardless of whether a separate verdict or judgment was entered against Oberlin College.

On June 7, 2019, the jury returned a compensatory damages verdict in favor of David R. Gibson in the amount of $5,800,000.00, which included $4,000,000.00 in non-economic damages and $1,800,000.00 in economic damages. The jury completed an interrogatory further specifying that $4,800,000.00 of the $5,800,000.00 was awarded to David R. Gibson and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,000,000.00 was awarded to David R. Gibson and against Oberlin College on the intentional infliction of emotional distress claim. On June 13, 2019, the jury returned a punitive damages verdict in favor of David R. Gibson in the amount of $17,500,000.00.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment is hereby rendered against Defendants and in favor of David R. Gibson for compensatory damages for economic loss in the amount of $1,800,000.00.

Judgment is hereby rendered against Defendants in favor of David R. Gibson for compensatory damages for noneconomic loss in the amount of $600,000.00. ($350,000.00 on the libel claim and $250,000.00 on the intentional infliction of emotional distress claim)

Judgment is hereby rendered against Defendants and in favor of David R. Gibson for punitive damages in the amount of $11,600,000.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR DAVID R. GIBSON: $14,000.000.00

On June 7, 2019, the jury returned a compensatory damages verdict in favor of Allyn W. Gibson in the amount of $3,000,000.00 in non-economic damages and $0.00 in economic damages. The jury completed an interrogatory further specifying that $2,000,000.00 of the $3,000,000.00 was awarded to Allyn W. Gibson and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,000,000.00 was awarded to Allyn W. Gibson and against Oberlin College on the intentional infliction of emotional distress claim.

One June 13, 2019, the jury returned a punitive damages verdict in favor of Allyn W. Gibson in the amount of $8,750,000.00.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment is hereby rendered against Defendants and in favor of Allyn W. Gibson for compensatory damages for noneconomic loss in the amount of $500,000.00. ($250,000.00 on the libel claim and $250,000.00 on the intentional infliction of emotional distress claim)

Judgment is hereby rendered against Defendants and in favor of Allyn W. Gibson for punitive damages in the amount of $6,000,000.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR ALLYN W. GIBSON: $6,500.000.00

On June 7, 2019, the jury returned a compensatory damages verdict in favor of Gibson Bros., Inc. in the amount of $2,274,500.00 in economic damages. The jury completed an interrogatory further specifying that $1,137,250.00 was awarded to Gibson Bros., Inc. and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,137,250.00 was awarded to Gibson Bros., Inc. and against Meredith Raimondo on the intentional interference with business relations claim.

On June 13, 2019, the jury returned a punitive damages verdict in favor of Gibson Bros., Inc., on the libel claim only, in the amount of $6,973,500.00.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

Judgment is rendered against Defendants and in favor of Gibson Bros., Inc. for compensatory damages for economic loss in the amount of $2,274,500.00. ($1,137,250.00 on each claim: libel and intentional interference with business relations).

Judgment is rendered against Defendants and in favor of Gibson Bros., Inc. for punitive damages in the amount of $2,274,500.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR GIBSON BROS. INC.: $4,549,000.00

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 7/17/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

JUDGMENT ENTRY ON AWARD OF ATTORNEYS' FEES & LITIGATION EXPENSES

On July 10, 2019 a hearing was held in the above matter to determine the amount of Plaintiffs' reasonable attorney fees. On June 13, 2019 the jury concluded its deliberations and returned a verdict awarding the Plaintiffs both punitive damages and reasonable attorneys' fees. The jury was instructed prior to deliberating that if attorneys' fees were awarded, the Court would determine the amount. On June 27, 2019, the Court, per the statutory damage caps, reduced the jury verdict for compensatory and punitive damages to judgment and scheduled an attorneys' fees hearing on July 10, 2019 at 1:30 PM by separate entry.

Prior to the hearing on July 10, 2019, Defendants filed a Motion for Reconsideration, asking the Court to reconsider its June 27, 2019 ruling applying the punitive and compensatory damages caps in Ohio Revised Code §§ 2315.18 and 2315.21. Defendants' Motion for Reconsideration is denied. Defendants also filed a written Renewed Motion to Continue the Hearing on Attorney Fees which they presented on the record prior to the attorney's fees hearing. The Court denied Defendants' motion to continue the hearing and cited the reasons therefore on the record.

At the hearing, Plaintiffs presented evidence in the form of the testimony and expert report of Attorney Dennis Landsdowne, the billing invoices and advanced costs invoices of the Plaintiffs' three law firms – Tzangas, Plakas, Mannos Ltd.; Krugliak, Wilkins, Griffiths, & Dougherty Co., L.P.A.; and James Taylor Co., L.P.A.; as well as the billing statements and costs advanced invoices of Defendants' counsel. Defendants presented evidence in the form of the testimony and expert report of Attorney Eric

Zagrans. Each party also briefed the issue of attorneys' fees[1] and attached several exhibits outlining their arguments. After considering all of the evidence presented and applicable precedent the Court makes the following ruling regarding Plaintiffs' attorney's fees:

I. Applicable Standard

The Supreme Court of Ohio has adopted a two-step method for determining reasonable attorney's fees. *See State ex. rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 3 (Ohio 2018) (citing *Bittner v. Tri-Cty. Toyota*, 58 Ohio St.3d 143, 145 (Ohio 1991). The analysis begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Id.* This "lodestar" number "provides an initial estimate of the value of the lawyers' services." *Id.* Next, the Court can adjust the lodestar number upward or downward by applying the factors listed in Prof. Cond. R. 1.5(a). *Id.* ("Ultimately, what factors to apply and what amount of fees to award are within [the Court's] sound discretion.").

Because of the overlap of the lodestar calculation and the Prof. Cond. R. 1.5(a), a Court, in its discretion, may choose not to adjust the lodestar number when the relevant factors are subsumed by the lodestar calculation. *See Id.* at ¶ 12 (citing *Miller v. Grimsley*, 197 Ohio App.3d 167, 173 (Ohio Ct. App. 11th Dist. 2011)).

Ultimately, there is no requirement that the fee be linked or proportionate to the underlying award. *See Welch v. Prompt Recovery Servs., Inc.*, 2015-Ohio-3867, ¶ 16 (Ohio Ct. App. 9th Dist.) ("The Supreme Court has refused to establish a rule linking reasonable attorneys' fees to the underlying monetary award."); *see also Grimsley*, at ¶16 ("Proportionality is not synonymous with reasonableness. A 'reasonable' fee must be related to the work reasonably expended on the case and not merely to the amount of the judgment awarded.").

II. Application of Law

Plaintiffs filed an Application for Attorneys' Fees and Litigation Expenses in an amount between $9.5 million and $14.5 million. This proposed amount is based on a lodestar amount of $4,855,856.00 and a multiplier of 2 to 3 times the lodestar. Plaintiffs' counsel also believes the Court should award them $404,129.22 in litigation expenses.

---

[1] On July 9, 2019, Plaintiffs filed an Application for Attorneys' Fees and Litigation Expenses with exhibits, and on July 12, 2019, Defendants filed their Brief in Opposition to Plaintiff's application with exhibits. Plaintiffs' also filed a Motion for Leave to file a reply brief instanter on July 15, 2019, but that motion is hereby denied.

Defendants requested that the Court not award fees, but if it does, to award fees only related to Plaintiffs' successful claims, and to exclude any fees related to experts that were not permitted to testify at the trial. Defendants' counsel and Defendants' expert opined that a reasonable attorneys' fee would be between $2,000,000.00 and $2,250,000.00 and that the combined litigation expenses should be reduced to $241,247.84. (Ex. 2 to Defs. Brief in Opposition to Pltfs. Application).

A. Attorneys' Fees

a. Reasonable Hourly Rate

The reasonable hourly rate "[...] is the prevailing market rate in the relevant community, given the complexity of the issues and the experience of the attorney." *See Harris*, at ¶ 4 (internal citations omitted). Plaintiffs presented evidence of hourly rates for their attorneys and paralegal/support staff that ranged from $675.00 per hour on the high end and $115.00 per hour on the low end, creating an average hourly rate of $395.00 per hour. Defendants' average hourly rates for attorneys and paralegals/support staff ranged from $400.00 per hour on the high end and $100.00 on the low end, creating an average hourly rate of $250.00 per hour. The Court hereby finds that a reasonable average hourly rate in this community, given the complexity of the issues and experience of the attorneys handling the case, is $290.00 per hour.

b. Hours Reasonably Expended

Next the Court must calculate the hours reasonably expended. Hours not properly billed to a client are also not properly billed to an adversary. *See Id.* at ¶ 5. In calculating the hours reasonably expended, it follows that the Court must exclude "[...] hours unreasonably expended, e.g., hours that were redundant, unnecessary, or excessive in relationship to the work done." *Grimsley*, at ¶ 14.

In sum, Plaintiffs tallied 14,417 hours of billed hours in this matter. At the hearing Plaintiffs argued that all of their hours were reasonable, and referenced the fact that Defendants' counsel – who did not bear the burden of proof – tallied 15,626 hours (1,209 more billed hours than Plaintiffs' counsel).

Defendants argued that Defendants' counsel's hours were not relevant to the reasonableness of Plaintiffs' counsel's hours simply because Defendants' counsel was not seeking to have their attorneys' fees awarded. The Court fails to understand the distinction, particularly given the fact that both Defendants' and Plaintiffs' counsel's fees are subject to the reasonableness standard of Prof. Cond. R. 1.5(a). The Court's lodestar analysis is not limited to a comparison with Defendants' fee bills, it just serves as a helpful reference point to the lodestar analysis because Defendants' counsel prepared for and tried the same case. Defendants also asserted that Plaintiffs'

counsel's invoices utilize block-billing, a practice recently criticized by the Supreme Court of Ohio in *Rubino*. *See Rubino*, at ¶ 7 (citing *Tridico v. Dist. Of Columbia*, 235 F.Supp.3d 100, 109 (D.D.C. 2017). In *Rubino*, the Supreme Court stated that it "will no longer grant attorney-fee applications that include block-billed time entries." This appears at first glance to be a bright-line rule, but the Supreme Court's citation of *Tridico*, and the Court's later statement that "[a]pplications failing to meet these criteria [i.e. that are block-billed] *risk* denial in full", leaves the door open for a trial Court to determine, on a case by case basis and in its' discretion, whether any block-billed time renders all or part of an attorney fee unreasonable. *See Id.* (emphasis added). The concern in both *Rubino* and *Tridico* was that certain methods of block-billing – generally those that involve large chunks of time (more than 5 hours), and multiple tasks (particularly unrelated tasks) – may render the Court unable to determine the reasonableness of the hours expended on the case. *See Rubino*, at ¶¶ 6-9; *see also Tridico*, at 109-110.

But here, the Court has no such concern with Plaintiffs' hours. Though the case was not filed until November 2017, Plaintiffs' counsel's invoices reflect that this case began for Plaintiffs in April of 2017. After the complaint was filed, nearly every phase of the case was vigorously contested, including the trial which encompassed twenty-four days over the course of nearly six weeks. Plaintiffs' counsel's billing invoices are reflective of, and consistent with, a case of this magnitude.

Furthermore, the Court finds that due to the nature of claims at issue in this case, it is not possible to separate the time spent on recoverable punitive damage claims (or related litigation expenses for experts) from non-recoverable punitive damage claims. *See Bittner*, at 145. The Court therefore finds that Plaintiffs' counsel's 14,417 billable hours were hours reasonably expended on the case.

c. Calculation of the Lodestar

Applying the above, Plaintiffs' counsel's reasonable hourly rate ($290.00 per hour) times the number of hours reasonably expended (14,417) equates to a lodestar amount of $4,180,930.

d. Application of the Factors for Enhancement or Reduction

Having calculated the lodestar number, the remaining issue is whether or not the lodestar should be reduced or multiplied for enhancement based on the factors in Ohio Prof. Cond. R. 1.5(a). Ohio Prof. Cond. R. 1.5(a) provides in relevant part: the factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

The parties strongly debated the appropriateness of a multiplier. Plaintiffs' counsel believes the lodestar should be multiplied 2 to 3 times, which would result in a total fee between $8,361,860 and $12,542,790 (using the Court's lodestar amount in Paragraph C above). Plaintiffs' argument for enhancement lies in the application of factors (1), (4), (7), and (8).

Defendants believe the Court should not utilize a multiplier because the relevant 1.5(a) factors are subsumed by the lodestar analysis and based on the United States Supreme Court's decision in *Perdue v. Kenny A. ex rel Winn*, 559 U.S. 542 (2010).

In *Perdue*, the Supreme Court issued a decision that addressed lodestar fee enhancements in the context of a federal civil rights case and 42 U.S.C.A. § 1988. In *Perdue* and its progeny, the United States Supreme Court opined that the lodestar amount is presumptively reasonable and that enhancements (or multipliers) should not be based on factors that are accounted for in the lodestar analysis. *Id.* at 552-553 (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("We have established a 'strong presumption' that the lodestar represents the "reasonable" fee [...].") (internal citations omitted). Recently, the Supreme Court of Ohio accepted a limited appeal[2] on the issue of fee enhancements or multipliers in *Phoenix Lighting Group LLC v. Glenlyte Thomas Group LLC*, Ohio S.Ct. Case No. 2018-1076, 2018-Ohio-4092 (Ohio 2018). *Phoenix* has been set for an oral argument on September 10, 2019. This Court cannot speculate as to the future holding or rationale of *Phoenix*. In *Rubino*, less than one year

[2] Specifically, the proposition of law accepted for appeal states: "Because there is a strong presumption that the loadstar [sic] method yields a sufficient attorney fee, enhancements should be granted rarely and only where the applicant seeking the enhancement can produce objective and specific evidence that an enhancement is necessary to compensate for a factor not already subsumed within the Court's loadstar calculation. (Perdue v. Kenny A., ex rel. Winn, 559 U.S. 542 (2010), followed.)

ago, the Supreme Court of Ohio considered the appropriateness of a lodestar multiplier. *See Rubino*, at ¶ 12. It follows then, that the Court in its discretion can adjust the lodestar amount upward or downward, if the 1.5(a) factors are not entirely subsumed within the lodestar calculation.

Here, the Court has determined that not all of the factors are entirely subsumed within the lodestar calculation precluding enhancement. Here, factor (1) - the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, while a component of the lodestar calculation, it was not entirely subsumed by it. The case presented extraordinary challenges for the plaintiffs. Similarly, factor (7) – the experience, reputation, and ability of the lawyer or lawyers performing the services – was a component of the lodestar calculation. But when considered with other relevant factors such as factor (3) – the fee customarily charged in the locality for similar legal services, factor (4) – the amount involved and the results obtained; and factor (8) – whether the fee is fixed or contingent, the Court believes a multiplier of one and a half (1.5) times the lodestar calculation is appropriate and necessary.

The Court therefore finds that the Plaintiffs' should be awarded $6,271,395.00 in reasonable attorneys' fees.

B. Litigation Expenses

In addition to attorneys' fees, Plaintiffs' also seek $404,139.22 in litigation expenses. Defendants and their expert believe Plaintiffs' proposed expenses are excessive and that several categories are not properly includable as expenses. Defendants believe the proper amount of litigation expenses total $241,247.84. This Court agrees that the expenses should be limited, albeit not to the extent requested by Defendants. In calculating the amounts below, the Court included expenses for discovery transcripts, witness fees, focus groups, video discovery, trial transcripts, mediation services, expert witness fees, filing fees, travel for Marvin Krislov's deposition, and process server fees. The Court makes the following ruling regarding each Plaintiffs' firms' litigation expenses:

- Plaintiffs are awarded litigation expenses advanced by Krugliak, Wilkins, Griffiths, & Dougherty Co., L.P.A's in the amount of $213,835.05 (reduced from $272,645.02);
- Plaintiffs are awarded litigation expenses advanced by James N. Taylor Co., L.P.A. in the amount of $796.00;

- Plaintiffs are awarded litigation expenses advanced by Tzangas, Plakas, Mannos Ltd. in the amount of $79,505.74 (reduced from $117,081.44).

Therefore, in addition to attorneys' fees of $6,271,395.00, Plaintiffs are hereby awarded the above litigation expenses, which total $294,136.79. In addition court costs are assessed to the Defendants. Case closed.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

TO THE CLERK: THIS IS A FINAL APPEALABLE ORDER PLEASE SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 9/9/19 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 FOR JUDGMENT NOTWITHSTANDING THE VERDICT

This matter comes before the Court upon Defendants Oberlin College and Meredith Raimondo's Ohio Civ. R. 50 Motion for Judgment Notwithstanding the Verdict filed August 14, 2019. Plaintiffs Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson filed a Response in Opposition on August 28, 2019. An Ohio Civ. R. 50(B) motion for judgment notwithstanding the verdict is reviewed under the same standard as an Ohio Civ. R. 50(A) motion for a directed verdict. *See Goodrich Corp. v. Commercial Union Ins. Co.*, 2008-Ohio-3200, ¶ 11 (Ohio Ct. App. 9th Dist.). Judgment notwithstanding the verdict is only appropriate where, when the evidence is construed most strongly in favor of the non-moving party, reasonable minds can come to one conclusion, and that conclusion is adverse to the non-moving party. *See McMichael v. Akron General Medical Center*, 2017-Ohio-7594, ¶ 10 (Ohio Ct. App. 9th Dist.); *see also Goodrich*, at ¶ 11.

The Court has reviewed and considered the parties' respective briefs and applicable precedent and, after construing the evidence most strongly in Plaintiff's favor, the Court does not find that the Defendants are entitled to judgment notwithstanding the verdict. Accordingly, Defendants' Motion for Judgment Notwithstanding the Verdict is denied.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

ORIGINAL

ENTERED

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

FILED
LORAIN COUNTY

2020 FEB 26 P 12: 22

COURT OF COMMON PLEAS
TOM ORLANDO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

STIPULATED ORDER GRANTING:
PLAINTIFFS' MOTIONS TO AMEND COMPLAINT TO REMOVE COUNTS IV & VIII

-and-

DEFENDANTS' MOTION FOR PARTIAL DIRECTED VERDICT

This matter is before the Court to journalize rulings on three (3) oral motions that were made to and granted by the Court on May 9, 2019 (prior to trial) and June 5, 2019 (prior to closing arguments during the compensatory phase of trial).

For the first motion, Plaintiffs[1] moved the Court to amend their Complaint to remove Count VIII, which contained claims by each Plaintiff against each Defendant for civil trespass. This motion was not opposed by Defendants[2] and thus granted by the Court. (See, Tr. Trans. Vol. II, pp. 44-45). For the second motion, Plaintiffs moved the Court to amend their Complaint to remove Count IV, which contained claims by each Plaintiff against each Defendant for tortious interference with contract. (See, Tr. Trans. Vol. XIX, p. 4). Defendants did not object to this motion, and it was granted by the Court. (Id.). For the third motion, Defendants moved the Court for directed verdict on David R. Gibson's claim for tortious interference with business relationships against each Defendant and on Allyn W. Gibson's claim for tortious interference

[1] "Plaintiffs" refers to Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson.
[2] "Defendants" refers to Oberlin College & Conservatory and Meredith Raimondo.

Journal 1311 Page 1611

with business relationships against each Defendant. (Id., pp. 4-5). Plaintiffs did not object to this motion, and it was granted by the Court. (Id., p. 5).

This Order journalizes the Court's May 9, 2019 and June 5, 2019 decisions granting each motion. Plaintiffs' Complaint is hereby amended and Counts IV and VIII are dismissed. In addition, the Court enters judgment for Defendants on David R. Gibson and Allyn W. Gibson's claim for tortious interference with business relationships (Count III).

IT IS SO ORDERED.

Per Civ.R. 58(B), the Clerk of Courts is directed to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal.

HON. JOHN R. MIRALDI

Approved by:

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