Case No. 2022-0583

In the Supreme Court of Ohio

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

GIBSON BROS., INC., *et al.*,

Plaintiffs/Appellees/Cross-Appellants,

vs.

OBERLIN COLLEGE, *et al.*,

Defendants/Appellants/Cross-Appellees.

MEMORANDUM IN OPPOSITION TO JURISDICTION & MEMORANDUM IN SUPPORT OF JURISDICTION OF CROSS-APPEAL OF APPELLEES, GIBSON BROS., INC., LORNA J. GIBSON, EXECUTOR OF THE ESTATE OF DAVID R. GIBSON, DECEASED, AND ALLYN W. GIBSON, DECEASED

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MEMORANDUM IN OPPOSITION TO JURISDICTION

I. INTRODUCTION

At the outset, it should be noted that this case has nothing to do with First Amendment protected expression or the suppression of student speech. The Ninth District Court of Appeals adroitly pointed this out in its opinion:

> 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**.

Gibson Bros., Inc. v. Oberlin College, 2022-Ohio-1079, ---N.E.3d---, ¶ 3 (9th Dist.) [emphasis added]. This case is not about student speech. The Gibsons[1] did not file claims against any Oberlin students. In fact, not one student testified at trial. (Id., ¶ 3). Efforts by Oberlin to dramatize this case as a First Amendment issue mislead the Court.

This case involves settled legal issues for three separate torts: (1) intentional infliction of emotional distress; (2) intentional interference with business relationships; and (3) libel.

The Court should decline Oberlin's invitation to clarify well defined defamation law. The law is well settled and there is no new law to write. This Court should also decline Oberlin's invitation to consider a narrow, fact specific issue regarding a bifurcated trial involving punitive damages, and it need not reexamine application of statutory language regarding caps on punitive damages which have been consistently applied and considered by two different courts of appeals.

[1] "Gibsons" refers collectively to Gibson Bros., Inc. ("Gibson's Bakery"), Lorna Gibson, Executor of the Estate of David R. Gibson, deceased ("David Gibson"), and Allyn W. Gibson, deceased ("Grandpa Gibson").

The Court should decline to entertain Oberlin's propositions of law because they cover issues of settled tort law, raise no novel questions of law, and raise no substantial constitutional questions or issues public or great general interest.

II. GIBSONS' COUNTER STATEMENT OF FACTS AND EVIDENCE ACTUALLY PRESENTED TO THE JURY

A. There was no public controversy

Oberlin's claim that there was a "public controversy" is based **entirely** on inadmissible materials that Oberlin did not even attempt to introduce or proffer at trial: (1) an unauthenticated thirty-year-old newspaper article from the College's *own* newspaper that was not submitted at trial; (2) double hearsay deposition testimony that Oberlin didn't even attempt to introduce during dispositive motion briefing, trial, or post-trial briefing; and (3) un-proffered, unauthenticated hearsay statements from the private social media account of a Gibson's employee. These **false** and **misleading** allegations were *conclusively disproven* during trial when numerous persons of color testified that the Gibsons did not have any history of racial profiling or discrimination. Not a single witness testified that the Gibsons had a history of racial profiling or discrimination. Oberlin's own "surveys" of the community failed to locate anyone who said Gibson's had some history of racism.

B. Oberlin admitted the students arrested for shoplifting confessed their crimes and got exactly what they deserved

At trial, no evidence was presented regarding a "violent altercation." Instead, ***Oberlin's counsel admitted in opening statements that the three students that stole from the Gibsons "got exactly what they deserved."*** Immediately following the students' criminal acts and extending to the students' open court admissions of criminal conduct, Oberlin knew that the three students had committed the crimes. Oberlin never tried to introduce any evidence from the students or any other source disputing the criminal conduct of the students.

C. Oberlin did not believe or introduce any evidence that the Gibsons had a history of racial profiling/discrimination

Numerous Oberlin administrators testified that they never heard of, witnessed, or experienced racial profiling or discrimination at Gibsons. Indeed, as one of several testimonial examples, former Chief of Staff Ferdinand Protzman, testified that none of Oberlin's administrators believed the Gibsons had a history of racial profiling. Nor did Oberlin ever try to introduce evidence that the Gibsons had a history of racial discrimination or racial profiling.[2]

D. Oberlin published the defamatory Flyer and Resolution

Ignoring the facts of the criminal incident, its 100+ year business relationship with the Gibsons, and its internal knowledge of the Gibsons, Oberlin published the libelous Flyer that falsely accused the Gibsons of "a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" and falsely accused the "owner" of Gibson's Bakery of **committing the crime of assault** on a member of the Oberlin community. *Gibson* ¶ 29. At trial, the following evidence was presented: (1) Vice President and Dean of Students Meredith Raimondo *handed out stacks* of the libelous Flyer, *Id.* ¶ 46; (2) Raimondo advised others to make copies of the libelous Flyer at Oberlin's Conservatory office, *Id.* ¶ 46-47; (3) Raimondo published a copy of the libelous Flyer to a local newspaper reporter, who identified himself as a reporter for the *Oberlin News-Tribune*, *Id.* ¶ 42; (4) with a bullhorn, Raimondo directed the distribution of the libelous Flyers; (5) one of Raimondo's direct reports had a stack of libelous Flyers and distributed them to passersby, *Id.* ¶¶ 43-44; (6) an Oberlin professor advised students that they could place copies of the libelous Flyer on windshields, *Id.* ¶ 45; (7) Oberlin provided rooms and food for people so they

[2] On page 8 of their jurisdictional memorandum, Oberlin claims that administrators allegedly heard "differing views." That evidence was excluded as inadmissible hearsay at trial. This decision was affirmed by the Ninth District, *Gibsons* ¶ 104, and Oberlin failed to seek jurisdiction with this Court on this issue. Thus, Oberlin has zero basis to claim that Oberlin heard "differing views."

could stay well-fed to continue defaming the Gibsons, *Id.* ¶ 48; and (8) Raimondo approved the use of Oberlin funds to purchase gloves for protesters so they could stay warm to keep distributing the libelous Flyers. *Id.*

The Resolution, stating that it was sharing "a few key facts," accused the Gibsons of assaulting the students and of having a "history of racial profiling and discriminatory treatment of students and residents alike." *Id.* ¶ 30. The trial evidence showed: (1) Raimondo, the *faculty advisor* to the Student Senate, testified that the Resolution remained posted in the same building where her office was located, *for more than one year*, *Id.* ¶ 50, 56; (2) the Resolution was posted in a very conspicuous, highly trafficked location that was "the right place" for maximum visibility, *Id.* ¶ 56; (3) Oberlin had the power and authority to remove the Resolution but left it in place for more than a year and only removed it when the Gibsons initiated this litigation, *Id.* ¶¶ 56-57; (4) the Resolution remained posted *even after the three students pled guilty*; and (5) Oberlin actively provided resources to the Student Senate, *Id.* ¶¶ 50-52.

E. Oberlin bullied the Gibsons by demanding special "no prosecution" treatment for Oberlin College student shoplifters

Oberlin bullied the Gibsons by demanding that they compromise the criminal justice system's protections and procedures. Specifically, Oberlin demanded that the Gibsons drop the pending criminal charges against the students. *Id.* ¶ 72. Oberlin insisted that the Gibsons forgo future use of law enforcement protection by calling Oberlin administrators rather than police when student shoplifters were apprehended. *Id.* Finally, Oberlin required that the Gibsons turn a blind eye to criminal conduct and provide a "first time pass" by not prosecuting Oberlin students for their first shoplifting offense. *Id.* Oberlin refused to allow the Gibsons' business relationship with Bon Appetit (Oberlin's food provider) to resume unless these egregious demands were met. *Id.*

F. Oberlin continued the defamation of the Gibsons even after the student shoplifters admitted their crimes and admitted their arrests did not result from racial profiling or discrimination

After the shoplifting students admitted to their guilt and disclaimed any accusation that the Gibsons were racist or profiled them, Oberlin continued defaming the Gibsons by continuing to post the Resolution, with high-ranking college administrators threatening to "**rain fire and brimstone**" and "**unleash the students**" on the Gibsons and their supporters. *Id.* ¶¶ 15, 73.

III. ARGUMENTS OPPOSING OBERLIN'S PROPOSED PROPOSITIONS OF LAW

A. Response to Oberlin's Proposed Proposition of Law No. 1: The trial court and the Ninth District Court of Appeals properly applied the test for identifying opinion speech as defined by this Court. Thus, Oberlin's first Proposition of Law does not raise any substantial constitutional questions or issues of great general or public interest

Oberlin purports to claim a license to defame if the defamatory statements are made in connection with a protest. Oberlin is wrong. There is no license to defame in any context. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002) ("freedom of speech has its limits; it does not embrace certain categories of speech, including defamation").

When private persons and small businesses are victims of defamatory statements, their recourse is the civil justice system. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 11, 110 S. Ct. 2695 (1990). The Ohio Constitution provides that citizens are responsible for their abuse of free speech: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right[.]" Ohio Constitution, Article I, Section 11.

Oberlin ignores the four-factor test established by this Court for determining whether a statement is an opinion under defamation law. Every court examines four factors when deciding whether a statement (spoken or written) is an opinion: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared." *Vail v. The Plain Dealer Publ'g. Co.*, 72 Ohio St.3d 279, 282, 649 N.E.2d 182 (1995), *citing Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). This Court's four-factor test is the appropriate test, and **the Ninth District applied the test**. Oberlin ignores the *Vail* test.

Oberlin's statements were influential, and statements published by a powerful institution of higher learning, with unlimited resources, undercuts arguments that the statements were mere

opinions. *Mauk v. Brundage*, 68 Ohio St. 89, 100, 67 N.E. 152 (1903); *Mehta v. Ohio Univ*., 194 Ohio App.3d 844, 2011-Ohio-3494, 958 N.E.2d 598, ¶¶ 45-46 (10th Dist. 2011).

Oberlin first disseminated the statements during a targeted protest campaign against a private business and private citizens. The statements were not presented as hyperbole or sarcasm. *Vail*, 72 Ohio St.3d at 282. And Oberlin's defamation was not some broader campaign against governmental actors or society in general, like that in *Jorg*.

In *Jorg*, the defendant civil rights organization led a boycott campaign against the entire city of Cincinnati. *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶ 2. The defendant was an outspoken critic of the police department and advocate for police reform after an individual died in police custody. *Id*. ¶ 3. As part of the political advocacy efforts, the defendant distributed written materials to "numerous national performers and organizations that were scheduled to appear in Cincinnati." *Id*. The materials accused the city, generally, of instituting "tyranny and general oppression" against minorities. *Id*. ¶ 20. The defendant was trying to highlight "an immediate crisis" within Cincinnati. *Id*.

Jorg is distinguishable from this case because Oberlin is an educational institution – its faculty, administrators, and employees conducted a ***targeted*** campaign to destroy a private family business and private citizens. Oberlin did not protest against the policies of a governmental entity. Oberlin attacked the livelihood of private citizens. Oberlin published pointed statements claiming racial profiling, racial discrimination, and assaults against particular individuals. The defamatory statements were not used to call attention to broader issues in the city of Oberlin or with a governmental department. *See* Ohio Constitution, Article I, Section 3; *State v. Kalman*, 4th Dist. No. 16CA9, 2017-Ohio-7548, 84 N.E.3d 1088, ¶ 29.

Oberlin's statements were created for use in a deliberate and calculated campaign directed against specific private citizens. The statements targeted Gibsons' reputation within the Oberlin community, including among potential customers. They were used to convey a specific message (that Gibsons were racists and violently targeted racial minorities) in hopes of driving business away from Gibsons and distracting attention away from the Oberlin administration's own controversies at the time. Oberlin did just that–as they acknowledged during trial–achieving a complete smearing of Gibsons name and brand.

Oberlin ignores the fact that Ohio law distinguishes between spoken and written word. Indeed, some words when spoken may not be defamatory, but those same words published in written form are defamatory. *Holloway v. Scripps Pub. Co.*, 11 Ohio App. 226, 232 (8th Dist.1919). The distinction exists because written words are presumed to be more deliberative prior to publication. *Id.*; *G.M. McKelvey Co. v. Nanson*, 5 Ohio App. 73 (7th Dist.1915). So, Oberlin's claim that it cannot be held liable for libel if it was not also held liable for slander is not supported under Ohio law.

Oberlin's cursory discussion of Gibsons' intentional infliction of emotional distress claim ("IIED") is not well-taken. The Ninth District relied on many pieces of evidence outside Oberlin's defamation to support the jury's IIED verdict. [Appx. 25-26, ¶¶ 72-76].

This proposition is not well-taken, as it is resolved by well-settled Ohio law in *Vail*, and the Gibsons respectfully request that this Court decline to accept jurisdiction on this proposition of law.

B. <u>Response to Oberlin's Proposed Proposition of Law No. 2</u>: Oberlin's second proposition fails to articulate a rule of law that could properly be adopted by this Court. As such, it raises no matter of great or public interest and should be rejected by this Court.

Oberlin's Proposition of Law No. 2 mischaracterizes the nature of the verdict and purports to refute the Ninth District's well-reasoned decision. Because the Gibsons were private figures who provided evidence of actual damages, the appellate court was not required to conduct an independent review. The correct application of established law does not present a constitutional question or one of great general or public interest.

The Ninth District did not create a new rule of Ohio law. Oberlin was not found liable for "facilitating" student speech. Instead, Oberlin was held responsible for taking direct action to publish defamatory materials that devastated the Gibsons' lives. *See* Sec. II(D). In reaching its conclusion, the Ninth District relied on longstanding caselaw. *See Gibson* ¶¶ 38-40.

Oberlin falsely claims that the Ninth District failed to conduct an independent review of the records even though the decision spans more than 130 paragraphs and considered each issue raised in depth. Regardless, the Ninth District was not required to conduct an "independent" review of the record. If at all, the concept of an independent review of the record only arises where state law defamation claims intersect with the narrow class of cases that involve the constitutional actual malice standard. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508, 104 S.Ct. 1949 (1984). But this Court articulated that where the case involves negligent defamation, **<u>an independent review is not required</u>**: "However, in cases such as the one at bar, where actual malice need not be proven, we decline to embrace the independent review requirement." *Lansdowne v. Beacon J. Pub. Co.*, 32 Ohio St.3d 176, 181, 512 N.E.2d 979 (1987).

In its briefing below, Oberlin **<u>only</u>** urged the Ninth District to conduct an "independent" review in conjunction with the first assignment of error, which demanded judgment as a matter of

law on the Gibsons' libel claim. But the Ninth District, based on longstanding case law, determined that the Gibsons were *private* figures. *See Gibson* ¶¶ 58-62. Because this case involved private figures regarding a matter of public concern, the Gibsons only had to show *negligence* to succeed on their libel claims because they submitted proof of *actual* damages (as opposed to presumed damages) during the compensatory phase of trial. *See Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 744, 756 N.E.2d 1263 (9th Dist. 2001). Oberlin did not challenge the jury's finding of negligence, and, even if they did, the Ninth District was not obligated to conduct an independent review of the record.[3]

This proposition is not well-taken as it fails to articulate a rule of law that could become a syllabus and merely takes issue with the settled area of law as analyzed by the Ninth District. As such, this Court should decline to accept it.

C. <u>Response to Proposed Proposition of Law No. 3</u>: Oberlin's Proposed Proposition of Law No. 3 deals with a factually specific case and has little or no precedential value and ignores (1) a statutory mandate regarding bifurcation of compensatory and punitive damages and (2) the fact that Oberlin requested the bifurcation.

There is no reason for this Court to accept jurisdiction on Oberlin's proposed third proposition because it creates no general rule of law as it is limited to narrow and unique issues that will have no impact on future cases. This is so because the following facts must be present before the issue would arise again: (1) a defamation claim asserted by a private person related to a matter of public concern; (2) a defense motion to bifurcate the punitive and compensatory phases of trial under R.C. 2315.21(B)(1); (3) a private person plaintiff offers proof of actual damages to the jury; (4) a private person plaintiff chooses not to seek presumed damages and hence does not

[3] While the Gibsons were required and did in fact prove actual malice during the punitive phase of trial, *see id.*, Oberlin did not challenge the evidentiary basis for actual malice in conjunction with the jury's punitive findings. Instead, Oberlin limited its argument to incorrect claims that the issue of actual malice should not have been submitted at all during the punitive phase.

focus on libel actual malice at trial; and (5) the private person plaintiff submits sufficient proof for libel actual malice during the punitive phase of trial. This is a factually specific case procedure mandated by statute and does not present an issue of general or public interest.

Further, the Ninth District correctly ruled on this issue. The jury's finding on libel actual malice in the compensatory phase was not issue preclusive because it was not "essential to the judgment." *See Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 201, 443 N.E.2d 978 (1983). Because the Gibsons submitted evidence of *actual harm*, they only needed to prove negligence to succeed on their libel claims during the compensatory phase of trial. *See Gibson* ¶ 80. *See also Gilbert*, 142 Ohio App.3d at 744. Importantly, Oberlin ***invited this procedure*** by filing to bifurcate under R.C. 2315.21(B)(1). Once Oberlin sought bifurcation, the Gibsons were precluded from submitting evidence on punitive damages during the compensatory phase of trial. R.C. 2315.21(B)(1)(a). During the punitive phase, the Gibsons submitted substantial additional evidence on libel actual malice, including witness testimony and documentary evidence.

Oberlin posits three main arguments regarding bifurcation:

First, Oberlin erroneously claims that Section 5, Article I, of the Ohio Constitution, the right to trial by jury, precludes the submission of libel actual malice in both phases of trial. To the contrary, it merely states, "[t]he right of trial by jury shall be inviolate." Oberlin does not cite (and the Gibsons are unaware of) any Ohio authority stating that the right to trial by jury prevents the submission of overlapping issues in a bifurcated trial in both phases. The only authorities cited by Oberlin are not on point. *Bradley v. Mansfield Rapid Transit, Inc.*, 154 Ohio St. 154 (1950) and *Elio v. Akron Transp. Co.*, 147 Ohio St. 363, 370 (1947) are distinguishable on their facts, were decided **decades** before the enactment of R.C. 2315.21, and ***did not deal with the bifurcation of punitive damages.***

Second, Oberlin claims that R.C. 2315.21 does not allow actual malice to be considered in both phases, but this is wrong. A case bifurcated under R.C. 2315.21(B)(1)(a) is initially to be submitted to the jury on the issue of compensatory damages. During this initial stage, evidence on punitive damages ***may not be submitted***. *Id.* Then, if the jury makes a finding that the plaintiff is entitled to compensatory damages for any reason, the plaintiff is entitled to proceed to the punitive damages phase of trial. R.C. 2315.21(B)(1)(b). The Gibsons did not need to prove actual malice to obtain compensatory damages; instead, the Gibsons could prove (and did prove) that Oberlin's defamation caused actual damages. *See* Sec.III(B). Because actual malice was not an essential finding for compensatory damages, but a necessary finding for punitive damages, the trial court was obligated to submit actual malice to the jury during the punitive phase of trial.

Third, Oberlin and/or amici argue that other jurisdictions do not allow bifurcation where issues may overlap between different phases of trial. But there is one glaring issue with this argument: each case cited by Oberlin and/or amici dealt with Fed.R.Civ.P. 42 (or a similar state rule) that places the decision of bifurcation within the trial court's discretion. (See, OACTA Br., pp. 6-7). But here, bifurcation was **mandatory** once requested by Oberlin. R.C. 2315.21(B). Oberlin knew this and requested bifurcation. Once requested, the trial court lost all discretion regarding bifurcation.

Because it is so factually specific, Oberlin requested bifurcation, the trial court adhered to the provisions of R.C. 2315.21, and the appellate court affirmed that determination, this Court should not accept jurisdiction on Oberlin's Proposed Proposition of Law No. 3.

D. Response to Proposed Proposition of Law No. 4: Oberlin's fourth proposition of law ignores R.C. 2315.21's plain language, which caps punitive damages at twice the amount of compensatory damages awarded by the jury.

R.C. 2315.21 caps punitive damages at two times the amount of compensatory damages awarded by the jury, not two times the amount of compensatory damages after application of R.C. 2315.18's cap on noneconomic damages.

When a case is tried to a jury and the plaintiff is seeking 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[.]" R.C. 2315.21(B)(2). This statutory provision does not discuss, describe, or incorporate the noneconomic damages caps found in R.C. 2315.18. Then, when the court applies the punitive damages cap, the statute expressly instructs the court to apply the cap according to the compensatory damages ***awarded by the jury*** pursuant to R.C. 2315.21(B)(2): "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*** ... ***as determined pursuant to division (B)(2)*** ... ***of this section***." R.C. 2315.21(D)(2)(a) [emphasis added].

Relying on legislative history surrounding Ohio's tort reform movement, Oberlin incorrectly claims that the word "recoverable" in R.C. 2315.21(B)(2) refers to the amount of compensatory damages after application of the noneconomic damages cap. The flaw in this position is two-fold.[4]

First, Oberlin ignores the first rule of statutory construction: "An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer,* 143 Ohio St. 312, 55 N.E.2d 413 (1944), syllabus

[4] Oberlin and amici try to create some distinction between the word "awarded" and "decided." Oberlin and amici claim that the jury decides the amount of damages, and the court awards damages. But even a cursory review of the statutory language reveals this as a red herring. R.C. 2315.21(D)(2)(a) specifically instructs the trial court to enter "judgment" for no more than two times the amount of compensatory damages "awarded" to the plaintiff ***by the jury***.

[emphasis added]. Reference to legislative history is inappropriate where a court is applying an unambiguous statute. *See Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8. R.C. 2315.21 is unambiguous and should applied, not interpreted.

Second, the language of R.C. 2315.21(B)(2) specifically refers to the amount of money the **jury** awards as compensatory damages. And R.C. 2315.18(F)(2) states that the jury cannot be told of the cap. Thus, the word "recoverable" cannot include a cap on noneconomic damages. *See Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959 ¶ 90 (interpreting the word "recoverable" to mean "the uncapped, total compensatory damages the jury awarded.").

It is important to note, however, that the legislative materials Oberlin references discuss a need for a reduction in punitive damages awards, ***which is exactly what happened in this case***. The jury awarded the Gibsons in excess of $33.2 million dollars in punitive damages. After applying R.C. 2315.21, the trial court reduced the Gibsons' punitive award ***by more than forty (40) percent***.

There is no confusion or conflict among appellate courts regarding this unambiguous statute. The Ninth District's decision is directly on point with the only other Ohio appellate court to discuss this issue. *See Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959. Therefore, this proposed proposition of law does not raise of question of great public or general concern.

IV. CONCLUSION

Because none of the proposed propositions of law raise substantial constitutional questions or matters of public or great general interest, deal with questions of settled law regarding defamation or settled factual questions, and don't present this Court with a novel or confused issue to be decided, the Gibsons respectfully request that this Court decline jurisdiction on Oberlin's appeal.

MEMORANDUM IN SUPPORT OF JURISDICTION OF CROSS-APPEAL

I. INTRODUCTION

Recently, the Court entertained argument in *Amanda Brandt v. Roy Pompa, et al.*, 2021-0497, where the appellant seeks an exception to the statutory non-economic damages cap. In *Brandt*, the appellant explains why Ohio courts must allow for exceptions to statutory damage caps in egregious cases involving intentional conduct where the cap is not rationally related to the public's health, safety, or welfare and is both unreasonable and arbitrary. The Gibsons assert that the vile, intentional, and egregious conduct exhibited by Oberlin College and Vice President and Dean of Students Meredith Raimondo provides a set of facts under which application of the statutory damage cap is unconstitutional and should not be applied to the punitive damages awarded by the jury. Application of the punitive damages cap blunts the jury's determination about the amount of punitive damages necessary to punish and deter a powerful, billion-dollar institution that targeted a small family business for destruction, using false charges of racism to permanently stain the business and its owners.

In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, this Court upheld the statutory damages cap as constitutional on a facial basis. Since *Arbino*, however, the Court has considered challenges to its holding. For example, in *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, the Court considered the constitutionality of the statutory cap on non-economic damages where a trial court reduced the plaintiff's non-economic damages from $3.5 million to $350,000 in a negligent hiring case involving the sexual assault of a child. In *Simpkins*, the Court upheld the damages cap on an as applied basis. However, the Court posited that "there may exist a set of facts under which application of the statutory damage cap would prove unconstitutional[.]" *Id.,* ¶51.

Gibsons urge the Court to accept jurisdiction and hold briefing on the following proposition of law pending the outcome of *Brandt*:

> R.C. 2315.21, as applied to small businesses and private citizens who suffer financial ruin from the egregious, intentional torts of defendants whose power and wealth renders them undeterred by the statutory damages cap, violates the due course of law/due process clauses of the Ohio and United States Constitutions and the constitutional right to trial by jury.

Gibsons recognize that this proposition of law does not deal with the non-economic damages cap or the horrible child sexual abuse involved in *Brandt*. But, like *Brandt*, this case provides a set of facts that falls within the exception contemplated by *Simpkins*. Minimizing the jury's punitive damages award is unconstitutional as applied to this case where Oberlin intentionally and viciously annihilated the Gibsons' reputations and livelihoods.

Some powerful defendants decide that the potential consequences of their reprehensible conduct are just a cost of doing business. As the Lorain County jury saw over the course of a six-week trial, Oberlin made the calculated decision that its conduct was actually good for business. In doing so, they cruelly crushed a proud, 132-year-old, fifth-generation, family business.

In some cases, the punitive damages cap leaves a defendant undeterred and a society's disapproval undermined. In these rare—but important—cases (vastly wealthy defendant/severely reprehensible conduct), the punitive damages cap is unconstitutional in application, and we must trust the jury's collective wisdom on the punitive damages amount. Here, the jury awarded Gibson's Bakery, David Gibson, and Allyn "Grandpa" Gibson, compensatory damages of $11,074,500 and punitive damages of $33,223,500, constituting less than 3% of Oberlin College's net worth. The jury determined that this amount of punitive damages was necessary to appropriately punish and deter the defendants after their smear campaign devastated the Gibsons and their family business.

Oberlin demanded that the family business: obstruct or ignore the criminal justice system, dismiss pending criminal charges, look the other way when its students committed crimes, adopt a policy of giving its students a *first-time shoplifters' pass*, and call the College administration rather than police when its students are caught stealing. The Gibsons disagreed with the policy, because (1) it would pervert the criminal justice system, (2) it would not properly prepare the next generation for a responsible role in society, and (3) rampant theft devastates small businesses. Oberlin responded with the full force of its power, threatening to "rain fire and brimstone" and "unleash the students" upon the Gibsons and their supporters. Oberlin led a defamation campaign to destroy this family business that had survived two World Wars, the Great Depression, and the Great Recession.

As applied, the statutory cap has an arbitrary and unreasonable and disproportionate effect here – minimal deterrence for billion-dollar bullies as compared to less powerful tortfeasors. In extremely egregious cases, rigidly relying on a simple mathematical formula when setting punitive damages violates (1) due process/due course of law under the Constitutions of the United States and the State of Ohio and (2) the constitutional right to trial by jury. In such cases, an exception to the cap must be allowed.

II. STATEMENT OF THE CASE AND FACTS

In June 2019, after a six-week trial, which was bifurcated at the request of Oberlin pursuant to statute, a Lorain County jury unanimously determined that Oberlin College and its then Vice President and Dean of Students Meredith Raimondo (collectively, "Oberlin") acted with reckless disregard, hatred, animus, and ill will in damaging the Gibsons through their libel and intentional infliction of emotional distress. The jury returned a verdict of $11,074,500 in compensatory damages and a second trial on punitive damages ensued. After the jury awarded a punitive damage judgment of $33,223,500, the trial court applied the cap in R.C. 2315.21, reducing the punitive damage award to $19,874,500. The Ninth District affirmed.

A. Oberlin destroys a sacrificial lamb to try to deflect from its own troubles.

Gibson's Bakery is a small family-run business that has been in operation since 1885. Oberlin managed to viciously destroy all that the Gibson family had worked for over five generations in just a few years.

Following a November 2016 arrest of Oberlin College students who were African American, Oberlin defamed Gibson's Bakery and its owners David Gibson and Grandpa Gibson as having committed the crime of assault and having a long history of racial profiling and discrimination. However, there is absolutely no evidence that David and Grandpa Gibson assaulted anyone, the students admitted their criminal conduct and, at trial, the College admitted the students were appropriately arrested and "got exactly what they deserved."

Moreover, at trial, Oberlin President Marvlin Krislov confirmed that during his entire ten-year tenure at the College, no one had ever suggested that the Gibsons were racists or had a history of racial profiling. Likewise, Oberlin's Chief of Staff testified that no one in the College administration thought the Gibsons were racists. Despite Oberlin's knowledge that the Gibsons

did not have a history of racial profiling, Dean Raimondo "sent people door to door into the neighborhoods to find out about [the Gibsons'] racism" but did not find a single person who said the Gibsons had any history of racism. Oberlin refused to disclose the results of the "investigation" to the community.

In fact, an Oberlin employee reported to the administration that her interviews with many persons of color in the community revealed that they were "disgusted and embarrassed" by Oberlin's attacks on the Gibsons, because the Gibsons were not racist at all. [Pl. Tr. Ex. 63]. Oberlin's administration ignored the investigation and said in emails that it "doesn't change a damned thing." [Pl. Tr. Ex. 63].

Oberlin was experiencing a recent history fraught with accusations and claims of racism leveled against the College and its administration. For instance, during the 2015-2016 academic year, students of color issued a 14-page list of demands to Oberlin complaining that: "In the 1830s, this school claimed a legacy of supporting its Black students. However, that legacy has amounted to nothing more than a public relations campaign initiated to benefit the image of the institution and not the Africana people it was set out for." [Pl. Tr. Ex. 257]. Further, students criticized President Krislov as being racist and complained that his office did not treat African Americans fairly.

The jury heard David Gibson connect the dots to explain Oberlin's nefarious motivations to deflect from the racism accusations lodged against Oberlin through a false smear campaign against the Gibsons.

B. Oberlin had the financial means and power to destroy the Gibsons.

At trial, Oberlin's VP for Finance and Administration testified that Oberlin is a tax-exempt institution with total assets of over $1,400,000,000.00, with total net assets (after liabilities and

debts) of $1,093,300,000.00. These assets include a large endowment that grows from investment income. For instance, the endowment increased by $66,000,000.00 from 2016 to 2017 and another $67,000,000.00 from 2017 to 2018.

Oberlin also receives over $70,000.00 per student for tuition, room, and board. And Oberlin possesses one of the most prestigious collections of artwork of any college in the United States, which is not even included in the $1.4 billion total assets identified above. Oberlin College dominates the City of Oberlin and has a stranglehold on nearly all downtown Oberlin real estate, with the Gibson's Bakery property being one of the few exceptions. Oberlin's abundance of riches enables the tax-exempt institution to pay its senior administrators generous compensation. For instance, President Krislov received over $945,000.00 in compensation in 2015, $550,000.00 in 2016, and over $1,100,000.00 in 2017.

C. Oberlin administrators' conduct revealed conscious disregard of the Gibsons rights and callousness, ill will, and hatred towards the Gibsons.

The jury heard overwhelming evidence about how Oberlin callously and maliciously used its power to defame, bully, and damage the Gibsons.

1. Oberlin viciously lashed out after the Gibsons did not "drop the charges" against three students arrested for shoplifting.

Oberlin demanded that the Gibsons "drop charges" that *prosecutors* filed against the three students arrested for shoplifting. [Pl. Tr. Ex. 145]. When Oberlin saw that the charges were not being "dropped", it responded with hatred, even though the Gibsons had no power to "drop" criminal charges. For instance, in email and text messages to others in the administration, Oberlin's Vice President Ben Jones said, "Fuck 'em" "they've made their bed" and called Gibsons' supporters "idiots." [Pl. Tr. Ex. 134].

2. Oberlin insisted that the Gibsons give all Oberlin students a *first-time shoplifter pass*, which would jeopardize the Gibsons' future.

Oberlin demanded a "first-time pass" for all students caught shoplifting at Gibson's Bakery. [Tr. Trans. Vol. X, p. 172]. Small businesses know that the first time a shoplifter is caught shoplifting is likely not the first time the person has shoplifted. Oberlin's look-the-other-way demand would lead to the financial ruin of a hard-working family business. Oberlin also insisted that the Gibsons call the College instead of the police when students were caught shoplifting. This is no surprise, as an Oberlin Police Department lieutenant testified at trial that College administration often obstructed the department's efforts. [Tr. Trans. Vol. XV, p. 31].

3. Oberlin threatened to "rain fire and brimstone" down upon the Gibsons.

After the three students took responsibility for their actions, pled guilty to shoplifting at Gibson's Bakery, and admitted their arrests did not result from racial profiling, Oberlin administration stated that Oberlin should "***rain fire and brimstone***" on Gibson's Bakery. [Pl. Tr. Ex. 206].

4. The College and its high-ranking administrators had such ill will towards the Gibsons, they threatened to "unleash the students" against Gibsons supporters.

When professor emeritus Roger Copeland wrote an article in the campus newspaper about how the College was continuing to mishandle the situation with the Gibsons, Dean Raimondo was sent a copy of the article by VP Ben Jones with a text message saying, "FUCKING ROGER COPELAND." Dean Raimondo responded by saying "Fuck him" and threatened to "***unleash the students***." [Pl. Tr. Ex. 211]. In exercising its might, Oberlin administration understood its power to weaponize the students.

D. Oberlin defamed and directed the defamation of the Gibsons despite knowledge that the defamatory statements were false.

1. Oberlin handed out stacks of Flyers that libeled the Gibsons.

During protests in front of Gibson's Bakery on November 10 and 11 of 2016, Oberlin published a libelous flyer ("Flyer") that made two defamatory statements: (1) it accused Gibson's Bakery and its owners, Grandpa Gibson and David Gibson, of being a racist establishment with a long account of racial profiling and racial discrimination; and (2) it accused the owners of Gibson's Bakery, *i.e.,* Grandpa Gibson and David Gibson, of committing an assault. [Pl. Tr. Ex. 263]. The jury heard evidence that Dean Raimondo (along with other College employees) had a stack of copies of the Flyer and was distributing them to the public. One expert testified at trial about the near-insurmountable negative reputational impact that results when a powerful institution, with unlimited resources, leads such an attack.

2. Raimondo directed and orchestrated the dissemination of the defamatory statements using a bullhorn.

Oberlin's administrators did not limit themselves to distributing the Flyer. Oberlin College and Dean Raimondo (while on a bullhorn) directed and orchestrated the distribution of the libelous Flyer, including instructing protestors to make additional copies. [Tr. Trans. Vol. IV, p. 28; Vol. III, p. 111; Vol. V, pp. 178-179, 190; Vol. VI, pp. 6-7].

3. Although it had the authority to remove libelous statements from its buildings, Oberlin permitted a libelous student senate resolution, which it knew was false, to remain posted in a conspicuous place for more than a year.

Although no students testified or provided any evidentiary materials in the multi-year litigation, Oberlin allowed a resolution that it attributed to the Oberlin Student Senate to be prominently posted in a campus building display case ("Resolution"). Consistent with the statements on the Flyer, the Resolution falsely claimed that Gibson's "has a history of racial

profiling and discriminatory treatment of students and residents." [Pl. Tr. Ex. 35]. At trial, Dean Raimondo, then faculty adviser to the Student Senate, testified that the Resolution remained posted in Wilder Hall, where Dean Raimondo's office is located, for more than a year. The Resolution remained in a very conspicuous glass case in Wilder Hall on College property and visible to all visitors. [Pl. Tr. Ex. 299]. President Krislov testified that the Resolution was in the best place for maximum visibility. Krislov further testified that the Resolution could have been removed by college personnel at any time. Indeed, the Resolution remained posted for more than a year, even after the three students admitted their guilt in open court monitored by Oberlin and was removed only when the Gibsons initiated litigation against the College in November 2017.

The evidence of Oberlin's relentlessly cruel attacks on the Gibsons was overwhelming for anyone sitting within the courtroom during the six-week jury trial. Even the College's counsel recognized that reality in the opening statements of the punitive damage phase: "Before you rendered your [compensatory] verdict last Friday, we already knew things had to change." Counsel then said that the jury's compensatory verdict "sent a profound message" and "we have heard you" and that they recognized that they needed to make tremendous changes. But the jury learned that this was mere lip service. During the punitive phase, a high-ranking Oberlin administrator testified about sending a public pronouncement to thousands of people (just before the punitive phase) stating that the jury was wrong and that the jury failed to understand the "clear evidence our team presented."

III. ARGUMENT IN SUPPORT OF JURISDICTION ON CROSS-APPEAL

Proposition of Law No. 1: R.C. 2315.21, as applied to small businesses and private citizens who suffer financial ruin from the egregious, intentional torts of defendants whose power and wealth renders them undeterred by statutory damages cap, violates the due course of law/due process clauses of the Ohio and United States Constitutions and the constitutional right to trial by jury.

As-applied exceptions to the punitive damages cap must be allowed in the most egregious cases where applying the cap is not rationally related to the public's health, safety, or welfare and is both unreasonable and arbitrary. This is one of those cases.

1. Mechanically applying R.C. 2315.21 to the punitive damages verdict violates the Gibsons' due process rights because it subordinates the public's morals and welfare to the predatory behaviors of a billion-dollar tortfeasor, who sees its intentional torts as the costs of doing business.

This Court has long recognized that punitive damages serve a valuable purpose—to punish the guilty, deter future misconduct, and show society's disapproval of the defendant's actions (*Arbino*, *supra*, ¶¶ 97, 100). And it is impossible to formulate a mathematical bright line between the constitutionally acceptable and unacceptable punitive damages. *Barnes v. Univ. Hosps. of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, ¶ 34 (2008) ("[T]he United States Supreme Court, like this court, has consistently rejected the notion of a bright-line mathematical formula for assessing the reasonableness of punitive damage awards.").

a. Applying the punitive caps here does not further Ohio's economy, nor protect a small employer from reputational, emotional and economic ruin.

As applied to the egregious set of facts in this case, R.C. 2315.21 does not further the economic public interests discussed in *Arbino* nor the valuable purposes underlying the imposition of punitive damages.

Oberlin's own expert acknowledged at trial that "family owned businesses are the backbone of the American economy" and "drive local economies." Imposing the caps to protect a

tax-exempt billion-dollar institution that, for its own gain, has intentionally driven out of business a tax-paying 132-year-old family business bears no real and substantial relationship to the general welfare of the public. Nor can any rational basis in application of the cap be found when the defendant demands that small businesses turn a blind eye toward crime or face unprecedented retaliatory economic attacks and reputational assassination.

Under this set of facts, capping punitive damages does not serve economic stability, but instead, leaves small businesses vulnerable to financial ruin at the hands of predatory large organizations intent on defaming and destroying their victims.

b. Applying the punitive caps here breaks the rational connection between the tortfeasors' intentional conduct and damage award because it altogether ignores the power and disregard that Oberlin exhibited towards its fellow citizens.

Applying the punitive damages cap in this case divorces the jury award from any rational connection to Oberlin's intentionally wrongful actions.

Oberlin's VP for Finance and Administration testified about a financial report that the College prepared and sent to board members, stakeholders, donors, and the public admitting that Gibsons' tort claims were just "the normal course of operations" at Oberlin and that the "ultimate outcome of such litigation and claims…will not have a material adverse effect" on how Oberlin operates or its finances. This necessarily means applying the punitive damages cap will only further widen the gap between the award and the College's wrongful conduct, *i.e.*, it lessens any deterrence. As this Court has analyzed, "If [prohibited conduct] is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available. . . . We should warn others to refrain from similar conduct and an award of punitive damages will do just that." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651, 635 N.E.2d 331 (1994).

When a powerful, billion-dollar entity maliciously drives a small family business out of business, the affected community jury must be able to assess the punitive damages that are sufficient to punish and deter, and to protect the community's economics.

c. Applying the punitive caps here does not undo an impermissible, subjective punitive damages calculation; instead, it ignores the objective reality of this case.

The jury's punitive damages award was rationally and proportionally connected to Oberlin's wrongful conduct, not left to uncertainty or subjectivity. The jurors heard 91-year-old Grandpa Gibson's agonizing distress that he would go to his grave labeled as a racist, sabotaging an entire lifetime that was based on treating everyone with respect, fairness, and decency. The jury heard expert testimony that the reputational damage inflicted on the bakery will take at least 30 years to recover. Oberlin's President Krislov even acknowledged that falsely attacking someone as being racist was one of the worst things one could ever do.

Moreover, the jury instructions on punitive damages included the first *Gore* guidepost on reprehensibility: the multi-factor test to protect against excessive, subjective punitive damage awards.[5] The jury was also instructed that the amount should be fair and reasonable and should not be influenced by passion or prejudice.

In sum, the jury was not set adrift. It had (1) Oberlin's extremely egregious tortious conduct, (2) Gibsons' severe damage, (3) limiting jury instructions, and (4) Oberlin's net worth. The jury weighed all the evidence and determined the amount of punitive damages sufficient to punish and deter Oberlin, while balancing against harms to the overall economy.

2. Applying the punitive damages cap here is arbitrary and unreasonable, as it ignores (1) the minimal financial impact that the jury's award had on the intentional tortfeasor and (2) the tort victim's significant reputational, financial and personal harm.

[5] *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

The jury determined that $33,223,500 (which is less than 3% of Oberlin College's net worth and only three times the compensatory award) was the necessary magnitude to deter, punish, and reflect society's disapproval of Oberlin's wrongful conduct.

Applying the cap in this case is arbitrary and unreasonable because the post-cap award has no rational connection between the amount of punitive damages and Oberlin's malicious conduct—it does not (1) deter; (2) punish; or (3) show society's disapproval of Oberlin's vile and utterly reprehensible conduct.

This case, like *Brandt*, proves the need for an exception to rote application of the damages cap in extreme, egregious cases. Application of the cap is unconstitutional as applied to the Gibsons because it does not further any legislative purpose of the punitive damages cap and is also arbitrary and unreasonable where Oberlin, a powerful, billion-dollar institution targeted the Gibson's small family business for destruction, using false charges of racism to permanently stain the business and its owners.

3. Applying R.C. 2315.21 to the Gibsons also violates their constitutional right to a jury trial.

Article I, Section 5 of the Ohio Constitution provides: "The right of trial by jury shall be inviolate * * *." "[T]he assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury." *Zoppo v. Homestead Ins. Co*., 71 Ohio St.3d 552, 557, 644 N.E.2d 397 (1994).

Imposing a bright-line mathematical formula in this case "impairs the traditional function of the jury in determining the appropriate amount of damages." *Zoppo*, 71 Ohio St.3d at 557. For the reasons stated above, and as determined by a unanimous jury after six weeks of evidence, the punitive award of $33,223,500 appropriately considered all relevant factors. Mathematics interceded without a link to the tortious conduct at issue. This violates Gibsons' right to a jury

trial. Moreover, applying the cap here nullified the jury's factual determination of the amount of damages necessary to punish and deter this vastly wealthy defendant committing severely reprehensible conduct.

The Sixth Circuit recently struck down a very similar statutory punitive damages cap because it violated the right to a trial by jury under Tennessee's Constitution. *Lindenberg v. Jackson Natl. Life Ins. Co*., 912 F.3d 348, 367, 369 (6th Cir.2018). The Sixth Circuit held that it was unconstitutional to cap a punitive damages award where the jury concluded that the defendant "so violated normal expectations of proper behavior" that a large punitive damages award was necessary. *Id*.

Given the extreme and egregious set of facts in this case, applying R.C. 2315.21 to the jury's punitive damage award violates Gibsons' constitutional right to a jury trial.

IV. CONCLUSION

Gibsons urge that the conduct exhibited by Oberlin was egregious, vile, and intentionally directed to drive them out of business. The jury returned verdicts for Gibsons on three separate torts and awarded compensatory damages over $11 million. In a separate trial, based on Oberlin's request to bifurcate the punitive damages claim, the jury awarded Gibsons $33,223,500 in punitive damages, but the statutory cap on those damages caused the trial court to reduce the punitive judgment to $19,874,500.

Gibsons assert this is "the set of facts" contemplated in *Simpkins* where application of the statutory damages cap is unconstitutional, and thus presents a similar issue to that being addressed by the Court in *Brandt*.

Accordingly, Gibsons respectfully ask this Court to accept jurisdiction of this cross-appeal and hold briefing pending the outcome of *Brandt*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served on June 13, 2022, pursuant to App.R. 13(C)(6) and (E), and S.Ct.Prac.R. 3.11(C)(1) and 3.11(D) by sending it by electronic means to the email addresses identified below, to:

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