IN THE SUPREME COURT OF OHIO

THOMAS WEIDMAN,	:	Case No. 2022-1042
Plaintiff-Appellee,	:	On Appeal from the Warren County Court of Appeals, Twelfth Appellate
vs.	:	District, Case No. CA 2021-09-084
CHRISTOPHER HILDEBRANT,	:	
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE THOMAS WEIDMAN

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I. Statement of Interest of Amicus Curiae

The Ohio Employment Lawyers Association (OELA) is a non-profit organization of lawyers throughout Ohio who represent individual employees in employment and labor matters. OELA has filed many amicus briefs over the years in this Court as well as in Ohio appellate courts. OELA's amicus work focuses on precedent-setting litigation affecting individual employees' workplace rights, remedies, and safety.

This case affects OELA's members and their clients across Ohio because among the most common settings in which defamation occurs in secret is the workplace. If the Twelfth District Court of Appeal's holding is reversed, as the Defendant-Appellant advocates, Ohio employees will be left defenseless against some of the most harmful and insidious forms of defamation: false statements about them that interfere with their ability to work, including false and disparaging references and the papering of files with false allegations of misconduct. The practicalities of job-searching and the limitations on private-sector employees' rights under Ohio law to access their own personnel files mean that such false statements can fester in secrecy for years before coming to the victim's attention. In the absence of a proper discovery rule, hostile or unscrupulously competitive supervisors, co-workers, or subordinates will continue to be able to sabotage an employee's career with absolute impunity.

II. Summary of Argument

The issue here is a clear and simple one, with an equally clear and simple answer: should someone be able to destroy another person's reputation by spreading lies about them in secret and avoid any legal responsibility for doing so if the very short clock on defamation claims runs out before their dishonesty is revealed? Obviously not.

This question is not hypothetical for Ohio employees. They are uniquely vulnerable to attacks on their reputation because of their often limited rights in the workplace. Private-sector workers have no automatic legal right to review their personnel file. They have no automatic legal right to know the identity of co-workers, subordinates, managers, or customers who complain about them—or even to know that anyone *has* complained about them. And when searching for jobs, they have no practical, enforceable means of learning what former employers have said about them when asked by prospective employers to provide a reference or verify their employment, except in rare cases where prospective employers volunteer the information.

In the rare instances when an employee does learn about one of these types of false and defamatory statements—which can often be just as concretely harmful as, for instance, an easily accessible news article or disparaging social media post—it is often either by happenstance (as in the case of the revelation of the Appellant's deception here) or because circumstances have changed to allow someone with knowledge of the statement to come forward, when they might previously have feared retribution from an unscrupulous supervisor.

What should happen in these rare instances? Those who rely upon secrecy to spread false claims understandably want their tortious conduct to be insulated from any consequence by extremely short, absolute, non-extendable time limits, knowing their targets will likely be unaware of when, how, or by whom their reputation has been destroyed. They argue, as the Appellant does here, that the reputational damage from their knowingly false and concealed statements will inevitably fade into the past. But the harm from their wrongdoing does not often fade so easily, and so, neither should accountability for that harm. False statements made in secret can irrevocably alter an employee's career path long after they are made, just as a medical device left inside a patient can spread hidden infection long after the procedure is over. For most

Ohio employees, who have no reasonable means to promptly learn of such falsehoods even when they are impeding their advancement, preventing them from finding a new job in their field, or destroying their careers and the future of their families, basic equity requires a remedy for such wrongs. The discovery rule is a tried and true method of preserving that remedy.

III. Statement of the Case and Facts

OELA adopts the Statement of the Case and Facts set forth in Appellee's brief.

IV. Argument

Proposition of Law: A defamation claim properly accrues when the person who has been defamed learns, or reasonably should have learned, both that the false publication has been made and the identity of the person who made the publication.

A. Application of the Discovery Rule Is the Only Means of Ensuring that Unscrupulous Actors Cannot Spread Secret Lies with Impunity.

This Court applies a discovery rule to legal claims based on principles of fairness and equity. *See, e.g., Harris v. Liston* (1999), 86 Ohio St. 3d 203, 206-07, 714 N.E.2d 377 (compiling cases adopting a discovery rule "to prevent inequities that occur when a statute of limitations is rigidly followed" and "fairness necessitates allowing the assertion of a claim" (qtns. omitted)). Using falsehoods to disparage a person's reputation stealthily is exactly the type of scenario in which equity requires the extension of the statute of limitations to avoid gross injustice.

OELA members and the employees they represent understand more than most the unfairness that can result from the long-term concealment of false and defamatory statements. The workplace is not only among the contexts in which false statements can be the most harmful, because they can cost employees opportunities for promotion or hiring or cause their firing; it is also a setting in which false statements are most likely to be shrouded in secrecy. This is because most Ohio employees do not have a statutory or contractual right to review their own personnel files. The same principle applies to files containing co-worker or customer complaints.

For instance, an unscrupulous manager who believes a high-performing subordinate may threaten their own future advancement may make false reports about the employee's performance, abilities, honesty, or even threatening behavior or other misconduct. Some companies will allow the affected employee to respond to a manager's reports, but many others have no procedure permitting the affected employee access to or even knowledge of manager reports, much less an opportunity to respond. In non-defamation cases handled by OELA members for employees, confidential manager notes containing false reports of an employee's alleged misconduct are frequently discovered in the employee's personnel file without ever having been shared or discussed with the employee. This is also true of manager or human resources notes of what turn out to be false claims from hostile or jealous co-workers.

Similarly, a customer who is denied a discount by a cashier at a department store can submit an entirely bogus complaint claiming the cashier used profanity toward them. Such a complaint *might*, at some stores, result in an open investigation in which the cashier can deny the allegation, or a review of surveillance cameras refuting the false claim. But it might just as easily be placed in a file the cashier never sees and be used years later to prevent the cashier from being promoted into management.

In addition, though in OELA members' experience, false claims of sexual or racial harassment are rare, they do happen. And for at-will employees, in this "#MeToo" era, when many employers who fear either liability or negative attention combine a zero-tolerance approach with guarantees of anonymity to victims, an employee who is falsely accused of such conduct may not learn the identity of the false accuser until long after losing their job or career.

Perhaps the most common scenario of all is the defamatory bad reference. An unscrupulous manager who has a grudge against a former employee or wants to prevent a

valuable employee from leaving for greener pastures has unparalleled power to sabotage that worker's job searches, causing direct, concrete, and sometimes permanent harm. But prospective employers rarely reveal the source, the specific nature, or even the existence of a bad reference. An employee who does not get a job rarely knows if it is because a better candidate beat them out or because their former manager, when asked to confirm their work history, decided to invent a story about money missing from the till.

Every once in a while, though, the truth comes out—and when it does, it can be long after the one-year statute of limitations for defamation has expired For example, a worker may secure a new job and learn for the first time from their new boss that the reason for their year and a half of unemployment was that everyone who called their old employer was being fed false stories about their misconduct—and unlike the new boss, everyone else must have believed it. Or a long-time employee may apply for a promotion in 2023 and find out they are ineligible because of a false customer complaint that was placed in their file in 2020. Or a middle manager who was terminated several years ago with no explanation may find out that it was because a rival co-worker made a false harassment claim, information that is coming out now only because an employee who knew about the false charge has since left the company and is able to speak freely.

In each of these scenarios, there is no principle of equity or fairness that would warrant a rigid application of the one-year statute of limitations. The employees in every such case would have no plausible means of discovering they were defamed, much less by whom (and in many cases, they would not even know their reputation had been attacked at all). Yet the wrong committed and the resulting harm would be real, lasting, and potentially catastrophic. The only one in each of these cases who would benefit from the absence of a discovery rule would be the person who relied on secrecy and non-disclosure practices to convey a false allegation they knew

would very likely cost their target a promotion, a job, or even their whole career. Rewarding wrongdoing in that way would be contrary to this Court's precedents and Ohio's principles. *See, e.g., Collins v. Sotka* (1998), 81 Ohio St. 3d 506, 510, 692 N.E.2d 581 (applying discovery rule in wrongful-death-by-murder cases because "it is illogical to penalize the victim's survivors" with a rule that "rewards" the murderer). While employment-related defamation certainly does not involve the death of a person, it can result in the death of a career or the destruction of a family's economic security. As the court below highlighted, this Court and Ohio's appellate courts have applied the discovery rule to a host of other legal claims to assure individuals of a reasonable opportunity to obtain remedies for serious wrongs.

It bears mentioning that the Twelfth District's holding, though correct, applies an unnecessary layer of complexity in stating that the discovery rule should apply to those defamation cases "where the publication of the defamatory statements was secretive, concealed, or otherwise inherently unknowable due to the nature of the publication." 2022-Ohio-1708, ¶ 29. It does not appear that this language adds anything to the ordinary application of the discovery rule, which already provides that the limitations period begins when, through the exercise of reasonable diligence, the plaintiff *should* have been aware of the claim. It is difficult to imagine any category of cases in which the plaintiff would not have discovered a defamatory publication with reasonable diligence unless it was concealed, secretive, or otherwise unknowable, and treating these as two separate, overlapping categories appears likely to generate confusion and conflicting results rather than the clarity offered by this Court's established discovery rule.

B. A Discovery Rule for Defamation Will Not "Open the Floodgates" to New Litigation; It Will Ensure a Remedy in Rare, Often Egregious Cases.

In opposing the application of a discovery rule, the Appellant has resorted to the familiar refrain of nearly all tortfeasors who desire to evade the consequences of their wrongful actions:

that reaching a just result in *this* case would "open the floodgates" to excessive future litigation. Of course, as is also almost always true of such arguments, there is no evidence to support it. For instance, if Ohio's Sixth District, which adopted the discovery rule for defamation claims in *Dipillo v. Cashen* (6th Dist. 1983), 1983 Ohio App. LEXIS 11595, *3-4, had been overwhelmed by some "flood" of otherwise-untimely defamation cases in the 40 years since *Dipillo* was decided, this Court surely would have learned of it by now.

The reason there has been no such flood, and will be no such flood, is simple. Although defamation that is whispered or occurs in secret is likely very common (talking behind others' backs may be an unattractive pastime, but it is also among the most popular), it is far less common for such acts to come to the surface. And the chances of a person learning of a long-ago act of defamation go down, not up. It is only where, as here, a perfect storm of a reprehensible act, serious harm, and clear evidence come together after the expiration of the one-year statute of limitations that any such claim could exist.

In particular, the application of the discovery rule would not trigger the deluge of cases the Appellant claims will arise from the advent of social media. Social media posts are usually discovered almost instantaneously. Although some such posts are made anonymously, the discovery of an anonymous defamatory post would trigger the obligation to investigate the poster's true identity, meaning the discovery rule would extend the statute of limitations only by the amount of time it would reasonably take to complete that investigation.

It is hard to think of a type of claim less likely to produce a flood of lawsuits than defamation, as Ohio law already provides muscular protection against all but the plainest and most egregious acts of defamation. The plaintiff bears the burden of proving falsity, and the evidentiary standard for the defendant's fault is proof by clear and convincing evidence. *Dale v.*

Ohio Civil Serv. Employees Ass'n (1991), 57 Ohio St. 3d 112, 114, 567 N.E.2d 253. Except in the inherently harmful "defamation *per se*" categories, Ohio defamation plaintiffs must also prove special damages. *Becker v. Toulmin* (1956), 165 Ohio St. 549, 553, 138 N.E.2d 391. And for workplace-based defamation like that discussed throughout this brief, employers enjoy a qualified privilege to discuss employee conduct and performance both within the employee's workplace and with other prospective employers of their former employees. *See, e.g., Miller v. J.B. Hunt Transp., Inc.* (10th Dist.), 2013-Ohio-3892, ¶¶ 23-24 (describing the common-law qualified privilege and the privilege established by Revised Code Section 4113.71(B) for the sharing of information among employers). In light of these existing protections, it is only the worst of the worst tortfeasors—those who are conclusively proven to have conveyed false information recklessly or intentionally, and with malice—that this Court would be shielding from accountability if it reversed the decision below. And it is only that trickle of egregious offenses, not a flood of new lawsuits, that would find a remedy if this Court affirms.

V. Conclusion

For the reasons explained above, amicus curiae OELA respectfully urges this Court to affirm the decision of the Twelfth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2023, a copy of the Brief of Amicus Curiae OELA in Support of Appellee was served by email upon the following:

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