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

GIBSON BROS., INC., et al.

Plaintiffs-Appellees/Cross-Appellants,

-vs.-

OBERLIN COLLEGE, et al.

Defendants-Appellants/Cross-Appellees.

Case Nos.: 19CA011563 and 20CA011632
(Consolidated)

Appeal from Lorain County
Court of Common Pleas,
Case No. 17CV193761

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS' MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

I. PRELIMINARY STATEMENT

Reporters Committee[1] urges this Court to apply a non-existent "redistributor" or "deliverer" liability test in this case. According to Reporters Committee, when a party "redistributes" or "delivers" someone's statement, a defamation plaintiff can only succeed on her claims if the defendant "republished" or "delivered" the statement with actual malice. Unfortunately for Reporters Committee, "redistributor/deliverer" defamation liability does not exist under Ohio law. In Ohio, liability for defamation claims is based on **publication**, regardless

[1] "Reporters Committee" or "Amici" refers collectively to Reporters Committee for Freedom of the Press, Freedom to Read Foundation, American Booksellers Association, Advance Publications, Inc., Cox Media Group, The E.W. Scripps Company, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MediaNews Group, Inc., MPA – The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, Ohio Association of Broadcasters, Ohio Coalition for Open Government, Online News Association, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.

of the authorship of the statement. Reporters Committee's motion for leave to file an amicus brief should be denied for the following reasons:

- ***First***, Reporters Committee advocates that the tortious and defamatory conduct of the Oberlin parties should be adjudicated based on the elements of "redistributor/deliverer" liability, a concept that does not exist under Ohio law outside the narrow circumstances of newspaper advertisements;

- ***Second***, even if the concept of "redistributor/deliverer" liability did exist under Ohio law, it does not apply to the facts and circumstances of this case and shows that Reporters Committee failed to investigate the record. In this case, the Oberlin Parties[2] actively participated in the publication of statements defaming the Gibsons.[3] Indeed, one of the putative Amici, *The Washington Post*, published an editorial praising the jury's decision and identifying the fact that the jury ruled in favor of the Gibsons based on the Oberlin Parties' tortious conduct in libeling the Gibsons, interfering with Gibson's Bakery's business relationships, and intentionally causing emotional harm to Grandpa Gibson and David Gibson: [4]

Oberlin College had an admirable liberal past. Now, it's a disgrace.

By George F. Will

***

Oberlin College has an admirable liberal past and a contemptible progressive present that will devalue its degrees far into the future. This is condign punishment for the college's mendacity about helping to incite a mob mentality and collective bullying in response to "racist" behavior that never happened.

***

The warriors mounted a protracted campaign against the bakery's reputation and solvency. But with the cowardice characteristic of bullies, Oberlin claimed in court that it had nothing to do with what its students did when they acted on the progressive righteousness that they imbibe at the school. However, at an anti-bakery protest, according to a complaint filed by the bakery, the dean of students helped distribute fliers, produced on college machines, urging a boycott because "this is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." (There is no record of any such complaints against the bakery, from which Oberlin bought goods until the hysteria began.) According to court documents, the administration purchased pizza for the protesters and authorized the use of student funds to buy gloves for protesters. The college also signaled support for the protests by suspending college purchases from the bakery for two months.

[2] "Oberlin Parties" refers to Defendant/Appellant Oberlin College & Conservatory ("Oberlin College") and Vice President and Dean of Students Meredith Raimondo ("Dean Raimondo").
[3] "Gibsons" refers to Gibson Bros., Inc. ("Gibson's Bakery"), Lorna Gibson, Executor for the Estate of David Gibson, Deceased ("David Gibson"), and Allyn W. Gibson ("Grandpa Gibson").
[4] A true and accurate copy of the article published in *The Washington Post* is included herein as **Exhibit 1**.

- ***Third***, considering Amici's substantial connections to the Oberlin Parties, including the fact that the Oberlin Parties' lead trial attorney worked for one of the Amici media entities for ten (10) years, it is clear that Amici are friends of the Oberlin Parties instead of friends of the Court; and

- ***Fourth***, further revealing Amici's failure to review the trial record in this case, Amici have ignored the trial record confirming the Gibsons submitted substantial evidence showing that Oberlin College acted with negligence and even actual malice in defaming the Gibsons.

II. LAW AND ANALYSIS

A. Standard of Review.

The decision to permit an amicus curiae is a matter of judicial discretion. *State v. Ioannidis*, 3rd Dist. Allen No. 1-86-52, 1987 WL 13130 at *15 (June 18, 1987). A motion for leave to file an amicus brief must identify the applicant's interest and explain why such a brief is desirable, given the briefing to be submitted by the parties. App.R. 17. An amicus curiae's function is to assist "the court on matters of law about which the court is doubtful." *City of Lakewood v. State Emp't Relations Bd.*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist.1990). Importantly, ***an amicus curiae is to be a friend of the court, not a friend of a party***. *United States v. State of Michigan*, 940 F.2d 143, 164-65 (6th Cir.1991). As Chief Judge Posner recognized:

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. ***Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party***.

Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir.1997).

B. Reporters Committee's "Redistributor/Deliverer" Liability Argument is Clearly a Red Herring. "Redistributor/Deliverer" Liability does not Exist Under Ohio Law, and Even if it Did, the Oberlin Parties were Held Responsible by the Jury for Actively Defaming the Gibsons.

The entire basis of Reporters Committee's motion and brief is a concern that the Oberlin Parties were held responsible for "redistributing" or "delivering" others' statements. However,

Ohio does not recognize "redistributor/deliverer" liability. But even if Ohio did recognize such concepts, "redistributor/deliverer" liability has no application to the facts of this case. Oberlin College was held responsible for actively defaming the Gibsons, interfering with Gibson's Bakery's business relationships, and intentionally causing emotional injury to David Gibson and Grandpa Gibson.

1. Under Ohio law, liability for defamation is based on publication, not authorship.

Although not stated overtly, Reporters Committee seems to be operating under the misconception that authors of defamatory material are more responsible than those who publish defamatory material. But this is incorrect. As this Court has recognized on several occasions, liability for defamation hinges on the **publication** of a false and defamatory statement with the requisite degree of fault:

> This court has previously held that a defamation claim is composed 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.

Gilbert v. WNIR 100 FM, 142 Ohio App.3d 725, 735, 756 N.E.2d 1263 (9th Dist. 2001) [citations and internal quotations omitted] [emphasis added]. The elements of defamation do not require the defendant to be the author of the libelous statement. *See, id.*

In fact, for more than 100 years, the Ohio Supreme Court has recognized that a person who republishes defamatory material is equally as responsible as the primary author. *See, e.g. Fowler v. Chichester*, 26 Ohio St. 9, 13-14 (1874) ("A party is not protected from an action by the party

injured, by communicating a previous publication and giving the name of the publisher at the time he repeats the slanderous words.").[5] Ohio courts continue to apply this proposition of law:

> Appellee's second contention ... is that he is not liable for defamation *per se* because he was merely acting as a conduit ... [and] were not made by appellee. Appellee's second contention is not persuasive because ***Ohio courts have long recognized that a person can be liable for defamation even when the person's action amounted only to a republication of defamatory statements uttered by another***.

Stresen-Reuter v. Hull, 6th Dist. Sandusky No. S-89-27, 1990 WL 109877 at *6 (Aug. 3, 1990) [emphasis added], citing *Fowler*, 26 Ohio St. at 14.

2. The concept of "redistributor/deliverer" liability, involving Amici's claim of a heightened fault standard, does not exist under Ohio law.

a. *Varanese v. Gall* has no application to the facts of this case.

Reporters Committee claims that pursuant to *Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 1177 (1988), whenever a party "redistributes" another person's speech, the person or entity redistributing that speech can only be found liable for defamation if the plaintiff shows actual malice. However, a review of *Varanese v. Gall* reveals that the Ohio Supreme Court did **not** adopt "redistributor" defamation liability and that the decision has absolutely no application to the facts of this case:

First, contrary to Reporters Committee's assertions, the *Varanese* Court applied the actual malice standard because the plaintiff was a public official:

> The parties to this appeal do not dispute [plaintiff's] status as a public official. As such, [plaintiff] bears the burden of proving, with convincing clarity, that [defendant-newspaper] published the advertisement at issue with actual malice.

[5] The *Fowler* Court also discussed the intersection between malice and defamation. However, it must be remembered that *Fowler* was decided before *New York Times* and its progeny created alternate burdens based on the plaintiff's status as a public figure or private figure. In fact, when *Fowler* was decided, malice was **presumed**.

Id. at 79 [citations omitted]. Pursuant to the framework established by the United States Supreme Court in *New York Times Co. v. Sullivan* and its progeny, when a public (*i.e.* government) officials asserts claims for defamation regarding their official duties, they are required to show that the publisher acted with actual malice to recover damages. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S.Ct. 710 (1964). In this case, the trial court determined that the Gibsons are private figures, meaning they need not show actual malice for purposes of compensatory liability.

Second, Reporters Committee claims that the *Varanese* Court adopted "redistributor" liability in its holding. However, that is not true, and Reporters Committee knows that is not true. Instead, in the limited circumstances of ***newspapers publishing advertisements***, the Court held that newspapers are only liable where they know the advertisement is false or where the advertisement is inherently improbable on its face:

> In defamation cases, a ***newspaper's*** liability for failure to check the accuracy of ***advertisements***, including political advertisements, is limited to those cases where the defendant actually knew the ad was false before publication, or where the ad is so inherently improbable on its face that the defendant must have realized the ad was probably false.

Varanese at ¶ 2 of the syllabus [emphasis added]. As Reporters Committee and every other party or entity involved in this case knows, this case has absolutely nothing to do with advertisements in any form of media.

3. The Oberlin Parties were not entitled to a jury instruction regarding "deliverer" liability pursuant to § 581 of the Restatement (Second) of Torts because no court in the State of Ohio has adopted or applied that provision.

Next, Reporters Committee argues that when this Court correctly recognizes that *Varanese v. Gall* has absolutely no application to this case that this Court should find that the Oberlin Parties were entitled to a jury instruction in line with the Restatement (Second) of Torts § 581. (Reporters Committee Amicus Br., p. 7). For several reasons, this is clearly incorrect:

First, pursuant to longstanding Ohio law, parties are only entitled to "correct statements of the law applicable to the facts in this case." *Schniple v. Safe-Turf Installation Group, LLC*, 190 Ohio App.3d 89, 2010-Ohio-4173, 940 N.E.2d 993, ¶ 30 (3rd Dist.) [citations and quotation marks omitted]. § 581 of the Restatement (Second) of Torts was published in 1977. In the more than half century since the provision was adopted for the Restatement, ***it has never been cited or adopted by a single Ohio court***. As such, § 581 is **not** a correct statement of Ohio law and was properly excluded from the jury instructions for this case. *See, Schniple* at ¶ 30.[6]

Second, even if Ohio courts applied § 581 (they do not), it is inapplicable to the facts of this case. Under the Restatement's defamation framework, a person who republishes defamatory material "***is subject to liability as if he had originally published it***." Restatement (Second) of Torts, § 578 (1977). § 581 identifies a minor exception to this rule to people who deliver or transmit defamatory material:

> Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.

Restatement (Second) of Torts, § 581 (1977). § 581 was meant to protect a certain class of individuals and companies from defamation liability such as telephone or telegraph companies who provide a network through which defamatory materials are transmitted.

[6] Reporters Committee includes string citations taking up nearly a page of their brief showing that Ohio courts utilize the Restatement (Second) of Torts in their decisions and identifying other courts that have adopted § 581. (Reporters Committee Amicus Br., p. 8). Reporters Committee conveniently fails to identify that Ohio courts often reject provisions in the Restatement. *See, e.g. McAllister v. Trumbull Properties Co. Ltd. Partnership*, 11th Dist. Trumbull No. 93-T-4891, 1994 WL 45277 at *3 (Feb. 11, 1994). Further, if Reporters Committee wishes to stake its claim to the Restatement, it should be noted that the Restatement provides that an owner of land or chattel is responsible if it permits its land or chattel to be used to publish a defamatory statement. *See,* Restatement (Second) of Torts § 577 (1977).

This has absolutely no application to the facts of this case. Dean Raimondo and other Oberlin College administrators were ***actively passing out <u>stacks</u> of the defamatory Flyer***. [See, Tr. Trans. Vol. III, p. 104; Tr. Trans. Vol. IV, pp. 15-18; Tr. Trans. Vol. V, pp. 178-79]. With a bullhorn, Oberlin College and Dean Raimondo actively directed and orchestrated the dissemination of the defamatory Flyer, including announcing that additional copies of the Flyer could be made at Oberlin College administrative offices. [See, Tr. Trans. Vol. IV, p. 28; Tr. Trans. Vol. III, p. 111; Tr. Trans. Vol. V, pp. 178-179, 190; Tr. Trans. Vol. VI, pp. 6-7]. Additionally, for more than a year, Dean Raimondo and Oberlin College published a copy of the defamatory Resolution at a prominent location in an Oberlin College administrative building. [See, Pl. Tr. Ex. 35; Tr. Trans. Vol. IV, p. 55; M. Krislov Dep. Vol. I, pp. 210-211].[7]

C. Amici are Clearly Friends of the Oberlin Parties, not Friends of the Court.

As indicated above, an amicus is supposed to be a friend of the court, **not a friend of the parties**. *United States v. State of Michigan*, 940 F.2d 143, 164-65 (6th Cir.1991). But in this case, it is clear that Amici are only friends of the Oberlin Parties. *See, Gibson Bros., Inc., et al. v. Oberlin College, et al. and WEWS TV, et al.*, 9th Dist. Case No. 20 CA 011648.

Amici are represented by the same attorney and law firm that are representing WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government in a collateral appeal seeking access to private documents that were properly sealed by the trial court. Ohio Coalition for Open Government is one of the Amici. Additionally, WEWS-TV's parent company, The E.W. Scrips

[7] This section of President Krislov's deposition testimony was played for the jury during trial. [Tr. Trans. Vol. III, p. 176]. The excerpts played for the jury can be found at Pl. Tr. Ex. 460. [See, Tr. Trans. Vol. XII, pp. 13-14]. President Krislov's deposition was filed with the trial court on March 15, 2019 and is part of the record on appeal.

Company, is also one of the Amici.[8] There are substantial connections between the Oberlin Parties and WEWS-TV, and by extension, The E.W. Scrips Company. The Oberlin Parties' lead attorney during trial, Ron Holman, II, ***worked for WEWS-TV and The E.W. Scrips Company for more than (10) years***.[9] Clearly, the Oberlin Parties are attempting to leverage their media connections to circumvent appellate brief page limitations.

D. If Reporters Committee had Reviewed the Evidence Submitted at Trial, it would have Discovered that the Gibsons Presented Substantial Evidence Showing that the Oberlin Parties Published the Flyer with not only Negligence, but Actual Malice.

In the second part of their brief, Reporters Committee argues that the facts were insufficient to find the Oberlin Parties negligent in defaming the Gibsons. But had Amici reviewed the record, it would have discovered that the Gibsons submitted more than enough evidence to find the Oberlin Parties liable for defamation.

1. The instruction given to the jury on negligence was appropriate as it provided the jury with the correct legal standard to find that the Oberlin Parties were negligent in defaming the Gibsons.

Reporters Committee initially argues that the jury instruction given by the Court on negligence for purposes of private person defamation was inappropriate. For several reasons, this argument is incorrect:

First, during the compensatory phase, the trial court gave the following instruction on negligence for purposes of defamation:

[8] For the Court's review, The E.W. Scrips Company lists WEWS-TV as one of its assets in its portfolio of local media operations. *See,* https://scripps.com/our-brands/local-media/ (last visited June 24, 2020).

[9] See, https://www.taftlaw.com/people/ronald-d-holman-ii (last visited Jun. 24, 2020).

> NEGLIGENCE. Negligence is a failure to use reasonable care. Every person is required to use reasonable care to avoid causing injury to others or their property.
>
> REASONABLE CARE. Reasonable care is the care that a reasonably careful person would use under the same or similar circumstances.

[Tr. Trans. Vol. XX, pp. 61-62]. Reporters Committee complains that this language was inadequate under Ohio law and that the jury should have been given a different instruction. While the Gibsons strongly disagree with this assessment, it is irrelevant because ***the Oberlin Parties proposed a nearly identical instruction***:

> Negligence is a failure to use ordinary care. Every person is required to use ordinary care to avoid injuring another person.[20]
>
> Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances.[21]

(Oberlin Parties Am. Pr. Jury Instructions, June 4, 2019).[10]

Further, the Oberlin Parties' failed to specifically object to the Court's negligence instruction. When the negligence objection was discussed before the trial court, the Oberlin Parties merely stated they "object to the inclusion of that definition and believe that the definition provided defendants' proposed instruction number 13 should be given to the jury." [Tr. Trans. Vol. XX, p. 26]. No further explanation was provided. Ohio courts routinely hold that "a party fails to preserve for review an error based upon a given jury instruction where the party raises only a general objection to the instructs at trial and fails to state a specific basis for the objection." *Coyne v. Stapleton*, 12th Dist. Clermont No. CA2006-10-080, 2007-Ohio-6170, ¶ 27.

[10] Within minutes of the start of closing arguments, the Oberlin Parties submitted an untimely set of amended proposed jury instructions seeking an alternate definition of negligence. However, the last-minute amended instruction was submitted after the deadline set by the trial court, untimely, and waived.

Second, the negligence instruction provided by the trial court, taken as a whole, was proper. Defamation plaintiffs must prove fault by clear and convincing evidence. *See, Gosden v. Louis*, 116 Ohio App.3d 195, 213, 687 N.E.2d 481, 492 (9th Dist.1996). Ohio courts have also "adopted the ordinary negligence standard ... for actions involving a private figure defamed in a matter of public concern." *Gilson v. Am. Inst. of Alternative Medicine*, 10th Dist. No. 15AP-548, 2016-Ohio-1324, 62 N.E.3d 754, ¶ 41 [citations omitted]. The jury was given the negligence instruction taken directly from the Ohio Civil Jury Instructions ("O.J.I."): "Negligence is a failure to use reasonable care." *Cf.*, O.J.I. CV 401.01(1) and O.J.I. CV 431.01(11). The jury was also instructed that it must find that the defamatory statement was false and that it "must also find by clear and convincing evidence that, in publishing the statement, the [Oberlin Parties] acted with negligence." [Tr. Trans. Vol. XX, p. 60]. Taken together, the jury was instructed that it could only find the Oberlin Parties liable for defamation if the Oberlin Parties lacked reasonable care in publishing a false statement about the Gibsons. Simply put, the language Reporters Committee believes should have been included in the instructions ***was included in the instructions***.

2. The jury received substantial evidence showing that the Oberlin Parties acted with negligence in publishing.

After complaining about the trial court's proper negligence instruction, Reporters Committee spends several pages discussing why "redistributors" should not be held liable for failing to investigate published content. But again, ***this case has nothing to do with "redistributor/deliverer" liability***. *See, supra* Sec. II(B). Indeed, even a brief review of the cases cited by Reporters Committee shows they have absolutely no application to this case. For instance, Reporters Committee cites to *Amann v. Clear Channel Communications*, 165 Ohio App.3d 291, 2006-Ohio-714, 846 N.E.2d 95 (1st Dist.) for the proposition that the "failure to verify information, without more, is insufficient to establish negligence in a defamation action." (Reporters

Committee Br., p. 13). However, *Amann* **was not a defamation case** and only dealt with the content of **advertisements on a radio program**. *See, id.* at ¶¶ 2-4. Clearly, this has no application to this libel case where the Oberlin Parties actively published defamatory materials about the Gibsons.[11] Reporters Committee also cites to *Young v. Russ*, 11th Dist. Lake No. 2003-L-206, 2005-Ohio-3397. Interestingly, in that case the court of appeals ***overturned*** a trial court decision granting summary judgment where a reporter failed to properly investigate and take account of differing information he received while reporting on a story involving a private figure. *Id.* at ¶¶ 52-53.

Reporters Committee's recitation of the "facts" does nothing but regurgitate Dean Raimondo's testimony from trial without taking into account substantial evidence that contradicted Dean Raimondo's testimony. Had Reporters Committee reviewed the record, it would have discovered that the jury was presented with **substantial** evidence showing that the Oberlin Parties not only acted with negligence when publishing the statements, but that they recklessly disregarded the falsity of the allegations in the Flyer and Student Senate resolution:

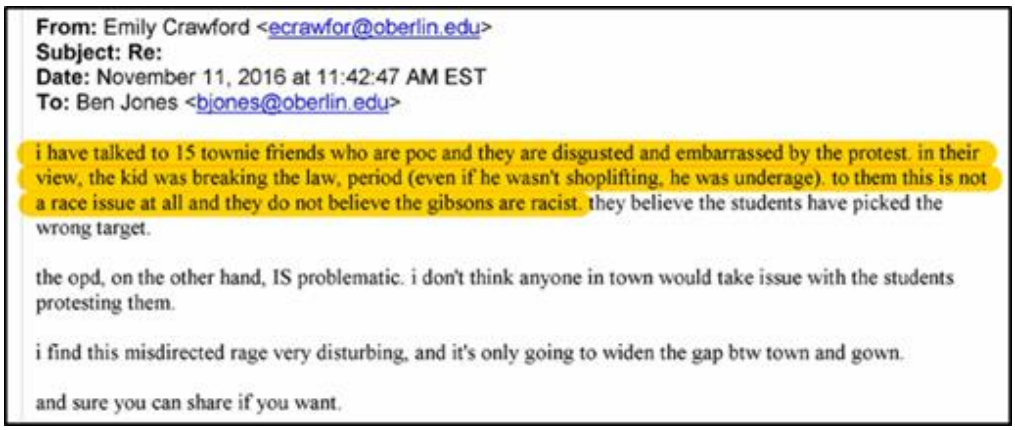
- Oberlin College and Gibson's Bakery did business together since before the **First World War**. [Tr. Trans. Vol. VII, p. 17]. President Krislov confirmed that during his entire ten-year tenure as president, no one had ever suggested to him that the Gibsons were racists or had a history of racial profiling. [M. Krislov Dep. Vol. I, p. 106].[12] Further, other Oberlin College administrators did not believe the Gibsons had a history of racial profiling or discrimination. During trial, Chief of Staff Ferdinand Protzman

[11] Further, the other cases cited by Reporters Committee dealt with media defendants reporting on stories after receiving information from sources. *See, e.g. Horvath v. Telegraph*, 11th Dist. Lake No. CA-8-175, 1982 WL 5841 at **2-3 (Mar. 8, 1982) (media reporting on drug bust); *Young v. Russ*, 11th Dist. Lake No. 2003-L-206, 2005-Ohio-3397, ¶

[12] This section of President Krislov's deposition testimony was played for the jury during trial. [Tr. Trans. Vol. III, p. 176]. The excerpts played for the jury can be found at Pl. Tr. Ex. 460. [See, Tr. Trans. Vol. XII, pp. 13-14]. President Krislov's deposition was filed with the trial court on March 15, 2019 and is part of the record on appeal.

confirmed that ***no one in the Oberlin College administration thought the Gibsons were racists***. [See, Tr. Trans. Vol. III, p. 23].[13]

- On November 11, 2016, Emily Crawford, who was an Oberlin College employee at that time in the communications department, sent the following email to V.P. Ben Jones as to the experience of persons of color ("POC") in the community:



From: Emily Crawford <ecrawfor@oberlin.edu>
Subject: Re:
Date: November 11, 2016 at 11:42:47 AM EST
To: Ben Jones <bjones@oberlin.edu>

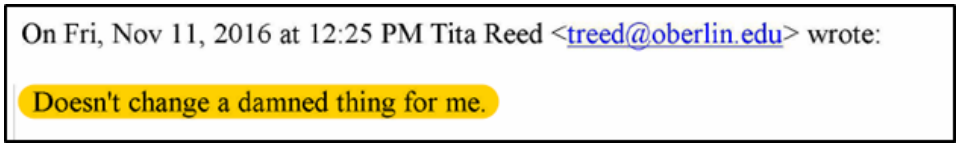
i have talked to 15 townie friends who are poc and they are disgusted and embarrassed by the protest. in their view, the kid was breaking the law, period (even if he wasn't shoplifting, he was underage). to them this is not a race issue at all and they do not believe the gibsons are racist. they believe the students have picked the wrong target.

the opd, on the other hand, IS problematic. i don't think anyone in town would take issue with the students protesting them.

i find this misdirected rage very disturbing, and it's only going to widen the gap btw town and gown.

and sure you can share if you want.

[Pl. Tr. Ex. 63].[14] Oberlin College's administrators blatantly ignored Ms. Crawford. Special Assistant to the President Tita Reed responded as follows to Ms. Crawford's email:



On Fri, Nov 11, 2016 at 12:25 PM Tita Reed <treed@oberlin.edu> wrote:

Doesn't change a damned thing for me.

[Pl. Tr. Ex. 63]. While the truth did not matter to Oberlin College, it certainly did to the jury.

- Special Assistant to the President Tita Reed testified at trial that she, as a person of color, had never experienced any racism from David Gibson or Gibson's Bakery in the 25 years she had lived in Oberlin. [Tr. Trans. Vol. III, pp. 75-76]. Despite her personal experience, Ms. Reed, in a text message to a former colleague, accused the Gibsons of "basic racial profiling" even though she had ***no evidence suggesting the three students were wrongfully arrested***. [Id., pp. 78-79].

- Oberlin College's administrators completely ignored numerous communications from alumni and community members, some of which were persons of color, that supported the Gibsons and informed the College that the Gibsons do not have a history of racial

[13] Mr. Protzman was impeached with this quote from his deposition and confirmed the accuracy of the statement later in his testimony. [See, Tr. Trans. Vol. III, p. 23-24].
[14] Emil Crawford's supervisor at Oberlin College, V.P. of Communications Ben Jones, confirmed that Ms. Crawford was a respected and credible employee. [Tr. Trans. Vol. VI, p. 45].

profiling or discrimination. [See, Pl. Tr. Exs. 111, 134, 161, & 485]. These communications were either ignored or the senders were outright ridiculed, with V.P. Ben Jones even calling Gibsons supporters "***idiots***." [See, Pl. Tr. Ex. 134].

- Dean Raimondo was well-aware that the owners of Gibson's Bakery did not commit an assault as the Flyer claimed. Former Oberlin Police Sergeant Victor Ortiz testified that he explained the circumstances and charges related to the arrest of the three students to Dean Raimondo on November 9, 2016. [Tr. Trans. Vol. III, pp. 149-150]. However, Dean Raimondo refused to issue a correction or retraction.

Reporters Committee spends nearly a page trying to convey to the Court the temporal aspects of negligence liability for defamation under Ohio law. But had Reporters Committee reviewed the facts, it would have realized that the Oberlin Parties defamation of the Gibsons continued for **more than a year** while the Resolution was posted in a prominent place in a College administrative building. [See, Pl. Tr. Ex. 35; Tr. Trans. Vol. IV, p. 55; M. Krislov Dep. Vol. I, pp. 210-211].[15] Thus, Reporters Committee's temporal concerns are irrelevant under the facts of this case.

E. Even though the Gibsons were under no obligation to prove who authored the defamatory statements, the jury was presented with sufficient evidence to infer that the Oberlin Parties, either in whole or in part, participated in their creation.

Even though they had no obligation to prove who authored the Flyer and Student Senate Resolution, the Gibsons presented substantial evidence that permitted the jury to infer the Oberlin Parties took part in the creation one or both documents:

First, based on the totality of the evidence, the jury could have inferred (though it was not necessary) that the Oberlin Parties participated in the preparation of the Student Senate Resolution (the "Resolution"). [See, Pl. Tr. Ex. 35]. The jury heard evidence that Dean Raimondo was the

[15] This section of President Krislov's deposition testimony was played for the jury during trial. [Tr. Trans. Vol. III, p. 176]. The excerpts played for the jury can be found at Pl. Tr. Ex. 460. [See, Tr. Trans. Vol. XII, pp. 13-14]. President Krislov's deposition was filed with the trial court on March 15, 2019 and is part of the record on appeal.

Student Senate adviser. [Tr. Trans. Vol. IV, p. 55]. The jury also discovered that Dean Raimondo was notified of the protests in advance, attended the protests in her role as Dean of Students, and that she and other administrators published stacks of the Flyers. [See, Tr. Trans. Vol. III, p. 104; Tr. Trans. Vol. IV, pp. 15-18; Tr. Trans. Vol. V, pp. 178-79]. The same Flyer published by Dean Raimondo was clearly the template for the Student Senate Resolution. [Cf. Pl. Tr. Ex. 263 and Pl. Tr. Ex. 35]. Immediately after the Student Senate Resolution was published to the entire student body through use of Oberlin College's email system [see, Tr. Trans. Vol. IV, p. 56; Pl. Tr. Ex. 34], the Oberlin Parties adopt and ratify the content of the Student Senate Resolution through a public statement, designed to give "props" to the Student Senate. [See, Pl. Tr. Ex. 67; Pl. Tr. Ex. 460, p. 8]. Then, the Oberlin Parties allowed the Student Senate Resolution to be prominently posted for more than a year in a college provided display case in Wilder Hall, a building Dean Raimondo enters on a daily basis. [Tr. Trans. Vol. IV, pp. 9, 54-56]. President Krislov testified that the Resolution was posted in very high traffic location and that the College had the authority to remove the resolution from the College display case. [Tr. Trans. Vol. XIV, p. 180; M. Krislov Dep. Vol. I, pp. 210-211].[16]

Even after the three students plead guilty to the theft crimes and announced in open court that their detention and arrest was not the result of racial discrimination or racial profiling [see, Tr. Trans. Vol. III, pp. pp. 78-79]., the Oberlin Parties refused to relent and continued their long term campaign of defamation, tortious interference with business relations, and intentional infliction of emotional distress against the Gibsons. In fact, when the three students broke ranks from the

[16] This section of President Krislov's deposition testimony was played for the jury during trial. [Tr. Trans. Vol. III, p. 176]. The excerpts played for the jury can be found at Pl. Tr. Ex. 460. [See, Tr. Trans. Vol. XII, pp. 13-14]. President Krislov's deposition was filed with the trial court on March 15, 2019 and is part of the record on appeal.

Oberlin Parties tortious campaign and told the truth in open court that their detention and arrest was a product of their criminal activity, the Oberlin Parties became enraged, with Toni Myers, an assistant Dean under Dean Raimondo, texting Dean Raimondo from the courtroom of the intention of the Oberlin Parties to continue its efforts to destroy the Gibsons in the following quote:

From: From: +REDACTED Toni Myers
Timestamp: 8/11/2017 12:11(UTC-4)
Source App: iMessage: +REDACTED
Body:

This is the most egregious process. Alan is here and Dave will make a statement. After a year, I hope we rain fire and brimstone on that store.

[Pl. Tr. Ex. 206]. Dean Raimondo did not object to her assistant Deans vicious plan. [See, Id.].

The irony of these journalism amici's efforts to rewrite history is best illustrated by *New York Times* liberal columnist, Nicholas Kristof, in a published editorial on June 29, 2019:[17]

The New York Times https://nyti.ms/2NI4IKL

Stop the Knee-Jerk Liberalism That Hurts Its Own Cause

We liberals need to watch our blind spots.

By Nicholas Kristof
Opinion Columnist

June 29, 2019

***

I understand that militancy emerges from deep frustration at inequities. But it turned out that the operative narrative here was not oppression but simply shoplifting. The student who stole the wine pleaded guilty to theft and acknowledged that there was no racial profiling involved.

***

As a liberal, I mostly write about conservative blind spots. But on the left as well as the right, we can get so caught up in our narratives that we lose perspective; nobody has a monopoly on truth. If Trump turns progressives into intolerant agents of incivility, then we have lost our souls.

With so much evidence of the Oberlin Parties' involvement with the Student Senate Resolution, the jury clearly could have inferred that the Oberlin Parties took part in its creation and drafting.

[17] A true and accurate copy of Nicholas Kristof's June 29, 2019 article is included in this communication as **Exhibit 2**.

Second, while the Oberlin Parties continue to deny their involvement, ***they did not produce a single witness during discovery or trial that took responsibility for drafting the Flyer or Student Senate Resolution***.

Thus, although it was not necessary to succeed on their claims, the Gibsons provided the jury with sufficient evidence to infer that the Oberlin Parties took part in the creation and authorship of the Flyer and Student Senate Resolution.

III. CONCLUSION

The Gibsons submit that Reporters Committee has no interest in examining the actual trial record, nor the circumstances of this case, nor acquainting itself with the law of the State of Ohio. Thus, it provides no legal perspective as a friend of the court that will assist the Court in reaching its decision in this appeal. An amicus brief should not be used as an apparent supplemental friend of a party brief. Therefore, the Gibsons request that this Court deny Reporters Committee's Motion for Leave to File Amici Curiae Brief.

DATED: June 29, 2020

Respectfully submitted,

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The Washington Post

Opinions

Oberlin College had an admirable liberal past. Now, it's a disgrace.

By George F. Will

"You Americans do not rear children, you incite them; you give them food and shelter and applause."

— Randall Jarrell,
"Pictures From an Institution"

EXHIBIT
1

Oberlin College has an admirable liberal past and a contemptible progressive present that will devalue its degrees far into the future. This is condign punishment for the college's mendacity about helping to incite a mob mentality and collective bullying in response to "racist" behavior that never happened.

Founded in 1833, Oberlin became one of the nation's first colleges to admit African Americans, and its first coeducational liberal arts college. It has, however, long since become a byword for academic self-caricature, where students protest, among many microaggressions, the food service's insensitive cultural appropriation of banh mi sandwiches, sushi and General Tso's chicken. Oberlin could have been Randall Jarrell's model for his fictional Benton College, where people "would have swallowed a porcupine, if you had dyed its quills and called it Modern Art; they longed for men to be discovered on the moon, so that they could show that *they* weren't prejudiced toward moon men."

In November 2016, a clerk in Gibson's Bakery, having seen a black Oberlin student shoplifting bottles of wine, pursued the thief. The thief and two female friends were, according to the police report, kicking and punching the clerk on the ground when the police arrived. Some social-justice warriors — they evidently cut class the day critical thinking was taught, if it is taught at Oberlin — instantly accused the bakery of racially profiling the shoplifter, an accusation complicated by the fact that the shoplifter and his partners in assault pleaded guilty.

The warriors mounted a protracted campaign against the bakery's reputation and solvency. But with the cowardice characteristic of bullies, Oberlin claimed in court that it had nothing to do with what its students did when they acted on the progressive righteousness that they imbibe at the school. However, at an anti-bakery protest, according to a complaint filed by the bakery, the dean of students helped distribute fliers, produced on college machines, urging a boycott because "this is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." (There is no record of any such complaints against the bakery, from which Oberlin bought goods until the hysteria began.) According to court documents, the administration purchased pizza for the protesters and authorized the use of student funds to buy gloves for protesters. The college also signaled support for the protests by suspending college purchases from the bakery for two months.

A jury in the defamation trial awarded the bakery $11 million from Oberlin, and $33 million more in punitive damages. The $44 million probably will be reduced because, under Ohio law, punitive damages cannot exceed

double the amount of compensatory damages. The combination of malice and mendacity precluded a free-speech defense , and the jury accepted the obvious: The college's supposed adults were complicit in this protracted smear. Such complicity is a familiar phenomenon.

As Stuart Taylor and K.C. Johnson demonstrated in their meticulous 2007 book "Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case," Duke University's administration and a large swath of the faculty incited hysteria against a few young men accused of a rape that never happened. The University of Virginia's administration similarly rushed to indignant judgment in response to a facially preposterous magazine story about another fictitious rape.

The shoplifting incident occurred the day after the 2016 presidential election, which Oberlin's president, vice president and dean of students partially blamed for students' "pain and sadness" and "fears and concerns" during the "difficult few days" after the "events" at the bakery. From Oberlin's despisers of President Trump, the events elicited lies and, in effect, cries of "fake news," the brazenness of which the master in the White House might admire. Oberlin alumni who are exhorted to contribute to this college, which has been made stupid and mendacious by politics, should ponder where at least $33 million is going.

Continuing to do what it denies ever doing — siding against the bakery — Oberlin, in impeccable progressive-speak, accuses the bakery of an "archaic chase-and-detain" policy regarding shoplifters and insists that "the guilt or innocence of the students is irrelevant" to the — of course — "root cause" of the protests against the bakery.

Oberlin's president defiantly says "none of this will sway us from our core values." Those values — moral arrogance, ideology-induced prejudgments, indifference to evidence — are, to continue using the progressive patois, the root causes of Oberlin's descent beyond caricature and into disgrace.

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Catherine Rampell: A chilling study shows how hostile college students are toward free speech

George F. Will

George F. Will writes a twice-weekly column on politics and domestic and foreign affairs. He began his column with The Post

in 1974, and he received the Pulitzer Prize for commentary in 1977. His latest book, "The Conservative Sensibility," was released in June 2019. Follow

The New York Times https://nyti.ms/2NI4IKL

Stop the Knee-Jerk Liberalism That Hurts Its Own Cause

We liberals need to watch our blind spots.

EXHIBIT 2

By Nicholas Kristof
Opinion Columnist

June 29, 2019

My daughter and I were tossing a football back and forth while also flinging around arguments about free speech, sexual assault, youthful intolerance and paternal insensitivity.

We were discussing a Harvard law professor, Ronald Sullivan. He had been pushed out of his secondary job as head of Harvard College's Winthrop House after he helped give Harvey Weinstein, accused of sexual assault, the legal representation every defendant is entitled to.

To me, as a progressive baby boomer, this was a violation of hard-won liberal values, a troubling example of a university monoculture nurturing liberal intolerance. *Of course* no professor should be penalized for accepting an unpopular client.

To my daughter, *of course* a house dean should not defend a notorious alleged rapist. As she saw it, any professor is welcome to represent any felon, but not while caring for undergraduates: How can a house leader support students traumatized by sexual assault when he is also defending someone accused of rape?

Our football face-off reflects a broader generation gap in America. Progressives of my era often revere the adage misattributed to Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it." For young progressives, the priority is more about standing up to perceived racism, misogyny, Islamophobia and bigotry.

The rise of President Trump has amplified this generational clash and raised the fundamental question of how to live liberal values in an illiberal age.

It's a difficult balance, requiring intellectual humility. Don't tell my daughter, but she has a point: The well-being of sexual assault victims is clearly a value to embrace, even as we weigh it against the right of a law professor to take on a despised client.

Yet while I admire campus activism for its commitment to social justice, I also worry that it sometimes becomes infused with a prickly intolerance, embracing every kind of diversity except one: ideological diversity. Too often, we liberals embrace people who don't look like us, but only if they think like us.

George Yancey, a black evangelical who is a sociology professor, once told me: "Outside of academia I faced more problems as a black. But inside academia I face more problems as a Christian, and it is not even close."

For those of us who believe that liberalism should model inclusivity and tolerance, even in intolerant times, even to the exclusive and the intolerant, it was disappointing to see Cambridge University this year rescind a fellowship for Jordan Peterson, the Canadian best-selling author who says he will not use people's preferred pronouns. Debate him — that's how to win the argument — rather than trying to squelch him.

Liberals sometimes howl when this newspaper brings in a conservative columnist or publishes a sharply conservative Op-Ed. We progressives should have the intellectual curiosity to grapple with disagreeable views.

This column will appall many of my regular readers, and I recognize that all of this is easy for me to say as a straight white man. But the road to progress comes from winning the public debate — and if you want to *win* an argument, you have to *allow* the argument.

I fear that Trump has made it easy for liberal activists to demonize conservatives and evangelicals. People are complicated at every end of the spectrum, and it's as wrong to stereotype conservatives or evangelicals as it is to stereotype someone on the basis of race, immigration status or sex.

Campus activists at their best are the nation's conscience. But sometimes their passion, particularly in a liberal cocoon, becomes blinding.

That's what happened at Oberlin College, long a center of activism, where students once protested the dining hall for cultural appropriation for offering poor sushi. Now Oberlin is in the news again because of a development in an episode that began the day after Trump was elected.

A black student shoplifted wine from a store called Gibson's Bakery, and a white store clerk ran after him and attempted to grab him. The police report shows that when officers arrived, the clerk was on the ground getting punched and kicked by several students.

Seeing this incident through the lens of racial oppression, students denounced Gibson's and distributed fliers claiming, "This is a RACIST establishment." A university dean attended the protest, and the university responded to student fervor by suspending purchases from the bakery.

I understand that militancy emerges from deep frustration at inequities. But it turned out that the operative narrative here was not oppression but simply shoplifting. The student who stole the wine pleaded guilty to theft and acknowledged that there was no racial profiling involved.

Gibson's this month won $44 million in actual and punitive damages from Oberlin, apparently reflecting the jury's exasperation with the university for enabling a student mob.

At a time when there is so much actual injustice around us — third-rate schools, mass incarceration, immigrants dehumanized — it's bizarre to see student activists inflamed by sushi or valorizing a shoplifter. This is kneejerk liberalism that backfires and damages its own cause.

As a liberal, I mostly write about conservative blind spots. But on the left as well as the right, we can get so caught up in our narratives that we lose perspective; nobody has a monopoly on truth. If Trump turns progressives into intolerant agents of incivility, then we have lost our souls.

As we head toward elections with monumental consequences, polarization will increase and mutual fear will surge. The challenge will be to stand up for our values — without betraying them.

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