No.

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE NOS. 19CA011563 AND 20CA011632

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS OBERLIN COLLEGE AND DR. MEREDITH RAIMONDO

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I. THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS ONE OF PUBLIC AND GREAT GENERAL INTEREST

This appeal arises out of a Ninth District decision establishing rules of law that will suppress free speech on college campuses and subvert Ohio tort reforms to punitive damages law. The Court should accept jurisdiction and resolve substantial constitutional questions and issues of public and great general interest, including:

- The Ninth District severed students' right to protest orally from written protest materials, insisting its decision would not chill speech because oral chants were protected and Oberlin's conduct was separate. Can a line be drawn between oral and written speech that protects only the former when the context is the same? Even if it can, can colleges be held responsible for facilitating this speech consistent with the First Amendment?

- Ohio reformed punitive damages law to restore fairness and predictability to the civil justice system. Can R.C. 2315.21's text and these goals be squared with rules of law that (i) require a jury to revisit stage-one findings of no constitutional malice in a bifurcated trial and (ii) cap the ensuing punitive damages based on uncapped noneconomic loss?

First, the Ninth District's novel line between oral and written protest speech is a substantial constitutional question meriting review. App. Op. ¶¶ 3-4, 25-26, Appx. 2, 10-11. The panel fails to justify this line, and it reflects at least two analytical errors that belie the assurance that the panel's decision will not affect the "rights of individuals to voice opinions or protest."

To begin with, the panel's terse contextual analysis, App. Op. ¶¶ 36-37, Appx. 14, conflicts with *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668 (1st Dist.). *Jorg* explained that urging a boycott to protest racial injustice is a "call to action" that is "easily assumed" to be "a persuasive piece of advocacy." *Id.* ¶¶ 20, 23. This means even "accusations of crimes" that in another context would seem factual are viewed "as opinions." *Id.* ¶¶ 16, 24. Yet the Ninth District summarily concluded that a similar call to action here supported viewing the challenged statements as factual. App. Op. ¶ 36, Appx. 14. The Court should reject that conclusion and adopt *Jorg*, which aligns with this Court's recognition that "[s]ome *types of writing* * * * *by*

custom or convention signal" speech is properly understood as opinion. (Emphasis in original.) *Wampler v. Higgins*, 93 Ohio St.3d 111, 131 (2001) (internal quotation omitted).

On top of this, the panel conflated constitutionally "protected opinion" with words considered "defamatory per se." App. Op. ¶ 32, Appx. 13. Even speech that negatively "reflect[s] upon a person's character," *Becker v. Toulmin*, 165 Ohio St. 549, 556 (1956), may still qualify for protection as opinion. *Wampler*, 93 Ohio St.3d at 127 n. 8. For "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 115 (internal quotation omitted). The Court should address this false dichotomy, which conflicts with *Wampler* and is mirrored in the trial court's focus on whether the speech at issue was "pejorative." *See* 4/22/19 JE, Appx. 59, 65-66, 69-71.

Review is crucial because these analytical errors make the distinctions drawn by the panel illusory: if speech is viewed as factual despite being part of a call to action and/or simply because it is defamatory, then *all* protest speech is at risk of being treated as factual going forward. Indeed, the damages here stemmed not from any statement in the writings, but projections on how long it "would take to overcome being accused of racism," App. Op. ¶ 107, Appx. 37-38, the thrust of the protected oral chants. *Id.* ¶ 25, Appx. 10; 4/22/19 JE, Appx. 71. Thus, the only way for colleges to avoid liability under the Ninth District's standard will be to censor protest speech and other speech on campus, including student newspapers and invited speakers.

Second, a rule of law that makes colleges liable as a "facilitator" of student speech, especially without also independently reviewing the record to ensure no intrusion on free expression, is a substantial constitutional question meriting review. The First Amendment imposes "a special obligation" to "examine critically the basis on which liability was imposed." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982). Broad and malleable facilitation rules that

make colleges liable for student speech—by, for example, allowing students to meet and pass resolutions, distribute speech by email, or display speech in a student center, App. Op. ¶ 50-52, Appx. 18-19—defy the precision the First Amendment requires. *NAACP v. Button*, 371 U.S. 415, 438 (1963). And characterizing steps that supposedly aided the distribution of a flyer and resolution not as speech but as "separate" conduct, in order to avoid review of the summary judgment and trial record on issues like actual malice, App. Op. ¶¶ 3, 20-22, 77-88, Appx. 2, 8-9, 27-31, conflicts with the First Amendment rule that an appellate court must independently review the whole record. *City of Urbana ex rel. Newlin v. Downing*, 43 Ohio St.3d 109, 115 (1989).

The Court should accept review and clarify that (i) the malleable facilitation rule adopted below fails to "provide adequate 'breathing space' to the freedoms protected by the First Amendment," *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (internal quotation omitted); and (ii) independent appellate review applies (a) equally to alleged facilitators and (b) to all stages of a case. After all, constitutional issues, not party status, trigger independent appellate review. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984).

Clarifying these rules is key to free expression on college campuses. Beyond the flawed facilitation rule, the panel never analyzed the record underlying irreconcilable jury findings in a bifurcated trial: (a) that Oberlin *did not* act with constitutional actual malice; and (b) after (incorrectly) revisiting the issue, that Oberlin *did* act with constitutional malice. The values protected by the constitutional malice standard, however, "make it imperative that judges—and in some cases judges of [the Supreme] Court—make sure that it is correctly applied." *Bose Corp.*, 466 U.S. at 508. With speech on college campuses already under fire, the rules of law applied below will compel administrators to censor large swaths of additional speech across the political spectrum. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)

(emphasizing that "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords").

Third, the Court should confirm that tort reform does not upend the rule of law that an issue may be tried only once. This Court recently confirmed that defamation cases are "tort actions" subject to tort reform caps. *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822, ¶¶ 16-22. This case presents a novel but related issue: whether tort reform bifurcation alters the rule that a "jury should not be allowed or required to reverse its findings on vital issues of fact * * *." *Elio v. Akron Transp. Co.*, 147 Ohio St. 363, 371 (1947). The Ninth District, believing that "a defamation case does not fit nicely" into R.C. 2315.21(B)(1), interpreted it to allow jurors to revisit their no-constitutional-malice finding at stage two because evidence of punitive damages cannot be presented in stage one. App. Op. ¶¶ 82-88, Appx. 29-31.

But the panel's assumption that evidence that may bear on punitive damages cannot be presented in stage one is overbroad—only evidence relating "solely" to punitive damages is excluded at that stage. R.C. 2315.21(B)(1)(a). That is not true of constitutional actual malice evidence in a defamation case: the panel conceded this evidence does not relate "solely" to punitive damages and was properly admitted during stage one.[1] App. Op. ¶¶ 81-82, Appx. 28-29. Nor does R.C. 2315.21(B)(1) address, let alone alter, the rule that jurors cannot revisit their findings. The Ninth District's rule of law thus finds no support in the statute's text.

This rule also unconstitutionally burdens defamation defendants with defending an issue twice. The Gibsons offered no new evidence on constitutional malice during the punitive damages stage; they just reargued the stage one evidence. This second-bite-at-the-apple conflicts with the

[1] Actual malice is required for public figures to recover at all and, where speech addresses matters of public concern, 4/22/19 JE, Appx. 57, for any plaintiff to recover presumed damages (in stage one) or punitive damages (in stage two). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

rule that jurors cannot revisit their findings and interferes with the fact-finding process, denying Oberlin its constitutional right to trial by jury. *E.g.*, *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 35 ("Section 5, Article I of the Ohio Constitution clearly protects this fact-finding function from outside interference.").

Fourth, the proper application of R.C. 2315.21's punitive damages cap merits review. The Ninth District held that a trial court caps punitive damages based on uncapped compensatory damages, a figure that includes amounts for noneconomic loss that a plaintiff cannot recover. App. Op. ¶¶ 110-113, Appx. 39-40. But this makes no sense, given the intent to "restore balance, fairness, and predictability to the civil justice system." Am.Sub.S.B. No. 80, Section 3(A)(4)(a). Noneconomic loss is capped to address "improper consideration of evidence of wrongdoing," *id.* at Section 3(A)(6)(d), meaning a rule of law that derives capped punitive damages from uncapped compensatory damages necessarily increases the judgment based on damages that punish at the liability stage. This double-punishment is unfair, and the resulting judgment is unpredictable.

The panel insisted that deriving capped punitive damages from capped compensatory damages does not align with R.C. 2315.21's text. App. Op. ¶ 113, Appx. 39-40. But the panel concedes the cap applies to "compensatory damages *awarded* to the plaintiff," based on jury "answers to an interrogatory that specifies the total compensatory damages *recoverable* by the plaintiff from each defendant." (Emphasis added.) *Id.* ¶ 111, Appx. 39, quoting R.C. 2315.21(B)(2). And the panel does not (and cannot) explain how noneconomic losses not recoverable under R.C. 2315.18(E)(1), which a trial court cannot award in a judgment under R.C. 2315.18(F)(1), are somehow still "recoverable" and part of the compensatory damages "awarded" under R.C. 2315.21. The Court should accept jurisdiction and confirm capped punitive damages derive from capped compensatory damages.

II. STATEMENT OF THE CASE AND FACTS

A. A bakery in the middle of a public controversy.

Plaintiff Gibson Bros., Inc., d/b/a Gibson's Bakery, is a well-known business bordering Oberlin College's campus. The bakery's "chase and detain" policy for shoplifters is "common knowledge." Its practices have generated controversy dating to the 1990s. Some people of color report favorable experiences; others report poor treatment. Allegations of racially charged incidents in the summary judgment record include a former employee who married a person of color being told by the Gibsons not to "have your N-word friends coming to your job"; a young girl told to let white customers be served first; and online reviews opining that "students who are not white" are "treated rudely and regarded with suspicion."

In recent years, racial controversy swirled around employee Allyn Gibson Jr., son of Plaintiff David Gibson and grandson of Plaintiff Allyn Gibson, Sr. In 2012, Allyn Jr. acknowledged "a huge thing about my store being racist"; in 2013, he claimed he was "getting sued for ass[a]ult b/c some piece of shit was preaching his black rights in my store"; and earlier in 2016, he complained that "people call me a racist * * * at least a few times a month" and that it was "[n]ot [his] fault most black ppl around my area suck." Allyn Jr. admitted he faced other accusations of racism too, up to a month before the incident.

B. A violent altercation outside the bakery sparks a peaceful protest urging a boycott on racial justice grounds.

The incident involved a physical altercation between Allyn Jr. and an unarmed black Oberlin student, Jonathan Aladin, in public view outside the bakery. Allyn Jr. saw Aladin concealing two bottles of wine and trying to buy a third with a fake ID. The police arrived and adopted the Gibsons' version of events: Allyn Jr. tried to detain Aladin, 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. According to Allyn Jr., two black female students began punching and kicking him while he was on the ground.

Several eyewitnesses told a markedly different story: while still in the store, Allyn Jr. pushed Aladin to the ground and attacked him. Aladin broke free, left his things behind, and ran outside. Allyn Jr. pursued him across the street, tackling him and putting him in a chokehold. Two black female students tried to pry Allyn Jr. off Aladin. Oberlin police arrested Aladin and the two other black students, but not Allyn Jr. A businessman called 911 after watching these events unfold and tried to give the police a statement; the police did not contact him. A follow-up letter found in the police chief's office after his resignation included the businessman's observation that "[t]he dark skinned person looked like he was defending himself."

Oberlin students reacted swiftly to the altercation, organizing a peaceful protest of the bakery the next day that urged a boycott. Meredith Raimondo, Oberlin's Dean of Students who monitored the protest, arrived the next morning after it was underway. Students were chanting and distributing a Flyer conveying the same message as their chants. A student handed Raimondo a Flyer with large text stating, "**DON'T BUY.**" 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). On the other side, smaller writing referred to an assault with a description that tracked several eyewitness accounts. Raimondo handed a Flyer to a reporter; while a bakery employee thought he saw her hand Flyers to another student, Raimondo denied it.

Later that day, Oberlin's Student Senate passed a Resolution supporting the boycott and sent it to all students with a cover email describing the resolution as "part of an effort working towards making significant change as part of an important national justice movement." After

claiming that a "Black student was chased and assaulted at Gibson's after being accused of stealing," and referring to the arrest of "other students [who] attempt[ed] to prevent the assaulted student from sustaining further injury," the Resolution asserted that "Gibsons has a history of racial profiling and discriminatory treatment[.]" The Resolution then called on: (i) students to "immediately cease all support, financial and otherwise, of Gibson's Food Market and Bakery"; and (ii) Raimondo, then-President Marvin Krislov, and "other administrators and the general faculty to condemn by written promulgation the treatment of students of color by Gibson's."

After the Senate emailed the Resolution to students, a Senator forwarded a copy to Raimondo and President Krislov. (A student later posted the Resolution in a locked bulletin board in the basement of the student union; no one testified that either Raimondo or Krislov saw it before this lawsuit.) Fairly quickly, Oberlin heard "very different, differing views from a number of people" about the bakery's treatment of persons of color—people "were coming out of the woodwork." Based on these conflicting accounts, and because it appeared that the students had a reasonable basis for their opinions, Oberlin declined the Gibson's later demand to censure its students' speech.

C. A lawsuit leads to an over $30 million judgment against a college for the opinions its students expressed.

The Gibsons sued Oberlin College and Raimondo (collectively, "Oberlin") for "facilitating" an "economic boycott of Gibson's." Oberlin moved for summary judgment, asserting (among other things) that the students' protest speech was constitutionally protected and the Gibsons were limited purpose public figures who could not show actual malice. The trial court: (i) ruled that students' chants were protected opinion, but allowed libel and intentional infliction of emotional distress (IIED) claims to go to trial based on similar written allegations in the Flyer and Resolution; and (ii) held as a matter of law that the Gibsons were not public figures of any kind.

Trial on the three remaining claims against both defendants (libel, IIED, and tortious interference with business relationships) was bifurcated into compensatory and punitive damages phases. The compensatory stage resulted in: (i) findings against both Oberlin and Raimondo on libel, but only against Oberlin on IIED and only against Raimondo on tortious interference; and (ii) damages totaling $11,074,500. The jury also repeatedly found that neither Oberlin nor Raimondo acted with constitutional actual malice. But the trial court allowed, over Oberlin's objection, a punitive damages phase on all three claims, requiring jurors to revisit constitutional actual malice and resulting $33,223,500 in punitive damages on the libel and IIED claims only. An incorrect application of damages caps led to a judgment with $5,174,500 in compensatory damages and $19,874,500 in punitive damages; a later award of attorney fees and expenses based on the punitive damages resulted in a $31,614,531.79 final judgment.

Oberlin appealed and the Ninth District affirmed, rejecting some of its arguments and failing to fully address others. *Compare, e.g.*, Appellants' Br. 11, 17-19 (arguing that the required independent appellate review showed no actual malice) *with* App. Op. ¶¶ 19-22, 77-89, Appx. 7-9, 27-31 (reciting wrong standard of review and conducting no review of record on actual malice); Appellants' Br. 20-21 (arguing that a failure to isolate damages caused by unprotected conduct is subject to independent appellate review and plain-error review) *with* App. Op. ¶¶ 23, n. 2, Appx. 10 (no review of whether damages flowed from unprotected conduct); Appellants' Br. 17 (citing *Elio*, *supra*, and other authorities holding that a trial court cannot require the jury to reconsider its findings) *with* App. Op. ¶ 77, Appx. 27 (claiming "Oberlin cites no authority in support of its argument on appeal"); Appellants' Br. 25 (arguing that excluded testimony was not hearsay because it was offered to show its effect on the listener's state of mind) *with* App. Op. ¶¶ 104, Appx. 36 (claiming "Oberlin does not argue that these statements were not hearsay").

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

> **The constitutional protection of opinion speech applies equally to oral and written statements during protests, regardless of the tort theory. A viewpoint or interpretation of events that is protected when spoken is also protected when expressed in writing.**

The Ohio Constitution's "separate and independent guarantee of protection for opinion" is broader than the First Amendment. *Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 281 (1995). Whether speech is opinion is a question of law that turns on four factors, including "the specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which it appears." *Id.* at 282. When, taken in context, speech is advocacy, it is protected even if the challenged statement is verifiable. *Scott v. News Herald*, 25 Ohio St.3d 243, 252-254 (1986) (in context, perjury accusation is opinion); *Jorg*, 2003-Ohio-3668, ¶¶ 23-24.

The courts below concluded the students' oral protest chants are constitutionally protected opinion, a ruling the Gibsons did not challenge. App. Op. ¶¶ 3-4, 25-26, Appx. 2, 10-11. The Court should reach the same conclusion on the challenged statements in the Flyer and Resolution, both of which were a call to action—as the trial court found, *see* 4/22/19 JE, Appx. 61, 66—and thus "a persuasive piece of advocacy." *Jorg*, 2003-Ohio-3668, ¶ 23. Indeed, the challenged statements were surrounded by language calling for a boycott and hyperbole (such as the reference to "a particularly heinous event"). App. Op. ¶¶ 28-30, Appx. 11-12. So even if some of those statements (a "long account of racial profiling" or an "assault") might in other contexts sound factual and verifiable, *id.* ¶¶ 33-34, 37, Appx. 13-14, a reasonable reader would view them as opinion in this context. *Jorg*, 2003-Ohio-3668, ¶¶ 23-24. The Ninth District erred by holding otherwise.

Because the challenged statements are protected, Oberlin is entitled to judgment on all claims, except the compensatory damages against Raimondo for tortious interference. A plaintiff

cannot avoid free speech protections by relabeling a libel claim. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-57 (1988). The IIED claim fails for that reason and because, aside from the protected speech, there was no "extreme and outrageous" conduct. App. Op. ¶¶ 70-76, Appx. 25-27. The allegations about Oberlin's relationship with the bakery do not rise to this level; they also are irrelevant, because individuals (not the bakery) bring an IIED claim and the jury *found for Oberlin* on the bakery's tortious interference claim. Internal Oberlin emails not sent to the Gibsons and the conduct of third parties likewise do not suffice. *Snyder*, 562 U.S. at 458-459. Since the libel and IIED claims fail, the punitive damages and attorney fees award must be vacated too.

Proposition of Law No. 2:

> **Imposing liability on a college for facilitating student speech contravenes First Amendment principles and cannot survive an appellate court's independent review of the whole record, including whether: the plaintiff is a public figure; there is clear and convincing proof of constitutional actual malice; and the damages awarded are limited to unprotected conduct.**

The Ninth District affirmed a massive judgment for facilitating speech, even though fostering speech is central to a college's mission. *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957). For example, the panel ruled that Oberlin published the Resolution because it recognized the Student Senate, provided an advisor, and allowed it to use its email, and because it did not remove the Resolution from a student government bulletin board. App. Op. ¶ 50-52, Appx. 18-19. Besides violating 47 U.S.C. § 230, this broad facilitation theory lacks the "[p]recision" required "in an area so closely touching our most precious freedoms," *Button*, 371 U.S. at 438, and gives inadequate breathing space to free expression, *Snyder*, 562 U.S. at 458.

The Ninth District compounded this error by failing to conduct an independent appellate review of the summary judgment and trial record to ensure that the judgment for libel and IIED satisfies the Constitution. The First Amendment requires not only clear liability standards, but also

"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). This obligation applies whenever it is necessary "to further the interests protected by the First Amendment," *State ex rel. Pizza v. Strope*, 54 Ohio St.3d 41, 45 (1990), and requires reviews of all stages of a lawsuit, including the summary judgment record. *Varanese*, 35 Ohio St.3d at 80-83; *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1293 (D.C.Cir.1988) (Bork, J.).

First, this review shows the Gibsons are limited purpose public figures who cannot recover without clear and convincing proof of constitutional actual malice. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967). The panel acknowledged a limited purpose public figure is someone who "'voluntarily injects himself or is drawn into a particular public controversy * * *.'" App. Op. ¶ 60, Appx. 21. But the panel erred by narrowly limiting this controversy to the November 2016 altercation, while upholding liability for statements about a "long account" or "history" of discriminatory practices. *Id.* ¶ 61, Appx. 22. Since the summary judgment record showed the Gibsons participated for decades in this broader controversy over racial bias in the bakery's practices, they are limited purpose public figures and cannot recover for libel or IIED, because the jury found no actual malice six times at stage one of the trial.

Second, even without those no-malice jury findings, independent appellate review reveals no evidence, let alone clear and convincing evidence, that Oberlin facilitated either the Flyer or Resolution with constitutional actual malice—that is, a "high degree of awareness of probable falsity." *Varanese*, 35 Ohio St.3d at 80. Actual malice is "measured as of the time of publication," *id.*, based on the subjective state of mind of the publishing individual. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). The panel's facilitation theory treated Oberlin as the publisher of both writings when students began to distribute them. App. Op. ¶¶ 41-57, Appx. 16-21. But

Oberlin could not have published with actual malice when: (i) no Oberlin administrator saw either writing before students distributed it; and (ii) there is no evidence that any Oberlin official believed either writing to be probably false before it was distributed. The evidence of views shared with Oberlin *after* publication is irrelevant—and, in any event, inconclusive. *Gall*, 35 Ohio St.3d at 80.

Third, the Ninth District failed to review the record to isolate damages flowing from allegedly unprotected conduct (the Flyer or Resolution), as distinguished from protected speech. *Claiborne Hardware*, 458 U.S. at 918; App. Op. ¶¶ 3-4, 25, Appx. 2, 10. The Gibsons' proffered evidence, at most, alleged injury flowing from *protected* conduct—i.e., the protests. There is no evidence anyone: (i) read either the Flyer or Resolution, (ii) believed it to be true, and (iii) thought less of the Gibsons as a result. Without such evidence, the judgment cannot be sustained.

In sum, the judgment for libel and IIED, and the punitive damages and attorney fees award, conflict with the First Amendment and must be reversed to preserve speech on college campuses.

Proposition of Law No. 3:

> **A jury cannot consider an issue again when jurors give an interrogatory answer that is clear and consistent with the verdict. R.C. 2315.21(B)(2) does not authorize a jury to revisit in stage two of a bifurcated trial any issue resolved in stage one that also relates to liability or compensatory damages.**

Even without an independent appellate review, Oberlin still would have a right to judgment on punitive damages and attorney fees. A trial court cannot resubmit an issue the jury clearly resolved. *Bradley v. Mansfield Rapid Transit, Inc.*, 154 Ohio St. 154, 166 (1950). *Elio*, 147 Ohio St. 363, paragraph two of the syllabus. The jury's six findings of no constitutional actual malice at stage one were clear and aligned with the compensatory verdict. The trial court had to accept them, and asking jurors to decide the issue again violated Oberlin's right to trial by jury and First Amendment rights. *Arbino*, 2007-Ohio-6948, ¶ 35; *Gertz*, 418 U.S. at 349.

Contrary to the Ninth District's conclusion, tort reform bifurcation does not allow the trial court to resubmit constitutional malice to the jury. App. Op. 79-88, Appx. 28. Stage one of trial only excludes evidence "that relates *solely* to * * * whether the plaintiff is entitled to recover punitive or exemplary damages * * *." (Emphasis added.) R.C. 2315.21(B)(1)(a). Evidence of constitutional malice does not fit this criterion, because it is also relevant to liability and compensatory damages. *See* p. 4, *supra*. The Gibsons thus could (and did) present whatever evidence of constitutional actual malice they had during stage one. Having failed to persuade jurors that Oberlin acted with malice, they were bound by the no-malice findings, the issue should not have been resubmitted, and Oberlin is entitled to judgment on punitive damages and attorney fees.

Proposition of Law No. 4:

> **R.C. 2315.21 limits punitive damages to twice the recoverable compensatory damages awarded to a plaintiff from a defendant. Because R.C. 2315.18(E)(1) limits recoverable noneconomic loss to a capped amount, and R.C. 2315.18(F)(1) prevents a judgment over that amount, capped punitive damages are derived from capped compensatory damages.**

Even if punitive damages were recoverable, they 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." (Emphasis added.) R.C. 2315.21(B)(2), in turn, contemplates jury interrogatory answers that "specif[y] the total compensatory damages *recoverable* by the plaintiff from each defendant." (Emphasis added.) Compensatory damages "awarded to the plaintiff" include only the capped damages a court has jurisdiction to award, R.C. 2315.18(F)(1), while "recoverable" damages include only amounts a plaintiff actually can recover. *See* R.C. 2315.18(E)(1). As a result, capped punitive damages must derive from capped compensatory damages.

The panel held otherwise, citing *Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959. App. Op. ¶ 113, Appx. 40. But *Faieta* does not show that "recoverable" ordinarily includes unrecoverable amounts. 2008-Ohio-6959, ¶ 90. The courts below thus erred by using *uncapped* compensatory damages to cap punitive damages at nearly *four times* the compensatory damages judgment—a figure over $11 million higher than the caps allow.

IV. CONCLUSION

The Court should accept jurisdiction and enter judgment for Oberlin and Dean Raimondo on the libel and IIED claims, as well as the resulting punitive damages and attorney fees award. In the alternative, and at a minimum, the Court should vacate the punitive damages and attorney fees award or at least properly cap the punitive damages.

Respectfully submitted,

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APPENDIX

STATE OF OHIO)ss: COUNTY OF LORAIN)		IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
GIBSON BROS., INC., et al. Appellees/Cross-Appellants v. OBERLIN COLLEGE, et al. Appellants/Cross-Appellees		C.A. Nos. 19CA011563 20CA011632 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 17CV193761

DECISION AND JOURNAL ENTRY

Dated: March 31, 2022

CARR, Judge.

{¶1} Appellants, Oberlin College and its Dean of Students, Meredith Raimondo (collectively "Oberlin" or individually "the college" or "Raimondo"), appeal from a judgment of the Lorain County Court of Common Pleas that entered judgment against them and awarded compensatory and punitive damages to Gibson Brothers, Inc., Allyn W. Gibson, and David R. Gibson[1] (collectively "the Gibsons"). The Gibsons cross-appealed the trial court's reduction of damages that the jury had originally awarded them. This Court affirms.

I.

{¶2} This case has a lengthy history, including more than one year of pre-trial proceedings, an almost six-week jury trial, a separate trial on punitive damages, and several post-trial motions and rulings. Although this case was initiated on November 7, 2017, with a 33-page

[1] David R. Gibson died shortly after this appeal was filed and was replaced by his estate as a party to the appeal.

complaint, alleging numerous claims against each of the defendants, only three of those claims (libel, intentional interference with business relationship, and intentional infliction of emotional distress) were ultimately decided by the jury and are at issue in this appeal.

{¶3} This Court recognizes that this case has garnered significant local and national media attention. The primary focus of the media coverage, and the several amicus briefs filed in this case, has been on an individual's First Amendment right to protest and voice opinions in opposition to events occurring around them locally, nationally, and globally. This Court must emphasize, however, that the sole focus of this appeal is on the separate conduct of Oberlin and Raimondo that allegedly caused damage to the Gibsons, not on the First Amendment rights of individuals to voice opinions or protest.

{¶4} When this case went to trial, the student protests were not a subject of this defamation case, but merely provided a background for how other, potentially defamatory speech arose and was disseminated. Moreover, as will be explained in much greater detail in this opinion, prior to allowing the jury to consider whether any written statements were actionable, the statements were reviewed by the trial court (and will be again by this Court on appeal) under modern defamation law, which explicitly protects First Amendment free speech.

{¶5} "The First Amendment generally prevents government from proscribing speech * * *." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). However, "[o]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, [such as defamation,] which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (Citation omitted.) *Id.* at 382-383. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, [however,] demands that the law

of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). Since the 1960s, to provide greater protection to First Amendment rights to free speech, the United States Supreme Court has "narrowed the scope of the traditional categorical exceptions for defamation[,]" noting that actionable categories of defamation are "not within the area of constitutionally protected speech[.]" (Internal citations omitted.) *R.A.V.* at 383.

{¶6} This Court begins by reciting facts relevant to this appeal, emphasizing that many of these facts are recited only for the purpose of providing the background under which this controversy arose. Gibson's Bakery is a bakery and convenience store located in Oberlin, Ohio, close to the college campus. It has been run by the Gibson family for more than 130 years and has had a long-standing relationship with the college, its students and employees, and the surrounding community. At the time this controversy began, the bakery was owned by Allyn W. Gibson, often referred to during this litigation as Grandpa Gibson, and his son, David R. Gibson. During this controversy, David's son, Allyn D. Gibson ("young Allyn"), was an employee at the bakery but had no ownership interest. Young Allyn is not a party in this case.

{¶7} As stated in the testimony of current and former Oberlin administrators, Oberlin College is a private liberal arts college and conservatory of music that has been operating in Oberlin, Ohio since the 1830s. When this dispute arose, many Oberlin students had been protesting and otherwise expressing their dissatisfaction with the treatment of people of color by the college.

{¶8} The controversy in this case arose following an incident at the bakery on November 9, 2016. Although media coverage may have included other details about the incident, this Court is confined to reviewing the record before us on appeal. *See In re G.D.*, 9th Dist. Summit No. 27337, 2014-Ohio-3476, ¶ 4. According to the testimony admitted at the hearing, three African

American Oberlin students (one male and two females) were in the bakery while young Allyn was working. Young Allyn later informed the police that he confronted the male student because he believed that the student was shoplifting wine and using a fake I.D. to purchase more alcohol; that the male student fled the store; and young Allyn chased him across the street to apprehend and detain him for the police to arrive. When a police officer responded to the scene, he observed that the two female students also became involved in the physical altercation between young Allyn and the male student. The police arrested the three students. The students eventually entered guilty pleas and were convicted for their roles in the incident.

{¶9} Several college administrators testified that rumors about this incident at the bakery quickly reached members of the student body. Because many Oberlin students apparently believed that the three students had been racially profiled by young Allyn, they announced that they planned to hold a protest outside the bakery beginning at 11:00 a.m. the following day. Although the record does not disclose details about who prepared the flyer, a one-page flyer was prepared to be distributed during the protests. The flyer urged a boycott of the bakery, asserting that it was a "RACIST establishment with a LONG ACCOUNT OF RACIAL PROFILING and DISCRIMINATION." (Emphasis in original.) The flyer also gave an account of the "heinous event involving the owners of this establishment" and stated that "Allyn Gibson" had racially profiled the male student, improperly chased him out of the store, and assaulted him.

{¶10} Raimondo learned about the planned protest shortly before it began. Early that morning, she met with other administrative and faculty members of the college and several of them attended the protests. The parties would ultimately dispute what role, if any, Raimondo and other college staff played in the distribution of the flyer at the protests. It was not disputed, however, that Raimondo, as the Dean of Students, attended the protests. Her testimony and the written

policy of the college stated that Raimondo had the responsibility to appear at off-campus student protests to attempt to maintain peace.

{¶11} The testimony of witnesses at trial indicated that 200 to 300 people demonstrated outside the bakery on November 10 and November 11, 2016. Although the student protests are not a subject of the Gibsons' defamation claims at this stage of the proceedings, the flyer that was distributed during the protests is central to this litigation. The flyer and its distribution will be discussed in more detail in this Court's disposition of the first assignment of error.

{¶12} The student senate held a meeting on the evening of November 10 and passed a student senate resolution ("Senate Resolution"). The student senate sent an "FYI" email with the Senate Resolution attached to Raimondo (their faculty advisor) and the then-president of the college, Marvin Krislov. That same evening, the student senate emailed the Senate Resolution to the entire student body. The student senate also posted the Senate Resolution in its glass display case in the student center in Wilder Hall, where it remained posted for almost one year.

{¶13} Because of the incident at the bakery, and in a claimed effort to appease the angry students, Raimondo testified that she instructed a subordinate to contact the college's supplier of food for its dining halls, Bon Appetit, and tell them to stop or halt supplying the college with food from the bakery. The parties dispute how long the bakery lost business from Raimondo's actions that interfered with the food order. They further dispute how much the bakery and the Gibsons' other businesses were negatively affected by publicity surrounding the flyer and the Senate Resolution. The Gibsons also owned two apartment buildings that provided off-campus housing for Oberlin students and others in the community, which the Gibsons alleged were also hurt by the actions of Oberlin.

{¶14} Oberlin and the Gibsons met a few times, but they sharply dispute what transpired during their attempts to resolve their differences and avoid litigation. For example, the Gibsons presented testimony that Oberlin initially had agreed to direct Bon Appetit to resume the dining hall orders, but only if the Gibsons dropped charges against the three students and/or gave students special treatment if they were caught shoplifting at the bakery, but the Gibsons would not agree to those conditions. Oberlin's witnesses denied even mentioning how it thought the Gibsons should handle incidents of shoplifting at the bakery. The Gibsons also asked Oberlin to reach out to its students to explain that the Gibsons had been falsely accused of a history of racial profiling and of assaulting the student. Oberlin's witnesses did not dispute that the Gibsons made that request or that it declined to comply with the Gibsons' request because it did not want to further anger its students.

{¶15} The Gibsons also presented evidence that members of Oberlin's senior administrative staff had communicated via several text and email messages to express their anger about the Gibsons pressing charges against the three Oberlin students and their feelings that the college should not work with the Gibsons to resolve this situation. For example, the interim assistant dean was present in court in August 2017 when the Oberlin students were convicted for their role in the November 2016 bakery incident. From the courthouse, she sent a text message to Raimondo, stating that "[t]his is the most egregious process" and that "I hope we rain fire and brimstone on that store." Raimondo responded by thanking the assistant dean for going to court to be with the students. Another example was a text message sent by Raimondo after the student newspaper published a letter from a retired Oberlin professor, which expressed criticism of the college's "handling of the Gibson matter." Raimondo sent a text message to another administrator

that stated, "F-him. I'd say unleash the students if I wasn't convinced this needs to be put behind us."

{¶16} During the next several months, the Gibsons believed that they lost business and became the targets of what they perceived to be ongoing harassment by Oberlin and its students. They blamed Oberlin for repeated vandalism and property damage and for Grandpa Gibson breaking his back while investigating the source of someone pounding on his apartment door in the middle of the night. According to the Gibsons, they had suffered significant financial and emotional damages caused by the actions of Oberlin.

{¶17} The Gibsons filed this action, which ultimately proceeded to a jury trial. The jury entered verdicts for the Gibsons (individually and/or the business) on their claims for libel, intentional infliction of emotional distress, and on their claim against Raimondo for intentional interference with business relationship. The jury also awarded attorney fees and compensatory and punitive damages, which were later capped by the trial court.

{¶18} Oberlin appeals, raising three assignments of error. The Gibsons cross-appeal, raising one cross-assignment of error.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN DENYING MOTIONS FOR SUMMARY JUDGMENT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT FILED BY [OBERLIN].

{¶19} Oberlin's first assignment of error does not challenge the jury's verdict as being against the weight of the evidence, nor does it directly challenge the admission of any evidence at trial. Instead, this assignment of error is confined to the trial court's denial of Oberlin's motions

for summary judgment and/or judgment notwithstanding the verdict (JNOV), based on reasons articulated in one or both of those motions and reiterated now on appeal.

{¶20} The Ohio Supreme Court has held that any error by the trial court in denying a motion for summary judgment based on disputed facts is harmless if a later trial on the merits involving the same factual issues demonstrates that there were disputed material facts, which result in a judgment in favor of the nonmoving party. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156 (1994). Any error in the denial of summary judgment became irrelevant after a jury decided the factual disputes, based on a full presentation of the relevant evidence. *Id.* at 157-158. Therefore, the trial court's denial of Oberlin's motion for summary judgment on grounds based on disputed facts is not a point of consideration in this appeal. *Amore v. Ohio Turnpike Comm.*, 194 Ohio App.3d 182, 2011-Ohio-1903 (9th Dist.), ¶ 33.

{¶21} *Whittington* also emphasized, however, that its decision was limited to a motion for summary judgment denied upon a finding that there were genuine issues of material fact, not on purely legal questions that were conclusively decided by the trial judge prior to trial. *Id.* at 159. This Court continues to have authority to review the denial of Oberlin's motion for summary judgment on purely legal questions that were never presented to the jury for its consideration, such as whether the speech at issue in this case was constitutionally protected. Because Oberlin reiterated those legal questions in its motion for JNOV, however, this Court will confine its review to the arguments raised through its motion for JNOV. "JNOV is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the nonmoving party reasonable minds could come to but one conclusion, that being in favor of the moving party." (Internal citations omitted.) *State v. The Jacts Group, LLC*, 9th Dist. Medina No. 19CA0044-M, 2020-Ohio-1173, ¶ 29. As a motion for JNOV is decided as a matter of law, this

Court will address these arguments de novo. *Williams v. Spitzer Auto World Amherst, Inc.*, 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 9.

{¶22} Through its lengthy motion for JNOV, Oberlin raised several arguments about why the Gibsons' claims should fail as a matter of law and argued that the matter should not have proceeded to a separate hearing on punitive damages. This Court will individually address the arguments that Oberlin has properly raised through this assigned error but will not reach the merits of arguments that Oberlin did not properly raise through its motion for JNOV or legal arguments that it did not raise on summary judgment, as Oberlin cannot fault the trial court for failing to grant their motions on grounds not asserted in those motions or forfeited during trial. *See In re F.B.*, 9th Dist. Summit Nos. 28960, 28985, 2019-Ohio-1738, ¶ 27; *Lehmier v. W. Res. Chem. Corp.*, 9th Dist. Summit No. 28776, 2018-Ohio-3351, ¶ 48; Civ.R. 51(A).

A. Libel

{¶23} "To establish defamation, the plaintiff must show (1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement." (Internal citation omitted.) *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, ¶ 77. Through their motion for JNOV, Oberlin challenged several aspects of the Gibsons' libel claims and many of those challenges have been raised again on appeal. Oberlin asserts that the Gibsons' libel claims failed on the first, third, and fifth elements listed above because: the alleged libelous statements were

constitutionally protected opinion; Oberlin did not publish the statements; and Oberlin did not act with the requisite degree of fault.[2]

1. Factual Statements or Constitutionally Protected Opinion

{¶24} Oberlin attempted to defend against the libel claims by asserting that its students had a right to free speech and that their protests and written statements were protected by the First Amendment. It was for the trial court to decide as a matter of law whether the statements alleged to be defamatory were constitutionally protected speech or actionable as statements of fact. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 372 (1983), abrogated on other grounds in *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451.

{¶25} Oberlin has asserted throughout this case, as have several organizations through amicus briefs on appeal, that any liability for defamation in this case could have a chilling effect on students' rights to free speech at colleges and universities across the country. This Court must emphasize, however, that Oberlin was granted summary judgment on the Gibsons' claims based on the verbal protests by Oberlin students. The trial court agreed that the student chants and verbal protests about the Gibsons being racists were protected by the First Amendment and, therefore, were not actionable in this case. By the time of trial, the Gibsons' libel claim focused solely on whether Oberlin had disseminated false, written statements of fact that caused the Gibsons significant harm.

{¶26} After the trial court granted partial summary judgment to Oberlin, the only potentially defamatory statements at issue in this case were those contained in two documents:

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[2] Although Oberlin argues on appeal that the Gibsons failed to prove an actual injury caused by the publication of the libelous statements, this Court will not address that argument because it was not raised in the motion for JNOV.

(1) the flyer distributed during the protests and (2) the Senate Resolution, which was emailed to all members of the student body and posted in a display case in the student center.

{¶27} "'In determining whether a statement is defamatory as a matter of law, a court must review * * * the totality of the circumstances * * * to determine whether a [reasonable] reader would interpret [it] as defamatory." *Am. Chem. Soc.,* 133 Ohio St.3d 366, 2012-Ohio-4193, at ¶ 79, quoting *Mann v. Cincinnati Enquirer*, 1st Dist. Hamilton No. C-09074, 2010-Ohio-3963, ¶ 12. The words should be considered within the context of the entire publication and the thoughts that the publication is "calculated to convey to the reader to whom it is addressed." *Am. Chem. Soc.* at ¶ 79, quoting *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 840 (6th Cir.1988). To determine whether an alleged defamatory statement is fact or opinion, we examine four factors: the specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. *Scott v. News-Herald*, 25 Ohio St.3d 243, 250 (1986).

Flyer

{¶28} The flyer was a two-sided page. The front page of the flyer began with a large font, bold-faced "DON'T BUY" printed inside a template of an eight-point star, and included other pleas that people boycott the bakery and shop elsewhere. The back page of the flyer listed other local retailers for the students to find specific items.

{¶29} The libel claims focused on the following language on the front page of the flyer:

> 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 [t]he young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until 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.
>
> If you have been victimized by this establishment in any capacity, we ask you to stand with us in support of our community member.

(Emphasis in original.) The remainder of the first page provided an email address for people to supply additional information or photographs of the incident at the bakery.

Senate Resolution

{¶30} The Senate Resolution was passed by the student senate on November 10, 2016. It urged students to cease all support of the bakery, and called upon the faculty and administration of the college to "condemn * * * the treatment of students of color by Gibson's Food Market and Bakery[.]" Rather than quoting the resolution in its entirety, this Court will summarize and quote the most relevant portions at issue here. The resolution begins by acknowledging and condemning hatred and bigotry as well as all acts of violence. It then details "a few key facts" about the Gibsons' incident because "we find it important to share" them with the Oberlin Community:

> 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 receiving 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. * * * .

{¶31} Oberlin has argued that the flyer and Senate Resolution contained only opinions, but it has focused its arguments throughout this case on statements alleging merely that the Gibsons

were racists. Despite Oberlin's arguments to the contrary, the potentially libelous statements in this case include much more than calling the Gibsons "racists."

{¶32} The trial court determined, as a matter of law, that both the flyer and the Senate Resolution were not statements of constitutionally protected opinion but were defamatory per se. The trial court focused on the statements about the Gibsons and their bakery having a history of racial profiling and discrimination toward students and residents and the statements about an "assault[]" of a student by an owner or owners of the bakery.

{¶33} The flyer states that the bakery has a "long account of racial profiling and discrimination" and the Senate Resolution states among its "key facts" that "Gibson's has a history of racial profiling and discriminatory treatments of students and residents alike." (Emphasis omitted.) Statements that the bakery has a "history" or "account" of discrimination and racial profiling would be interpreted by a reasonable reader to mean that there were past incidents of discrimination or profiling. These statements can be verified as true or false by determining whether there is, in fact, a history or account of racial profiling or discriminatory events at the bakery.

{¶34} The statements about an "assault[]" of a community member based on racial profiling at the bakery was described as "heinous" in the flyer and described in both the flyer and Senate Resolution to be unjustified under the circumstances. The trial court found that allegations of an assault, if untrue, were defamatory per se and Oberlin has not raised a timely or proper challenge to that ruling by the trial court.[3]

[3] Although Oberlin challenges this ruling on appeal, this issue was not raised in its motions for summary judgment or JNOV.

{¶35} Oberlin also argues that the statement in the flyer about a student being apprehended by "Allyn Gibson" was referring to young Allyn, who is not a party to this litigation, so there was no potential libel against any party. The flyer did not identify Allyn by his middle initial, however. Also, the sentence immediately preceding the first reference to Allyn in the flyer states that the young man was assaulted "by the owner of this establishment[.]" Moreover, the first paragraph of the flyer referred to "a particularly heinous event involving the owners of this establishment[.]" A reasonable reader would interpret this language to state that the owners of the bakery assaulted the young man.

{¶36} The trial court's conclusion that these statements were actionable factual statements was further supported by reading them within the context of the flyer and Senate Resolution and the broader context of the environment at the college, where students had been expressing ongoing dissatisfaction with racial injustice on campus and in the community at large. These statements were published shortly after the incident at Gibsons, prior to the prosecution and conviction of the students, and before the actual facts had been flushed out.

{¶37} Given the public's lack of knowledge of what had happened at the bakery and the ongoing tension on campus about racial injustice, these statements would convey to a reasonable reader that the arrest and alleged assault at the bakery were racially motivated, that the Gibsons had a verifiable history of racially profiling shoplifters on that basis for years, and that those facts were a reason to boycott the bakery. The trial court did not err in concluding, as a matter of law, that these were actionable statements of fact, not constitutionally protected opinion. Consequently, it did not err in denying Oberlin's motion for JNOV on this basis.

2. Publication of Statements

{¶38} Next, Oberlin asserts that the Gibsons did not prove that Oberlin published either the flyer or the Senate Resolution. Much of Oberlin's argument about whether the Gibsons proved publication is intertwined with an argument about the degree of fault that the Gibsons were required to prove. Although fault must be proven at the time of publication, publication is a distinct element of the libel claim. *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, ¶ 77. This Court will focus its publication review on whether the trial court erred in denying JNOV on the publication element of the Gibsons' libel claims.

{¶39} "Any act by which [] defamatory matter is communicated to a third party constitutes publication." (Emphasis omitted.) *Hecht v. Levin*, 66 Ohio St.3d 458, 460 (1993), citing 3 Restatement of the Law 2d, Torts, Section 577(1), Comment a (1965). "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." (Internal quotations and citation omitted). *Cooke v. United Dairy Farmers, Inc.*, 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25.

{¶40} Construing the evidence before the trial court in favor of the Gibsons, as a motion for JNOV requires, reasonable minds could conclude that Oberlin published the flyer and the Senate Resolution. Therefore, JNOV on that basis would not have been proper. *See The Jacts Group, LLC*, 2020-Ohio-1173, at ¶ 29. We will review the evidence pertaining to the publication of each allegedly defamatory statement separately.

Flyer

{¶41} It is unknown from the record who wrote the flyer or made the initial copies of it. Nevertheless, it is not disputed that the flyers were distributed during the protests outside the bakery. Moreover, the Gibsons presented evidence that Raimondo handed at least one copy of the flyer to Jason Hawk, a reporter and editor with the Oberlin News-Tribune. Although Raimondo and other Oberlin witnesses disputed much of the evidence presented by the Gibsons on this issue, in our review of the denial of Oberlin's motion for JNOV, we must construe the evidence in favor of the Gibsons. *See id.*

{¶42} Jason Hawk testified for the Gibsons. According to him, Raimondo saw him watching the protest and trying to take pictures. She walked over to him and identified herself by name and her role at the college. He told Raimondo that he was a reporter with the Oberlin News-Tribune. She asked him if he already had a copy of the flyer and, because he did not, she asked a student to go get one for him. The student returned with a flyer, handed it to Raimondo, who then directly handed it to Hawk. Hawk later published more than one article in the Oberlin News-Tribune that quoted in part from the flyer.

{¶43} The former director of security at Oberlin testified that he attended the protests to see what was transpiring at the event. He was handed a flyer by a student but threw it away. He testified that another man, who identified himself as being with the college, later tried to hand him another flyer but he refused it. The former security director was later able to identify the man by his picture on the college's Facebook page as the associate director of Oberlin's multicultural resource center. Although no one else testified that this Oberlin employee had been handing out flyers, other witnesses did testify that he attended the protest.

{¶44} The former security director further testified that he saw the same man walking through the crowd with a stack of flyers. On cross-examination, Oberlin questioned whether he could read the flyers in the man's hands. The witness responded unequivocally that it was the same flyer because he could see the star emblem on top that read, "DON'T BUY[.]"

{¶45} An Oberlin College professor testified that she was monitoring the students during the protest when one of them asked if the students could place flyers on the windshields of parked cars. She responded that they could place the flyers on car windshields but advised them not to go onto any private property.

{¶46} An employee of the bakery who was working during the protests testified that he observed Raimondo with a large stack of flyers and saw her handing smaller stacks of them to students to distribute. He testified that he also overheard Raimondo tell students that they could make more copies of the flyer in the conservatory office.

{¶47} An Oberlin employee who worked in the conservatory office that day testified that, during the protests, students brought her a flyer to make copies. She explained that she handed the flyer to a superior, who offered to make copies and walked toward the copy room. Although she never saw her superior with copies of the flyer, he never told her that he did not copy the flyer. She testified that she believed that he had made copies of the flyer for the students.

{¶48} Finally, the jury heard evidence about other actions taken by the Oberlin faculty and administration to aid the students. The college provided a room in a nearby building for them to take breaks during the protests, the college supplied coffee and pizzas in that room, and Raimondo agreed to reimburse a student for $75-100 that she spent on gloves so the protestors would not get too cold.

{¶49} Construing the totality of this evidence in favor of the Gibsons, a reasonable person could conclude that Oberlin took actions to directly publish and/or assist in publishing the flyer. Therefore, the trial court properly denied JNOV as to the publication of the flyer.

Senate Resolution

{¶50} Although the jury heard less evidence about the active role that Oberlin played in the publication of the Senate Resolution, there is an important distinction between the Senate Resolution and the flyer. Unlike the flyer, the Senate Resolution was not distributed on the street by an unknown group of students to people who happened to walk by. The Senate Resolution was written and published by an organization that was sanctioned by the college to govern its student body. The jury heard evidence that Oberlin assisted the student senate in its activities by providing it with financial support; a faculty advisor, Raimondo; an office in the student center; and a nearby glass display case within which it could post announcements.

{¶51} More significantly, the college also provided the student senate with the authority to meet and pass resolutions, distribute them to the entire student body via a mass email, and display their resolutions in the glass display case in the student center. Also, the evidence at trial was undisputed that the evening that the student senate passed the resolution, the senate sent a copy of the resolution to Raimondo, its advisor, and then-president Krislov. Raimondo and Krislov did not respond about the content of the resolution, and both claimed that they were unaware that it was posted in the student center, for nearly one year, in the same building in which Raimondo had her office.

{¶52} This evidence about Oberlin affirmatively providing the student senate with various types of outward assistance could support a jury conclusion that Oberlin facilitated the initial publication of the Senate Resolution. But for Oberlin providing the student senate with the means

and authority to create and send the Senate Resolution to the entire student body via email and post it in a prominent display case in the student union to be seen by current and potential students, the Senate Resolution could not have been published in the manner it was in this case. *See Cooke*, 2003-Ohio-3118, at ¶ 25 (affirmative acts of aiding and abetting are sufficient to establish publication).

{¶53} The Gibsons also argued throughout the trial that Raimondo or the college should have stopped the publication of the Senate Resolution by removing the resolution from the display case, sending a message to the student body, and/or otherwise calling upon the student senate to retract and/or correct their defamatory statements. Oberlin responded throughout these proceedings that it had no obligation to remove the resolution from the display case or to take corrective actions regarding it.

{¶54} Oberlin cited no legal authority to support that argument, however, nor did it present evidence at trial that it lacked the ability to take corrective actions. On the other hand, there is authority to support the Gibsons' position on this issue. In addressing similar issues, the Tenth District determined that a defendant could be held liable for not removing defamatory signs posted on her property. In wrestling with the issue, the court held that "[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication." *Dillon v. Waller*, 10th Dist. Franklin No. 95APE05-622, 1995 WL 765224, *7 (Dec. 26, 1995), quoting and later adopting 3 Restatement of the Law 2d, Torts, Section 577, at 201 (1977). We agree with this reasoning.

{¶55} In reviewing the evidence in line with Section 577 and the reasoning of the Tenth District, there was evidence before the jury, construed in favor of the Gibsons, that supported a

conclusion that Oberlin knew that the Senate Resolution was posted in the display case in the student center for nearly one year, yet it failed to take action to remove it. The evidence was not disputed that the Senate Resolution was enacted on November 10, 2016, a copy was sent to Raimondo and the college's then-president that same evening, and the resolution was posted in the display case near the student senate office in the student center until after the Gibsons filed their lawsuit on November 7, 2017. Oberlin presented the testimony of Raimondo and others that no one in a position of authority at the college knew that the resolution was posted in the display case until after the lawsuit was filed, because the complaint referred to the posting in the display case.

{¶56} The Gibsons presented evidence, however, to question the credibility of Oberlin's witnesses about their lack of knowledge about the Senate Resolution being posted in the display case. The student senate emailed an "FYI" copy of the Senate Resolution to Raimondo and the college's then-president Krislov. Both testified that they were aware that the glass display case was where the student senate posted announcements. Moreover, Raimondo's office was one floor up in the same building and she was the faculty advisor of the student senate, whose office was near the display case. Evidence was also admitted that the display case could be easily seen by students, prospective students and their parents, and other visitors to the student center. A reasonable juror could conclude that Raimondo and/or the former president knew that the Senate Resolution was posted in the display case.

{¶57} Shortly after the Gibsons filed this lawsuit, Raimondo asked members of the student senate to remove the resolution from the display case, which they did. A reasonable juror could also infer from that evidence that Raimondo, as the faculty advisor, had the authority and/or obligation to instruct the student senate to remove the resolution many months earlier. Therefore,

construing the evidence presented at trial in favor of the Gibsons, the trial court did not err in failing to grant Oberlin JNOV based on the publication of the Senate Resolution.

3. Degree of Fault Required

{¶58} On appeal, Oberlin argues the trial court incorrectly found as a matter of law that the Gibsons were not public figures or limited-purpose public figures and should have granted their JNOV motion on this basis. The status of the plaintiffs determines the degree of fault required to prevail on their claims for libel. Because the trial court found that the Gibsons were private figures, they were required to prove that Oberlin acted negligently in publishing the resolution and flyer. *See Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 736, 742 (9th Dist.2001). Had the trial court accepted Oberlin's argument that the Gibsons were public figures, they would have been required to prove malice to support their libel claims. *Id.* at 735.

{¶59} One may be designated a public figure for all purposes by achieving "pervasive fame or notoriety." *Id.* at 736. As this Court further explained in *Gilbert*, "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* at 737, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). This Court rejected the argument that attorney Gilbert was a public figure simply because he was a "well-known attorney in the Akron legal community." *Gilbert* at 737. Similarly, we cannot conclude that the Gibsons became public figures merely because they ran a well-known business in the small community of Oberlin, Ohio.

{¶60} A person may also become a public figure for certain purposes when he "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (Citation omitted.) *Id.* at 736. Oberlin argues that the Gibsons had

become limited purpose public figures because they voluntarily injected themselves into the controversy at issue in this case.

{¶61} Oberlin broadly defines the controversy in this case to be what it alleges is a history of racism at the bakery. The proper focus of this inquiry, however, is on the controversy from which the alleged defamation arose: the incident at the bakery on November 9, 2016. *See Woods v. Capital Univ.*, 10th Dist. Franklin No. 09AP-166, 2009-Ohio-5672, ¶ 36. The Gibsons did not voluntarily inject themselves into a shoplifting incident at their bakery, nor did they voluntarily inject themselves into extreme public criticism of their employee's efforts to apprehend and detain the shoplifter. Oberlin has failed to demonstrate that the trial court erred in concluding, as a matter of law, that the Gibsons were private figures.

{¶62} Because the Gibsons were private figures in this libel case, they were required to prove only that Oberlin acted with negligence, not actual malice. Oberlin has not argued through this assignment of error that the Gibsons failed to prove negligence, so we need not review the propriety of that finding. Therefore, as Oberlin has failed to demonstrate merit in any of its arguments, the trial court did not err in overruling Oberlin's motion for JNOV on the Gibsons' libel claims.

2. Interference with Business Relationship

{¶63} After the jury trial, judgment was granted on behalf of Oberlin but against Raimondo on the Gibsons' claims for intentional interference with business relationship. Oberlin argued in its motion for JNOV that, based on the evidence presented at trial, Raimondo also should have been granted judgment on this claim. "The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with

another, or not to perform a contract with another." *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council,* 73 Ohio St.3d 1, 14 (1995). The interference must be "by someone who is not a party or agent of the party to the contract or relationship at issue." *Dorricott v. Fairhill Ctr. for Aging,* 2 F.Supp.2d 982, 989-990 (N.D.Ohio 1998), citing *Miller v. Wikel Mfg. Co., Inc.,* 46 Ohio St.3d 76, 79 (1989).

{¶64} Oberlin argued that the Gibsons had no cognizable claim against Raimondo for tortious interference with the business relationship between Bon Appetit and the bakery because Bon Appetit was not a third party but was an agent of the college. Thus, Raimondo, as an employee of the college, could not tortiously interfere in a business relationship with another agent of the college because she was essentially a party to that relationship. Consequently, the sole dispute is whether Bon Appetit conducted business with the Gibsons as an independent third party or as an agent of Oberlin.

{¶65} "Agency has been defined as a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent." (Internal quotations and citations omitted.) *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, ¶ 20. The parties both argue that the authoritative case law involves whether Bon Appetit had authority to bind Oberlin to the business relationship that it had with the bakery. *See, e.g., id.*; *Willoughby Hills Dev. & Distrib., Inc. v. Testa*, 155 Ohio St.3d 276, 2018-Ohio-4488.

{¶66} Therefore, this Court confines its review to the argument briefed by the parties: whether Bon Appetit, the alleged agent, had authority to bind Oberlin, the alleged principal. *Cincinnati Golf Mgt., Inc.* at ¶ 20; *Willoughby Hills Dev. & Distrib., Inc.* at ¶ 27-28. "[B]inding the principal to agent-made contracts typically requires that the agent make the contracts on the

principal's behalf with actual authority to do so. The Restatement defines 'actual authority' in terms of an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent." (Emphasis and citations omitted.) *Cincinnati Golf Mgt., Inc.* at ¶ 24.

{¶67} To determine whether a principal-agent relationship existed, the court should review the management agreement to determine whether the way in which it defined the relationship between the two parties was consistent with imputing purchase-agent status to the alleged agent. *Cincinnati Golf Mgt., Inc.*, 132 Ohio St.3d 299, 2012-Ohio-2846, at ¶ 26. "A purchaser is not 'acting on behalf of' a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent." *Willoughby Hills Dev. & Distrib.*, 155 Ohio St.3d 276, 2018-Ohio-4488, at ¶ 30, quoting 1 Restatement of the Law 3d, Agency, Section 1.01, at 30 (2006).

{¶68} Oberlin and Bon Appetit had entered into a management agreement years earlier. Among other things, the agreement provides that "Bon Appetit shall act as agent for Oberlin in the management of Food Service Operation[.]" The parties do not dispute that this one statement referring to Bon Appetit as Oberlin's agent is not determinative of the agency issue. *See N & G Constr., Inc. v. Lindley*, 56 Ohio St.2d 415, 417 (1978), fn. 1.

{¶69} The Gibsons also pointed to a sentence in that same "Agency Relationship" paragraph, which provides that "Bon Appetit shall purchase food and supplies in Bon Appetit's name and shall pay the invoices." This language indicates that Bon Appetit simply purchased goods from the bakery and resold them to Oberlin, acting as a principal, not an agent. *See Willoughby Hills Dev.*, 155 Ohio St.3d 276, 2018-Ohio-4488, at ¶ 30. Nothing in the remainder of the 11-page management agreement indicates that Bon Appetit had any authority to bind

Oberlin to its business relationship with the bakery or any of its vendors. Consequently, Raimondo failed to prove that Bon Appetit acted as a purchasing agent for Oberlin, so she has failed to demonstrate that trial court erred in denying her motion for JNOV on this claim.

3. Intentional Infliction of Emotional Distress

{¶70} The Gibsons' final claim involves intentional infliction of emotional distress. To establish their claims for intentional infliction of emotional distress, David and Grandpa Gibson were required to prove that: the defendants intended to cause, or knew or should have known, that their actions would result in serious emotional distress; their conduct was extreme and outrageous, going beyond all bounds of decency and considered intolerable in a civilized society; their actions proximately caused psychic injury to the plaintiffs; and the plaintiffs suffered mental anguish beyond what a reasonable person would be expected to endure. *Shetterly v. WHR Health Sys.*, 9th Dist. Medina No. 08CA0026-M, 2009-Ohio-673, ¶ 15.

{¶71} Oberlin has argued that the claims of David and Grandpa Gibson for intentional infliction of emotional distress were legally insufficient because the claims relied on the same constitutionally protected speech that formed the basis of their libel claims and that the allegedly libelous statements did not rise to the level of extreme and outrageous conduct. This Court has already determined in this assignment of error, however, that that the statements that formed the basis of the Gibsons' libel claims were not constitutionally protected speech.

{¶72} Moreover, the conduct at issue in the Gibsons' claims for intentional infliction of emotional distress included much more than the statements in the flyer and the Senate Resolution. The Gibsons presented evidence that, despite the bakery's ongoing business relationship with Bon Appetit, Oberlin abruptly told Bon Appetit to stop doing business with the bakery. In meetings between the Gibsons and administration, Oberlin expressed a greater concern about appeasing its

students than with repairing the Gibsons' ongoing business relationship with Bon Appetit. According to the Gibsons, Oberlin would not direct Bon Appetit to resume business with the bakery unless the Gibsons agreed to drop criminal charges against the student shoplifters and/or implement a policy through which they would not prosecute any first-time student shoplifters but would instead give them a "pass" and contact the college instead of the police.

{¶73} The Gibsons presented several printed text and email messages between senior college administrators to demonstrate that, nearly a year after the bakery incident, they did not believe that the college should work with the Gibsons to resolve this situation. Oberlin's witnesses did not dispute that the printed messages had been communicated between the administrators. One text message sent by the interim assistant dean expressed that the criminal conviction of the three students was "an egregious process" and that she hoped the college would "rain fire and brimstone" on the bakery. In response to a published letter from a retired Oberlin professor who criticized Oberlin's response to the college's situation with the Gibsons, Raimondo stated in another text message, "F-him. I'd say unleash the students if I wasn't convinced this needs to be put behind us." The Gibsons presented other messages that were communicated between senior administrators that also expressed their lack of concern about the past and ongoing damages that had been suffered by the Gibsons.

{¶74} The Gibsons also presented evidence that, after Oberlin administrators had learned that the student allegations of assault and racial profiling might be false, they directed Bon Appetit to resume business with the bakery. Oberlin denied the requests of the Gibsons, however, to correct the statements in the flyer or Senate Resolution or to otherwise work with the students or community to help restore, or stop the ongoing damage to, the Gibsons' reputations. Although

Oberlin disputed much of this evidence, the trial court was required to construe the evidence in favor of the Gibsons.

{¶75} Also, through this argument, Oberlin has challenged only the adequacy of the outrageous conduct alleged by the Gibsons, not whether they proved that Oberlin was responsible for it. The Gibsons also presented evidence that they had been continually taunted and harassed for many months, that their business and property had been vandalized, and that Grandpa Gibson had broken his back after an encounter with someone he believed was trying to harass him or break into his apartment.

{¶76} Construing this evidence in favor of the Gibsons, this Court cannot conclude that reasonable minds could only conclude that this conduct failed to rise to the level of extreme and outrageous. Therefore, the trial court did not err in denying JNOV on this basis.

4. Punitive Damages

{¶77} Finally, Oberlin argues that the trial court erred in denying its motion for JNOV in that it should not have been allowed to consider an award of punitive damages in the bifurcated damage stage of the trial. Oberlin alleges that because the jury had already found no actual malice in the liability stage of the trial it was improper to further consider punitive damages on the libel claim. Oberlin cites no authority in support of its argument on appeal.

{¶78} R.C. 2315.21(B)(1) provides:

> In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, *upon the motion of any party*, the trial of the tort action shall be bifurcated as follows:
>
> (a) *The initial stage of the trial shall relate only to* the presentation of evidence, and a determination by the jury, with respect to *whether the plaintiff is entitled to recover compensatory damages* for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and *the court shall not permit a party to present, evidence that relates solely to the issue of*

> *whether the plaintiff is entitled to recover punitive or exemplary damages* for the injury or loss to person or property from the defendant.
>
> (b) *If the jury determines* in the initial stage of the trial that the *plaintiff is entitled to recover compensatory damages* for the injury or loss to person or property from the defendant, *evidence may be presented in the second stage* of the trial, and a determination by that jury shall be made, *with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages* for the injury or loss to person or property from the defendant.

(Emphasis added.)

{¶79} Oberlin moved the trial court, pursuant to this provision, to bifurcate the trial into stages on the issues of compensatory and punitive damages. Because Oberlin requested bifurcation under R.C. 2315.21(B), and the statute was otherwise satisfied, bifurcation was mandatory. *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, ¶ 25.

{¶80} As noted already, this case proceeded to the jury upon a legal finding by the trial court that the actionable statements in the flyer and Senate Resolution, if false, constituted libel per se. At common law, malice was presumed in cases of defamation per se, so a plaintiff did not have the burden to plead or prove damages. *Woods*, 2009-Ohio-5672, at ¶ 33. Decisions of the United States Supreme Court, including *Gertz*, 418 U.S. at 349, later held that states could no longer award presumed damages to a private defamation plaintiff in a matter of public concern without a showing that the defendant published the statement with knowledge or reckless disregard of its truth. *Id.* "Thus, in Ohio, [] plaintiff[s] must prove either: (1) ordinary negligence and actual injury, in which case [they] can receive damages for the actual harm inflicted; or (2) actual malice, in which case [they are] entitled to presumed damages." *Woods* at ¶ 35.

{¶81} The parties agreed at the commencement of the liability phase that malice was an element of the Gibsons' libel claims, insofar as it pertained to a presumption of damages on those claims, but nothing else. During the liability phase of the trial, without objection from any of the

parties, the jury was asked to determine whether Oberlin acted with malice in publishing the libelous statements. The jury interrogatories also asked the jury to determine if each plaintiff proved by clear and convincing evidence whether each defendant acted with malice and/or negligence on each libel claim.

{¶82} Oberlin argues only that the malice issue had already been decided during the liability phase, so malice should not have been relitigated during the punitive damages phase. The parties agreed from the beginning of the trial that malice was an element of the Gibsons' libel claims and pertained directly to their request for compensatory damages. The evidence and jury findings were limited to whether Oberlin published the flyer and Senate Resolution with knowledge or reckless disregard to the truth or falsity of the claims.

{¶83} In enacting the tort reform provisions under R.C. 2315.21(B)(1), the legislature granted either party the right to request that the trial of the liability portion of the tort claim be bifurcated or separated from any punitive damage stage. As such, if a party requests bifurcation and a jury finds compensatory damages in the liability stage, the court must hold a second stage of the trial to determine punitive damages since evidence of punitive damages cannot be presented in the liability stage. The benefits to a defendant are obvious because in an ordinary tort case, the jury is not potentially influenced in its liability determination by evidence of common law malice, e.g., hatred or ill will.

{¶84} Unfortunately, a defamation case does not fit nicely into this statutory framework. In fact, the Ohio Supreme Court only recently determined that noneconomic defamation damages are covered by R.C. 2315.21(B)(2) as a personal injury tort. *See Wayt v. DHSC, L.L.C.*, 155 Ohio St. 3d 401, 2018-Ohio-4822. As mentioned previously, the actual malice that needs to be proven in a defamation case is not the common law malice in a usual tort claim. Instead, the actual malice

that must be proven for punitive damages in defamation relates to whether the defendant published the statement with knowledge or reckless disregard of its truth, i.e., constitutional malice.

{¶85} It gets even more convoluted in relation to whether the plaintiff is a private figure or a public figure and whether or not it is a matter of public concern or private concern. Here the trial court ruled that the Gibsons were private figures in a matter of public concern, so they only had to prove negligence and not actual malice. However, with a finding of negligence alone the Gibsons had to prove actual damages in order to recover compensatory damages. The other avenue was to prove actual malice or that Oberlin published the statements with knowledge or reckless disregard of its truth and recover presumed damages.

{¶86} R.C. 2315.21(B)(1)(b) provides that punitive damages can only be given after an award of compensatory damages. The Gibsons could have received compensatory damages at trial in one of two ways, upon proof of actual damages or with presumed damages upon a finding of actual malice. The jury found Oberlin negligent and awarded actual damages to the Gibsons. After the jury's award of compensatory damages in the first stage of the trial, R.C. 2315.23(B)(1) provides that the jury shall then determine at a second stage, after the presentation of evidence, whether punitive damages shall be awarded as well.

{¶87} On the other hand, if Oberlin had not requested bifurcation, the Gibsons could have put on their entire case at the liability stage of the trial with evidence presented of both compensatory and punitive damages. Without Oberlin's request for bifurcation, the jury would not have had to look at actual malice for liability and then again for punitive damages.

{¶88} Because Oberlin did request bifurcation, however, after compensatory damages were awarded by the jury, the Gibsons were entitled to proceed to the second stage of trial and put on any evidence they had pertaining to punitive damages for each of their claims: defamation,

intentional infliction of emotional distress, and tortious interference with business relationship. The Gibsons cannot be punished for Oberlin's choice to bifurcate.

{¶89} For all the reasons stated above, Oberlin's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING OBERLIN'S MOTION FOR A NEW TRIAL OR REMITTITUR AND BY FAILING TO CAP DAMAGES AS REQUESTED.

{¶90} Oberlin's second assignment of error is that the trial court erred in denying its motion for a new trial or remittitur based on certain arguments raised in that motion, including that the trial court gave incorrect jury instructions on the libel claims; it erred in excluding certain evidence; and that it should have reduced the compensatory damage award. This Court will address each argument in turn.

A. Jury Instructions

{¶91} Through its motion for a new trial and again on appeal, Oberlin challenges the trial court's instructions to the jury pertaining to the degree of fault that the Gibsons were required to prove on their libel claims.

{¶92} Oberlin argues that the trial court erred in instructing the jury with an incorrect legal definition of the standard of negligence that applies in a defamation case. Although the trial court did correctly instruct the jury that it must find negligence by clear and convincing evidence, Oberlin argues that it did not correctly define "negligence" as it applies to the degree of fault required in the publication of an allegedly libelous statement. Specifically, the trial court instructed the jury as follows:

> Negligence is the failure to use reasonable care. Every person is required to use *reasonable care to avoid causing injury* to others or their property.

> Reasonable care is the care that a reasonably careful person would use under the same or similar circumstances.

(Emphasis added.)

{¶93} Oberlin argues that the above instruction was not the correct definition of negligence to use in a libel case because it focuses on the care that was used to avoid injury, not on the care used to discover the truth or falsity of the statements being published. *See Lansdowne v. Beacon Journal Publishing* Co., 32 Ohio St.3d 176, 180 (1987). The Gibsons argue that Oberlin did not preserve this issue for appellate review. *See Thornton v. Summit Cty. Bd. of Mental Retardation & Dev. Disabilities*, 9th Dist. Summit No. 19343, 2000 WL 112086, *8 (Jan. 26, 2000) (a party must comply with Civ.R. 51 to raise an objection to a jury instruction through a motion for new trial).

{¶94} Civ.R. 51(A) provides, in relevant part:

> [A]ny party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. * * * .
>
> On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, *stating specifically the matter objected to and the grounds of the objection.*

(Emphasis added.) "The Ohio Supreme Court has held that an appellant fully informs the court of its position when the appellant formally requests an instruction to the contrary and argued the issue to the trial court." *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. 22387, 2005-Ohio-5103, ¶ 9, citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 61 (1991). In other words, Oberlin could have preserved its objection to the negligence jury instruction by formally requesting an instruction to the contrary or by raising a timely objection to the instruction, if Oberlin also fully informed the trial court of the specific objection and the grounds for it.

{¶95} Oberlin did submit a different proposed jury instruction to the trial court:

> Negligence is a *failure to use ordinary care in ascertaining the truth or falsity* of the alleged libelous statements. Every person is required to use ordinary care to avoid injuring another person.

(Emphasis added.). Although Oberlin proposed the standard of negligence as set forth in *Lansdowne* and other Ohio Supreme Court cases, it failed to cite any legal authority to support the different instruction. When the trial court stated that it would give a different instruction, Oberlin objected on the record, but again cited no legal authority to support its argument that the trial court's negligence instruction was incorrect.

{¶96} Although Oberlin cited to *Lansdowne,* 32 Ohio St.3d at 180, in its motion for a new trial and again on appeal, it did not timely apprise the trial court of the specific grounds for its objection: that the trial court's negligence instruction did not comport with the legal standard set forth by the Ohio Supreme Court. Instead, in its written proposed jury instruction, Oberlin cited only to the *Ohio Jury Instructions,* CV Section 401.01(1) (Rev. May 12, 2012). The Ohio Jury Instructions apply the same definition of negligence to all torts, including defamation. *See Ohio Jury Instructions*, CV Section 431.03(11) (Rev. Sept. 13, 2003). The negligence standard set forth in Section 401.01(1) of the Ohio Jury Instructions provides:

> Negligence is a failure to use (reasonable) (ordinary) care. Every person is required to use (reasonable) (ordinary) care to avoid injuring (another person) (another's property).

{¶97} The Ohio Jury Instructions' definition of negligence is virtually identical to the negligence instruction given by the trial court in this case. Oberlin's citation to the Ohio Jury Instructions provided no support for its argument that a different negligence instruction was warranted in this case. Because Oberlin did not apprise the trial court of the specific grounds for its objection, Oberlin forfeited its right to raise this issue through a motion for a new trial or on

appeal to this Court. The appellants have not argued plain error and this Court will not make that argument for them. *See State v. Curtis*, 9th Dist. Medina No. 04CA0067-M, 2005-Ohio-2143, ¶ 15.

{¶98} Although Oberlin also argues that the jury should not have been instructed on aiding and abetting and that the jury should have been instructed on distributor liability, it likewise failed to preserve those issues for its motion for new trial because it did not comply with Civ.R.51(A) by stating its objection and the legal basis for these changes to the jury instructions. The appellants forfeited all but plain error regarding these two instructions, have not argued plain error, and this Court will not make a plain error argument for them. *See id.* Oberlin has failed to demonstrate that the trial court erred in denying its motion for new trial based on any of these jury instructions.

B. Evidence Excluded

{¶99} Oberlin also argues that the trial court erred in denying its motion for new trial based on its exclusion of certain evidence: (1) specific details of what happened during the shoplifting incident, and (2) testimony about "what Oberlin heard from members of the community about experiences at the bakery that they believed to be racially discriminatory[.]" Oberlin asserts that the exclusion of this evidence was prejudicial because the Gibsons were permitted to present evidence on these issues that was unfavorable to Oberlin, but Oberlin was not permitted to defend against these claims by presenting contradictory evidence.

{¶100} "Depending upon the basis of a motion for a new trial, this Court reviews the trial court's decision to grant or deny the motion under either a de novo or an abuse of discretion standard of review." *Designers Choice, Inc. v. Attractive Floorings, LLC*, 9th Dist. Lorain No. 19CA011576, 2020-Ohio-4617, ¶ 10, quoting *Calame v. Treece*, 9th Dist. Wayne No. 07CA0073, 2008-Ohio-4997, ¶ 13, citing *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraphs one and two

of the syllabus. "[If] the basis of the motion involves a question of law, the de novo standard of review applies, and when the basis of the motion involves the determination of an issue left to the trial court's discretion, the abuse of discretion standard applies." *Designers Choice, Inc.*, 2020-Ohio-4617, at ¶ 10, quoting *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 9th Dist. Wayne No. 09CA0073, 2010-Ohio-4657, ¶ 32.

{¶101} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Therefore, Oberlin must demonstrate that the trial court abused its discretion in excluding this evidence. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶102} Both parties had attempted to present more evidence about the shoplifting incident, but the trial judge would not allow it and repeatedly reminded counsel on both sides not to relitigate the criminal proceedings. Throughout this lengthy trial, the trial judge refused to allow the parties to present evidence about the shoplifting incident except that it happened, the students were arrested, the protests and alleged defamatory statements followed, and the three students were eventually convicted. Consequently, very few details about the shoplifting incident were admitted at trial, as is reflected in this Court's brief statement of facts about that incident. As Oberlin has failed to demonstrate that the exclusion of this evidence affected the parties differently or otherwise prejudiced its case, it has failed to demonstrate that the trial court acted unreasonably in excluding this evidence.

{¶103} Next, Oberlin argues that the Gibsons were permitted to present evidence that they were not perceived as racists, while Oberlin was prohibited from presenting contradictory

evidence. The Gibsons presented the testimony of numerous witnesses who knew them either as employees of the bakery, friends, or community members. Those witnesses testified about their own experiences with the Gibsons and the bakery and explained that they had never witnessed any incidents of racism or racial profiling.

{¶104} Oberlin, on the other hand, did not call witnesses to testify about their personal experiences with the Gibsons. Instead, the defendants sought to have Oberlin administrators testify about "what Oberlin heard" about the Gibsons from community members. Under Evid.R. 801(C), hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Oberlin does not argue that these statements were not hearsay or that they fell within an exemption or exception to the rule against admissibility set forth in Evid.R. 802. Oberlin's excluded evidence was hearsay, while the Gibsons' evidence on this issue was not. Oberlin has failed to demonstrate that the trial court abused its discretion by excluding its hearsay evidence about what Oberlin had heard about the Gibsons. Therefore, Oberlin has failed to demonstrate that the trial court erred in denying its motion for a new trial based on excluded evidence.

C. Compensatory Damages

{¶105} This Court will next address Oberlin's argument that the trial court should have remitted the damages further. "[C]ourts have inherent authority to order remittiturs to reduce jury awards when they deem the amount to be excessive based on facts found by the jury." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 38. "This Court reviews a trial court's decision to deny remittitur for an abuse of discretion." *Jemson v. Falls Village Retirement Community, Ltd.*, 9th Dist. Summit No. 20845, 2002-Ohio-4155, ¶ 17.

{¶106} Oberlin argues that, even applying damages caps, the award is still exorbitant. It argues that there was no witness testimony as to any losses caused by the flyer or resolution. It also argues that any economic loss caused by the alleged hostile environment created by the protests was merely speculative, including the belief that the harm would continue for 30 years. The Gibsons argue that they presented sufficient evidence of their damages as well as the fact that it flowed from Oberlin's tortious conduct.

{¶107} The Gibsons called a certified public accountant with 35 years of experience to testify about the economic harm they suffered. He testified that he had a professional designation as a certified valuation analyst and that his experience and training enabled him to give a professional opinion on the economic losses proximately caused by Oberlin's actions. He divided the Gibsons' damages into three categories: lost profits for the bakery, lost rental income, and lost rental opportunities. For the lost profits to the bakery, he reviewed the Gibsons' tax returns, general ledger, and other financial statements. He also visited the site of the bakery, interviewed the Gibsons, and reviewed the Gibsons' depositions. He then applied professional guidelines to compute the Gibsons' lost profits. He explained that the reason he projected the losses out 30 years is that the bakery dates to 1885, which puts it in the top one percent of all businesses in terms of longevity. He also considered that the taint of being labelled a racist business was unlikely to be overcome until at least a generation had passed. For the lost rental income, he looked at the decline in rental income that the Gibsons experienced after the events and the long time it would take to overcome being accused of racism. Finally, for the lost rental opportunities, he looked at the business plan that the Gibsons had for constructing additional rental properties that would have to be delayed or abandoned because of their reduced cash flow. Regarding causation, the

accountant testified that a multitude of things affected the business, including the protests and the resolution, but he opined that it was Oberlin's actions that caused the Gibsons' losses.

{¶108} The Gibsons also called a professor of marketing who focuses on consumer behavior and who had 25 years of experience. Addressing negative word-of-mouth, she testified that such communications have a much greater effect than positive word-of-mouth and have twice the effect on revenue. She also testified that it is much harder to counteract negative word-of-mouth, supporting the accountant's opinion about the lasting effects Oberlin's labelling of the Gibsons would have on their businesses. Upon review of the record, we conclude that the economic loss caused by Oberlin's conduct was not speculative. We also cannot say that the jury lost its way when it chose to believe the testimony of the accountant about the amount of the damages. *See Certain Care, LLC v. Mikitka*, 9th Dist. Lorain No. 19CA011544, 2020-Ohio-3544, ¶ 13-14.

{¶109} Oberlin next asserts that the noneconomic part of the damage award should have been capped at $350,000 for each plaintiff instead of $350,000 for each claim. It does not develop an argument in support of this contention in its initial brief, however, except for citing part of the language of R.C. 2315.18(B)(2). The appellant has the burden of demonstrating error on appeal. *See* App.R. 16(A)(7); former Loc.R. 7(B)(7). "It is the duty of the appellant, not this [C]ourt to demonstrate [the] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Mastice,* 9th Dist. Wayne No. 06CA0050, 2007-Ohio-4107, ¶ 7, quoting *State v. Taylor*, 9th Dist. Medina No. 2783-M, 1999 WL 61619, *3 (Feb. 9, 1999); *see also*, App.R. 16(A)(7); former Loc.R. 7(B)(7). Accordingly, this Court will not make an argument for Oberlin.

D. Punitive Damages

{¶110} Oberlin next argues that the punitive damages award must be capped at twice the amount of the capped compensatory damages award instead of twice the amount the jury initially awarded as compensatory damages. The Gibsons argue that R.C. 2315.21(B)(2) is clear that punitive damages are capped at two-times the amount awarded by the jury and that the total is not affected by any statutory caps on compensatory damages.

{¶111} Under R.C. 2315.21(D)(1), "the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages." R.C. 2315.21(D)(2)(a) provides that the "court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to [subsection] (B)(2) or (3) of this section." Subsection (B)(2) applies to cases that are tried to a jury and provides that, if a plaintiff makes a claim for both compensatory and punitive damages, "the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant." R.C. 2315.21(B)(2).

{¶112} According to Oberlin, the amount recoverable under R.C. 2315.21(B)(2) embraces the caps on recovery established by law under R.C. 2315.18. Specifically, R.C. 2315.18(E)(1) provides in relevant part that "in no event shall a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in division (B)(2) of this section."

{¶113} The plain language of R.C. 2315.21(D)(2)(a) sets the cap on punitive damages in a jury case at two times the amount of compensatory damages "determined pursuant to [R.C.

2315.21(B)(2)] * * *." The statute does not contain any language capping the award based on the maximum recoverable amount as determined by R.C. 2315.18. Instead, R.C. 2315.21(B)(2) directs the court to have the jury return a general verdict and, if it is for the plaintiff, to have the jury answer an interrogatory that specifies the amount recoverable from each defendant. There is no language limiting a jury's general verdict to the amounts recoverable under R.C. 2315.18. Thus, upon review of R.C. 2315.21, we conclude that the trial court did not err when it capped the punitive damages award at twice the jury's uncapped compensatory damages award. *Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959, ¶ 90 (concluding that R.C. 2315.21's provisions "refer to the uncapped, total compensatory damages the jury awarded."). For the reasons above, Oberlin's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ENHANCING [GIBSON'S] ATTORNEY FEES AWARD.

{¶114} In its third assignment of error, Oberlin argues this Court should vacate the enhancement that was added to the attorney fees lodestar.[4] Oberlin, in making this argument, suggests the Supreme Court of Ohio's recent decision in *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 160 Ohio St.3d 32, 2020-Ohio-1056, establishes the trial court enhanced the award based on improper factors. Oberlin specifically argues that the trial court did not identify any objective and specific evidence to warrant an enhancement and, therefore, the enhancement should be vacated.

[4] The lodestar is the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." (Internal quotations and citations omitted.) *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 160 Ohio St.3d 32, 2020-Ohio-1056, ¶ 10.

{¶115} In *Phoenix Lighting*, the Supreme Court of Ohio noted that its decisions regarding reasonable attorney fees had been guided over time by the decisions of the United States Supreme Court. *Id.* at ¶ 10. The Court explained that the determination regarding reasonable attorney fees usually begins with the lodestar amount. *Id.* It also explained that in prior cases it had held that the lodestar could be adjusted up or down after applying the factors identified in Prof.Cond.R. 1.5(a). *Phoenix Lighting* at ¶ 12. The Court recognized, however, that the United States Supreme Court had more recently backed away from enhancements because many of the factors supporting an adjustment were already accounted for in the initial lodestar computation. *Id.* at ¶ 16. In so doing, the *Phoenix Lighting* Court concluded:

> There is a strong presumption that the reasonable hourly rate multiplied by the number of hours worked, which is sometimes referred to as the "lodestar," is the proper amount for an attorney-fee award. Enhancements to the lodestar should be granted rarely and are appropriate when an attorney produces objective and specific evidence that an enhancement of the lodestar is necessary to account for a factor not already subsumed in the lodestar calculation.
>
> A trial court has discretion to modify the presumptive calculation of an attorney-fee award – the reasonable hourly rate multiplied by the number of hours worked – but any modification must be accompanied by a rationale justifying the modification.

Phoenix Lighting at paragraphs one and two of the syllabus.

{¶116} In their application for attorney fees, the Gibsons argued they should be awarded the lodestar with a two to three multiplier enhancement. Initially, they argued that a lodestar of $4,855,856 was appropriate. The Gibsons noted the complexity and magnitude of the case, the five-week trial with another week just arguing motions, the 33 witnesses called, the contentiousness and complexity of discovery and pre-trial issues, the hundreds of thousands of documents exchanged, and the numerous pre-trial motions. The Gibsons also noted that many of the hours their attorneys spent on the case were because of Oberlin's actions, such as the 32

depositions Oberlin took, some of which lasted up to five days. Further, the Gibsons indicated that Oberlin had also filed 17 motions and 16 motions in limine. The Gibsons also argued that the hourly rates charged by their attorneys and their attorneys' staff were reasonable.

{¶117} Regarding enhancement of the lodestar, the Gibsons argued the case was time and labor intensive, involved complex substantive and procedural issues that were intertwined among the plaintiffs, precluded the attorneys from taking other work, involved a substantial amount of money, was justified by the results, required substantial experience and ability, and was accepted on a contingency fee basis that equated to $10,000,000 in attorney fees. Oberlin, on the other hand, argued the lodestar was unreasonable, that the enhancement factors listed in Prof.Cond.R. 1.5(a) were already part of the lodestar calculation, and the enhancement should be reserved for rare and exceptional circumstances.

{¶118} In awarding attorney fees, the trial court employed a two-step method. Regarding the lodestar, it found that a reasonable average hourly rate in the community given the complexity of the issues and experience of the attorneys handling the case was $290 per hour. The trial court did not have any concern with the number of hours spent on the case and determined that it was not possible to separate the time the attorneys had spent on the recoverable punitive damages claims versus the non-recoverable punitive damages claims. The trial court, therefore, found that the 14,417 hours that the Gibsons' counsel spent on the case was reasonable. Applying the hourly rate to the number of hours expended resulted in a lodestar of $4,180,930.

{¶119} As to enhancement of the lodestar, the trial court examined the factors outlined in Prof.Cond.R. 1.5(a). It considered Oberlin's argument that those factors were subsumed in the lodestar calculation. However, regarding the time and labor involved, the novelty and difficulty of the issues, and the skill required to perform the legal services properly, the trial court found that

factor was not entirely subsumed by the lodestar because of the "extraordinary challenges" faced by the Gibsons. The trial court concluded that, although the experience, reputation, and ability of the Gibsons' attorneys was part of the lodestar calculation, when considered with other factors such as the fee customarily charged in the locality, the amounts involved in the case, the results obtained, and whether the fee was fixed or contingent, a multiplier of one and a half was appropriate and necessary for the attorneys' fee award. It, therefore, awarded the Gibsons $6,271,395 in attorney fees.

{¶120} Although the trial court's decision to award the Gibsons an enhancement of the lodestar pre-dated *Phoenix Lighting*, the trial court's analysis is consistent with *Phoenix Lighting*. Like the Ohio Supreme Court did in *Phoenix Lighting*, the trial court, here, specifically considered the United State Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010) stating:

> In *Perdue*, the 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. * * * It follows then, that the [c]ourt 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.

As previously indicated, the trial court, in its judgment entry, not only determined several factors were not entirely subsumed by the lodestar, but also determined the "case presented extraordinary challenges" to the Gibsons. Thus, based upon the trial court's rationale in justifying the upward lodestar modification, which is consistent with the analysis in *Phoenix Lighting*, this Court cannot determine the trial court abused its discretion.

{¶121} Oberlin's third assignment of error is overruled.

CROSS-ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT APPLIED THE PUNITIVE DAMAGE CAPS CONTAINED IN [R.C.] 2315.21 TO THE FACTS OF THIS CASE.

{¶122} In their cross-appeal, the Gibsons assign as error that the trial court should not have placed a cap on the punitive damages that the jury awarded them. They argue that the cap of twice the compensatory damages is unconstitutional as applied to the facts of this case because it does not allow the punitive damages to accomplish their purpose. Specifically, they argue that the punitive damages cap violates the due process clause and their right to a trial by jury.

{¶123} "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." (Internal citations and quotations omitted.) *State v. Cook*, 83 Ohio St.3d 404, 409 (1998), *superseded by statute on other grounds as stated in State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374. "[If] an act is challenged on the ground that it is unconstitutional when applied to a particular state of facts, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts which makes the act unconstitutional and void when applied thereto." *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus. "The determination whether a statute * * * is constitutional is a question of law that we review de novo." *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 2016-Ohio-7760, ¶ 16.

{¶124} The Gibsons note that the jury initially awarded them $11,074,500 in compensatory damages and $33,223,500 in punitive damages. They assert that the jury's punitive damages award represents less than three percent of Oberlin's total assets. Noting that the purpose of punitive

damages is to appropriately punish and deter defendants, the Gibsons argue that a purely mathematical application of the caps thwarts those purposes. They also argue that applying the cap in their case bears no rational connection to the public welfare or a rational connection to Oberlin's wrongful conduct. They further argue that the punitive damages cap violates their right to a trial by jury.

{¶125} Regarding due process, the Ohio Supreme Court has held that "[a] legislative enactment will be deemed valid on due process grounds ' * * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.'" *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274 (1986), quoting *Benjamin v. Columbus*, 167 Ohio St. 103 (1957), paragraph five of the syllabus. The Gibsons' argument asks this Court to measure whether the caps on punitive damages are in accordance with the purpose of punitive damages. "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651 (1994). "[A] punitive damages award is more about a defendant's behavior than the plaintiff's loss." *Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 439 (1999). "The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant." *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, ¶ 178.

{¶126} Whether the punitive damages cap advances the purpose of punitive damages, however, is not the issue before this Court. Instead, because the Gibsons' challenge is to the validity of the cap, we must address whether the cap bears a real and substantial relation to the public health, safety, morals, or general welfare of the public. Specifically, because the Gibsons have made an as applied challenge, we must examine whether the restriction that R.C. 2315.21

imposes on the amount the Gibsons may recover as punitive damages has a rational relationship to the general welfare of the public and is not arbitrary and unreasonable. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 99-104.

{¶127} In *Arbino*, the Ohio Supreme Court considered a facial constitutional challenge to R.C. 2315.21. The Court recounted the economic interests that the punitive damages cap intended to advance and concluded that R.C. 2315.21 bore "'a real and substantial relation' to the general welfare of the public." *Id.* at ¶ 101-102. In particular, the Court noted that the General Assembly decided that "the uncertainty and subjectivity associated with the civil justice system were harming the state's economy." *Id.* at ¶ 101. The cap on damages in R.C. 2315.21 "[was] an attempt to limit the subjective process of punitive-damages calculation, something the General Assembly believed was contributing to the uncertainty." *Id.* Reviewing the legislative record, the *Arbino* Court concluded that the placement of limits on punitive damages bore a real and substantial relation to the economic interest of having a more predictable civil justice system. *Id.* at ¶ 102. To be clear, in *Arbino*, the Ohio Supreme Court concluded that the legislature's public policy goal was to promote economic stability by fostering a more predictable and reliable litigation environment and that the caps have a rational relationship to the general welfare of the public and are not arbitrary and unreasonable. *Id.* at ¶ 99-104.

{¶128} The Gibsons argue that the cap's mathematical formula does not strike a balance between the financial wherewithal of the college and an amount that would be proper to punish and deter it. They argue that imposition of the cap in this case, in effect, permits a billion-dollar institution to treat its tortious conduct as nothing more than a cost of doing business and allows it to continue such conduct. They note that reports by Oberlin's administration concluded that the outcome of this case would not have a material adverse effect on how Oberlin operates or a

material effect on its financial position. According to the Gibsons, imposition of the cap under these circumstances negates the community jury's ability to punish and deter Oberlin and does not serve the interests that punitive damages are intended to address.

{¶129} The Gibsons' argument, however, focuses exclusively on whether application of the cap in this case advances the purposes of punitive damages instead of the purposes of the punitive damages cap. They have not alleged that the application of the punitive damages cap in this case is inconsistent with the economic goals that the *Arbino* court determined R.C. 2315.21 intended to advance. In fact, the Gibsons have not even addressed any of the public policy interests underlying the statute recounted by the Ohio Supreme Court in *Arbino* and they have not attempted to establish that those interests are not advanced here by the application of the punitive damages cap. We, therefore, must conclude, in light of *Arbino*, that the Gibsons have not established by clear and convincing evidence that, as applied in this case, R.C. 2315.21 bears no real and substantial relation to the general welfare of the public or is arbitrary and unreasonable. *See also Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 38 ("[T]he status of a plaintiff does not diminish either the economic benefits of limiting noneconomic damages, as found by the General Assembly, or the substantial relationship that we found in *Arbino* between the statutory limitations and the benefits to the general public welfare.").

{¶130} To the extent that the Gibsons argue that the reduced punitive damages award is inadequate, they have failed to establish that they have a constitutionally cognizable right to a particular degree of punitive damages. The Ohio Supreme Court has recognized that defendants who are subject to punitive damages have a fundamental right to fairness, which requires that they receive notice of the severity of the penalty the State may impose for their conduct. *Dardinger*, 98 Ohio St.3d 77, 2002-Ohio-7113, at ¶ 152. "A lack of fair notice may render a sanction 'grossly

excessive' and thus unconstitutional." *Id.* at ¶ 154, quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Whether a defendant has received adequate notice of a possible punitive damages sanction is indicated by three guideposts: the reprehensibility of the defendant's conduct, the disparity between the harm suffered and the amount of the damages, and the difference between the punitive damages awarded in that case and the civil or criminal penalties authorized or imposed in similar cases. *Dardinger* at 153, citing *Wightman*, 86 Ohio St.3d at 439-440. The Gibsons have not identified any authority that indicates that there is a comparable right for plaintiffs concerning alleged grossly inadequate punitive damages. As such, this Court will not address whether the capped punitive damages award was sufficient to punish Oberlin or deter it from engaging in similar conduct in the future.

{¶131} Regarding the Gibsons' right to a trial by jury, in *Arbino,* the Ohio Supreme Court noted that the right to a jury trial is not absolute. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 32. It explained that, although a jury's fact-finding function is protected under the Constitution, that "does not mean jury awards are insulated from all outside influences." *Id.* at ¶ 36. Specifically, "a court may apply the law to change a jury award of damages without running afoul of the Constitution." *Id.* at ¶ 38. Regarding the noneconomic damages cap that was at issue in that case, the Court explained that, "[b]y limiting noneconomic damages for all but the most serious injuries, the General Assembly made a policy choice that noneconomic damages exceeding set amounts are not in the best interest of the citizens of Ohio." *Id.* at ¶ 40. When courts "simply apply the limits as a matter of law to the facts found by the jury[,] they do not alter the findings of facts themselves, thus avoiding constitutional conflicts." *Id.*

{¶132} The Gibsons do not allege any jury trial right that is different in their case from the rights that were at issue in *Arbino*. Upon review of the record, we must conclude that the Gibsons

have failed to establish that the imposition of the punitive damages cap infringed on their constitutional rights. The Gibsons' assignment of error is overruled.

III.

{¶133} Oberlin's assignments of error are overruled. The Gibsons' sole assignment of error in their cross-appeal is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to Appellants/Cross-Appellees and Appellees/Cross-Appellants.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
SUTTON, J.
CONCUR.

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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.

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

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

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."

***

> 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 Auxiliary 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