[Cite as *Gerace v. Biotheranostics, Inc.*, 2022-Ohio-302.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JAMES GERACE, :

Plaintiff-Appellant, :

No. 110440

v. :

BIOTHERANOSTICS, INC., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 3, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-939288

Appearances:

Polk Kabat, LLP, Shannon J. Polk, Mark F. Humenik, and Daniel M. Connell, *for appellant*.

Jackson Lewis P.C., Vincent J. Tersigni, and Donald G. Slezak, *for appellees*.

LISA B. FORBES, J.:

{¶ 1} Plaintiff James Gerace ("Gerace") appeals from the trial court's judgment dismissing his complaint against his former employer Biotheranostics, Inc., and three of the company's executives: Lisa Whitmyer, Vice President of

Marketing; Don Hardison, Chief Executive Officer; and Matt Sargent, Chief Commercial Officer (collectively "Defendants"). After reviewing the facts of the case and pertinent law, we affirm the lower court's judgment.

I. Facts and Procedural History

{¶ 2} This case concerns, in part, whether California law can properly govern Gerace's claims in an Ohio state court. Gerace filed his complaint against the Defendants in the Cuyahoga County Common Pleas Court setting forth three claims: California unfair business/trade practices; wrongful discharge in violation of public policy under California law; and wrongful discharge in violation of Ohio public policy.[1] The gist of all three claims is that Defendants improperly terminated Gerace's employment.

{¶ 3} A brief summary of the parties and places is a logical place to start. Viewing the allegations in a light most favorable to the plaintiff, as we must when reviewing a lower court's ruling on a motion to dismiss, the following information is taken from Gerace's complaint. Gerace is a resident of Ohio, who lived and worked in Ohio at all times pertinent to this case. Biotheranostics is a Delaware corporation with a principal place of business in California and regularly conducts business in Ohio. Whitmyer is a resident of Ohio, Hardison is a resident of California, and Sargent is a resident of Arizona.

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[1] Claims one and two are against Biotheranostics and Doe/XYZ Corporation Defendants. Claim three is against all Defendants.

{¶ 4} In January 2016, Biotheranostics hired Gerace to market its "most significant product, Breast Cancer Index ["BCI"], to hospitals and oncologists specializing in the treatment of breast cancer." The National Comprehensive Cancer Network ("NCCN") is a nonprofit organization "of 28 leading cancer centers devoted to patient care, research, and education." During the 5th Annual Cleveland Breast Cancer Summit, which was held in late August 2019, Dr. Jame Abraham ("Dr. Abraham"), who was the director of the Breast Cancer Oncology Program at the Cleveland Clinic, as well as an NCCN panelist, "spoke favorably about Biotheranostics's [BCI], giving the impression that the NCCN had approved, or would likely approve [BCI] for inclusion in its guidelines."

{¶ 5} During a break at the summit, Gerace thanked Dr. Abraham "for his positive comments about" BCI, and Dr. Abraham "became extremely upset, most likely as a result of a concern that he had violated NCCN's" policies by appearing to unofficially endorse BCI. Dr. Abraham communicated to the Defendants his disapproval of Gerace, ultimately stating that he was "done with Biotheranostics." On August 27, 2019, Biotheranostics terminated Gerace's employment. The next day, Dr. Abraham communicated to Defendants that he "could work with Biotheranostics after all."

{¶ 6} On March 22, 2021, the court granted Defendants' motion to dismiss, stating in part as follows:

> Count one of plaintiff's complaint, California unfair business/trade practices, pursuant to Cal. Bus. & Prof. Code § 17000 et seq. and count [two] wrongful discharge in violation of public policy under Cal. Penal

> Code § 641.3 and Cal. Bus. & Prof. Code §17200 against Defendants * * * are dismissed as the operative facts alleged in the complaint occurred in Ohio, and therefore, Ohio law governs, and California's presumption against the extraterritorial application of state law preclude the claims.
>
> Count three of plaintiff's complaint, wrongful discharge in violation of Ohio public policy * * * is dismissed as plaintiff failed to establish the clarity and jeopardy elements required to succeed on a wrongful discharge in violation of public policy claim.

{¶ 7} It is from this order that Gerace appeals.

II. Law and Analysis

A. Civ.R. 12(B)(6) Motion to Dismiss

{¶ 8} We review rulings on Civ.R. 12(B)(6) motions to dismiss under a de novo standard. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. * * * Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party." *NorthPoint Props. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶ 11 (8th Dist.). "For a trial court to grant a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to relief.'" *Graham v. Lakewood*, 2018-Ohio-1850, 113 N.E.3d 44, ¶ 47 (8th Dist.), quoting *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2011-Ohio-6167, 967 N.E.2d 1249, ¶ 3 (8th Dist.).

{¶ 9} For ease of discussion, we address Gerace's assignments of error out of order.

B. California's Presumption Against the Extraterritorial Application of California Law Does Not Apply

{¶ 10} In Gerace's second assignment of error, he argues that the "trial court erred * * * by determining * * * that California's presumption against the extraterritorial application of state law preclude[s] the claims." Upon review, we conclude that we need not look to California law because Ohio law governs the claims in the instant case.

{¶ 11} First, we note that appellate courts review a trial court's choice-of-law determination under a de novo standard. *Holliday v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86069, 2006-Ohio-284, ¶ 14. The Ohio Supreme Court has held that "[w]hen confronted with a choice-of-law issue in a tort action * * * a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit." *Morgan v. Biro Mfg. Co.*, 15 Ohio St.3d 339, 342, 474 N.E.2d 286 (1984).

{¶ 12} More specifically, Ohio courts have held that in a wrongful termination case, the place where the plaintiff lost his or her employment is the place of the injury. *See Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 04AP-941, 2005-Ohio-6367, ¶ 27 (applying *Morgan* to a wrongful termination case and holding that New Jersey law applied when the plaintiff resided, worked, and was terminated in New Jersey); *see also Walker v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 16AP-894, 2018-Ohio-1810, ¶ 20 ("Because a plaintiff's injury in a wrongful termination claim is the loss of employment, the place where the plaintiff lives and works is the place of injury.").

{¶ 13} Turning to the facts of the case at hand, Gerace lived and worked in the same state at the time his employment was terminated. This state is Ohio, and a presumption arises that Ohio law applies to his wrongful termination claims. For Gerace to overcome the presumption that Ohio law applies to his case, he must show that "another jurisdiction has a more significant relationship to the lawsuit." *Morgan* at 342. Courts take several factors, including the following, into consideration when determining whether a party made this showing:

> (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; * * *. All of these factors are to be evaluated according to their relative importance to the case.

Id.

{¶ 14} In the case at hand, the place of injury — i.e., Gerace's termination — is Ohio. The conduct that Gerace alleges caused his termination — i.e., Dr. Abraham's threats — took place in Ohio. Gerace also alleges that "[c]ritical decisions," such as "[t]he decision to terminate [him were] made in California by Biotheranostics executives * * *." Gerace lived and worked in Ohio. Biotheranostics is a Delaware corporation with a principal place of business in California and regularly conducts business in Ohio. Whitmyer is a resident of Ohio, Hardison is a resident of California, and Sargent is a resident of Arizona. According to Gerace's complaint, the Defendants "effectuat[ed] the termination of Plaintiff's Ohio-based employment," which tips the scales in favor of Ohio under the fourth factor.

{¶ 15} Upon review of Gerace's complaint, we conclude that Ohio has the most significant relationship to this lawsuit. Keeping in mind that Gerace's termination is the injury, the conduct leading up to the termination and the termination itself dominate this fact pattern. It is undisputed that these actions took place in Ohio. "[T]he state in which both the conduct and the injury occur has the dominant interest in regulating that conduct, determining whether is it tortious in character, and determining whether the interest is entitled to legal protection." *Kurent v. Farmers Ins. of Columbus,* 62 Ohio St.3d 242, 246, 581 N.E.2d 533 (1991). Gerace's second assignment of error is overruled.

C. The Operative Facts Occurred in Ohio

{¶ 16} In his first assignment of error, Gerace argues that the trial court erred by dismissing his first two claims, specifically "by making impermissible factual findings that the operative facts alleged in the Complaint occurred in Ohio and not in California as specifically alleged by Plaintiff."

{¶ 17} In the first claim of Gerace's complaint, he alleges that Defendants violated two California code sections. First, Cal. Bus. & Prof. Code 17200, which states in pertinent part that "unfair competition shall mean and include any lawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Second, California Penal Code 641.3, which states that

> [a]ny employee who solicits, accepts, or agrees to accept money or any thing of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who

> offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.

{¶ 18} In the second claim of Gerace's complaint, he alleges that Defendants' termination of his employment "was unlawful, unfair, fraudulent, immoral, unethical, oppressive, and anti-competitive and frustrated the public policy of California, including, but not limited to, California's commercial bribery statute, Cal. Penal Code 641.3 and Cal. Bus. & Prof. Code 17200." In other words, Gerace's first and second claims allege the same facts and cite the same law.

{¶ 19} It is undisputed that the trial court found that "the operative facts alleged in the complaint occurred in Ohio * * *." Upon review of Gerace's complaint, we agree with the trial court. All of the facts in the complaint occurred in Ohio, with the exception of the following allegations: "Critical decisions resulting in Biotheranostics' 'plan' to bow to Dr. Abraham's demands and terminate Gerace were made in California." It is unclear from Gerace's complaint what those "critical decisions" were, although the only references to actions that took place in California concern communicating, via email or telephone, with people located in California. For example, Gerace alleges that "[i]t is believed than [an] email was shared with Biotheranostics' in-house General Counsel, Karla Kelly, in California, and other California-based members of Biotheranostics management team, including Defendant Hardison." Gerace also alleged that the "decision to terminate" was made in California.

{¶ 20} In his appellate brief, Gerace argues that the "trial court ultimately (but wrongly) accepted as true Defendants' characterizations of what allegedly happened, not Plaintiff's version of events." To clarify our standard of review, "we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party." Applying this test to the facts alleged in Gerace's complaint, we find that Gerace failed to plead "liability-creating conduct" that occurred in California, because, as explained above, "the place where the plaintiff lives and works is the place of the injury." *Walker*, 10th Dist. Franklin No. 16AP-894, 2018-Ohio-1810, at ¶ 20. This is the most significant factor in considering which state's law governs a wrongful termination claim. *Id*. We must not, and we did not, look to anything but Gerace's complaint to reach this conclusion.

{¶ 21} Upon review of Gerace's complaint, we cannot say that the trial court impermissibly found that the operative facts in the complaint occurred in Ohio. Accordingly, Gerace's first assignment of error is overruled.

D. Motion to Dismiss or Motion for Summary Judgment?

{¶ 22} In his third assignment of error, Gerace argues that the "trial court erred as a matter of law by relying on matters outside the pleadings and improperly converting a motion to dismiss into a motion for summary judgment * * *."

{¶ 23} Pursuant to Civ.R. 12(B), "[w]hen a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading

and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56."

{¶ 24} In the case at hand, Defendants attached the following exhibits to their motion to dismiss: A) the complaint in *Gerace v. Cleveland Clinic Found.*, Cuyahoga C.P. No. CV-19-926516;[2] B) documents purporting to relate to Dr. Abraham's biographical information; C) documents purporting to relate to NCCN's guidelines; D) the complaint in *Gerace v. Biotheranostics*, Cal. S.C. No. 37-2019-00065891-CU-WT-CTL (Sept. 18, 2020);[3] and E) the court's journal granting the defendants' motion to dismiss in *Gerace*.

{¶ 25} We need not decide whether these exhibits were properly or improperly attached to the motion to dismiss. As stated earlier in this opinion, a ruling on the motion to dismiss could be, and was, properly rendered by viewing the complaint alone. Furthermore, there is nothing in the record to indicate that the trial court converted Defendants' motion to dismiss into a motion for summary judgment.

{¶ 26} Accordingly, Gerace's third assignment of error is overruled.

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[2] Gerace filed a complaint in the Cuyahoga County Common Pleas Court against the Cleveland Clinic Foundation and Dr. Abraham based on the same allegations as in the case at hand. This case is still pending as of the time this opinion was released.

[3] Gerace filed a complaint in a California trial court against the same defendants and alleging the same facts as in the case at hand. This case was dismissed prior to the date the complaint in the instant case was filed.

E. Motion to Strike

{¶ 27} In his fourth assignment of error, Gerace argues that the "trial court committed prejudicial error by presumptively denying [his] motion to strike [attachments] to Defendants' * * * motion to dismiss * * *."

{¶ 28} Gerace filed a motion to strike the above-referenced attachments, and our review of the docket shows that the trial court did not rule on this motion. Ohio courts consistently hold that when a trial court fails to rule on a pending motion at the time of final judgment, appellate courts presume the motion was implicitly denied. *See, e.g., Siemientowski v. State Farm Ins. Co.*, 8th Dist. Cuyahoga No. 85323, 2005-Ohio-4295, ¶ 39.

{¶ 29} Upon review, we cannot say that the implicit denial of Gerace's motion to strike Defendants' attachments was erroneous, because there is no evidence in the record that the trial court relied on these attachments in rendering its decision in this case. Therefore, Gerace's fourth assignment of error is overruled.

F. Wrongful Discharge in Violation of Ohio Public Policy

{¶ 30} In his fifth and final assignment of error, Gerace argues that the "trial court erred as a matter of law by dismissing [his claim] for wrongful discharge in violation of Ohio public policy."

> The common-law doctrine of employment at will generally governs employment relationships in Ohio. Under this doctrine, a general or indefinite hiring is terminable at the will of either the employee or the employer; thus, a discharge without cause does not give rise to an action for damages. * * * In response to perceived abuses of the at-will principle, a number of states created an exception that permitted a discharged employee to assert a tort cause of action for wrongful discharge in violation of a fundamental public policy. * * * [T]his court

> followed the national trend in *Greeley* [*v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990)] and recognized a cause of action in tort for wrongful discharge in violation of public policy.

Wiles v. Medina Auto Parts, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, ¶ 5.

{¶ 31} In *Wiles* at ¶ 7-10, the Ohio Supreme Court listed the four elements of a claim for wrongful discharge in violation of Ohio public policy:

> 1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
>
> 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
>
> 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
>
> 4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

{¶ 32} In the case at hand, the trial court found that Gerace "failed to establish the clarity and jeopardy elements" of the tort. We recognize that Gerace need not "establish" anything to successfully oppose a motion to dismiss. Nonetheless, we are able to review this assignment of error under the proper standard for reviewing the court's decision to grant a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted; accepting all factual allegations of the complaint as true and drawing all reasonable inferences in favor of the nonmoving party, it appears from the face of the complaint that the plaintiff can prove no set of facts entitling him to relief.

{¶ 33} Additionally, the *Wiles* Court established "that the clarity and jeopardy elements were questions of law to be decided by the court while factual issues relating to the causation and overriding justification elements were generally for the trier of fact to resolve." *Wiles*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, at ¶ 11.

{¶ 34} Upon review, we find that Gerace has met the clarity element of the *Wiles* test; however, he failed to establish the jeopardy element, which posits that the facts at issue in a particular case would "jeopardize" the noted public policies.

{¶ 35} In Gerace's complaint, he refers to "well-recognized public policies in the State of Ohio, including * * * Ohio's common law prohibiting tortious interference with an employment relationship and Ohio's statute prohibiting deceptive trade practices." He further alleges that "[t]he actions of Defendants in terminating Gerace's employment [and] participating in, acquiescing to and/or failing to prevent [his] termination * * * jeopardized the aforementioned public policies." We note that this allegation is a legal conclusion. "[U]nsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." *State ex rel. Fain v. Summit Cty. Adult Prob. Dept.*, 71 Ohio St.3d 658, 659, 646 N.E.2d 1113 (1995).

1. Prohibiting Tortious Interference with an Employment Relationship as a Public Policy

{¶ 36} The elements of a tortious interference with an employment relationship are as follows: "(1) the existence of an employment relationship between plaintiff and the employer; (2) the defendant was aware of this relationship;

(3) the defendant intentionally interfered with this relationship; and (4) the plaintiff was injured as a proximate result of the defendant's acts." *Hester v. Case W. Res. Univ.*, 2017-Ohio-103, 80 N.E.3d 1186, ¶ 37 (8th Dist.).

{¶ 37} The tort of interfering with an employment relationship manifests a sufficiently clear public policy to satisfy the first element of a wrongful discharge in violation of public policy claim. *See Vitale v. Modern Tool & Die Co.*, 8th Dist. Cuyahoga No. 76247, 2000 Ohio App. LEXIS 2743 (June 22, 2000) ("Common law has established a public policy against tortious interference with contract * * *."). We find that this satisfies the clarity element of the *Wiles* test.

{¶ 38} However, we further find that the facts of the case at hand do not jeopardize Ohio's public policy against tortious interference with an employment relationship. This court has held that "the employer cannot be a defendant in this type of claim * * *." *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶ 20.

> [T]here are three players in a tortious interference claim: the plaintiff, the defendant, and a third-party employer. In this instant case, however, appellant alleges that other employees interfered with her work, making the defendant in her case, her employer. This is not the type of situation that tortious interference with employment relationship is designed to protect.

Id. at ¶ 19.

{¶ 39} In following *Lennon*, we conclude that the facts alleged in the complaint filed in the case at hand do not jeopardize the public policy against tortious interference with employment relationships. Gerace sued his employer. He

did not sue Dr. Abraham or the Cleveland Clinic in this case. Gerace's employer and Defendants are one in the same. It is also notable that Ohio also has a clear public policy in favor of at-will employment. *See Greeley*, 49 Ohio St.3d at 234, 551 N.E.2d 981 (holding that the employment-at-will doctrine "permits termination of employment for no cause or for 'any cause' which is not unlawful, at any time and regardless of motive").

{¶ 40} Terminating Gerace under the circumstances in the case at hand did not jeopardize Ohio's public policy against tortious interference and cannot be the basis for wrongful termination in violation of Ohio public policy.

2. Prohibiting Deceptive Trade Practices as a Public Policy

{¶ 41} R.C. 4165.02 defines acts constituting deceptive trade practices and section (A)(10) states that it is a deceptive trade practice when a "person * * * in the course of the person's business, vocation, or occupation, * * * [d]isparages the good, services, or business of another by false representation of fact * * *." By enactment of this statute, the legislature expressed a public policy against deceptive trade practices. *See Greeley* at 234 ("[P]ublic policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute.").

{¶ 42} Gerace has alleged no acts or omissions in his complaint by any of the Defendants that could be seen as disparaging anything by false representation of fact. The factual allegations in the complaint center almost exclusively on Gerace and Dr. Abraham. Defendants' only act, as alleged in Gerace's complaint, was to

terminate Gerace's employment. There are simply no allegations that Defendants engaged in deceptive trade practices in violation of R.C. 4165.02(A)(1) or that Defendants violated the public policy against deceptive trade practices when they fired Gerace; therefore, Gerace's complaint fails to allege facts that jeopardize Ohio's public policy against deceptive trade practices.

{¶ 43} Accordingly, the court did not err by dismissing this claim against Defendants and Gerace's fifth and final assignment of error is overruled.

G. Conclusion

{¶ 44} The trial court did not err by dismissing Gerace's first two claims because they are based on California law and Ohio law controls the case at hand. Furthermore, the trial court did not err by dismissing Gerace's third claim because, looking at the allegations in a light most favorable to Gerace, he failed to allege circumstances under which Defendants jeopardized a clear Ohio public policy.

{¶ 45} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LISA B. FORBES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
EMANUELLA D. GROVES, J., CONCUR

[Cite as *Shipp v. Norton Outdoor Advertising, Inc.*, 2022-Ohio-216.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JERRY L. SHIPP,	:	APPEAL NO. C-210150 TRIAL NO. A-1802632
and	:	
CYNTHIA SHIPP,	:	*O P I N I O N.*
Plaintiffs-Appellants,	:	
	:	
vs.	:	
NORTON OUTDOOR ADVERTISING, INC.,	:	
	:	
and	:	
LAL PROPERTIES, LLC,		
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: January 28, 2022

Phillips Law Firm, Inc., *John H. Phillips* and *Kyle E. Hackett,* for Plaintiffs-Appellants,

Robbins, Kelly, Patterson & Tucker, LPA, Michael A. Galasso and *Robert Ernst,* for Defendant-Appellee Norton Outdoor Advertising, Inc.,

Cors & Bassett, LLC, and *Michael L. Gay*, for Defendant-Appellee LAL Properties, LLC.

CROUSE, Presiding Judge.

{¶1} Plaintiffs-appellants Jerry and Cynthia Shipp (the "Shipps") appeal the judgment of the Hamilton County Court of Common Pleas, raising a sole assignment of error for our review. The Shipps argue the trial court abused its discretion when it denied the Shipps' motion for class certification. For the following reasons, we hold that the trial court did not abuse its discretion in denying class certification, and we affirm its judgment.

Factual and Procedural Background

{¶2} At the center of this case are two, 14-feet-tall by 48-feet-wide LED-billboards located at 130 West Ross Avenue in the Village of St. Bernard, Cincinnati, Ohio. The billboards are positioned to face Interstate 75. They are owned by Norton Outdoor Advertising, Inc., ("Norton") while LAL Properties, LLC, ("LAL Properties") owns the land on which the billboards sit. The Shipps live on West Ross Avenue and allege that the lights emitted from the color-changing billboards are a nuisance to them and their neighbors. Specially, they note that the messages on the billboards change every eight seconds, resulting in frequent flashes of light in the neighborhood.

{¶3} Norton has maintained billboards on the site since the 1970s, but the controversy was not sparked until 2018 when Norton converted the traditional billboards to variable message LED-billboards.

{¶4} Shortly after the new billboards began operating, the Shipps filed a class-action complaint and jury demand against Norton, LAL Properties, Flora

Byrnes,[1] Leesman Lighting, LLC,[2] and the Village of St. Bernard ("St. Bernard"). The complaint brought claims for nuisance, trespass, and negligence against Norton, LAL Properties, Byrnes, and Leesman Lighting, LLC. The complaint also alleged violations of procedural and substantive due process under both the United States and Ohio Constitutions against St. Bernard.

{¶5} On June 22, 2018, the Shipps voluntarily dismissed Leesman Lighting, LLC. On June 28, 2018, St. Bernard removed the case to the United States District Court for the Southern District of Ohio on the basis of federal-question jurisdiction. Once there, the Shipps voluntarily dismissed St. Bernard, along with their trespass claims. After unsuccessful attempts to settle the matter in federal court, the case was remanded back to the Hamilton County Court of Common Pleas.

{¶6} Once back in state court, the remaining parties again attempted to settle, but were not successful. Following that attempt, the Shipps moved for class certification on October 16, 2019. They sought to certify the following class:

> All owners, renters, and occupants of residential property located within a Five Hundred (500) foot radius of Norton Outdoor Advertising, Inc.'s Two Electronic, Variable Message Billboards located at 130 West Ross Avenue, Village of St. Bernard from January 17, 2018, onward.

{¶7} The trial court denied the Shipps' motion to certify, finding that the proposed class failed to satisfy Civ.R. 23(A) in that it lacked numerosity, typicality,

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[1] Byrnes was alleged in the complaint to own a parcel of property also located at 130 West Ross Avenue, but she is no longer a party to the action.

[2] Leesman Lighting, LLC, is a tenant of LAL Properties and operates a business with its principal place of business at 130 West Ross Avenue.

commonality, and adequacy of representation. Finding none of these prerequisites to be met, the court opted not to assess the proposed class under Civ.R. 23(B).

The proposed class lacks numerosity

{¶8} A trial court's decision whether to grant class certification is reviewed for an abuse of discretion. *Robinson v. Johnston Coca-Cola Bottling Group, Inc.*, 153 Ohio App.3d 764, 2003-Ohio-4417, 796 N.E.2d 1, ¶ 4 (1st Dist.), citing *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), first paragraph of the syllabus. It is not an abuse of discretion where a reviewing court may have decided a class-certification issue differently than a trial court. *Robinson* at ¶ 5 (explaining that a trial court's mandate to articulate its findings when deciding whether to certify a class "discourages reversal on the ground that the appellate judges might have decided differently had they been the original decision makers."). Of course, "the court's discretion is not unlimited." *Id.* at ¶ 4.

{¶9} Pursuant to Civ.R. 23, the trial court must find seven requirements to be satisfied to grant class certification:

> (1) an identifiable class must exist and the definition of the class must be unambiguous;
>
> (2) the named representatives must be members of the class;
>
> (3) the class must be so numerous that joinder of all members is impractical;
>
> (4) there must be questions of law or fact common to the class;
>
> (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class;

(6) the representative parties must fairly and adequately protect the interests of the class; and

(7) one of the three Civ.R. 23(B) requirements must be satisfied.

Id. at ¶ 2, citing *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, citing *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091 (1988). If a party fails to satisfy even one of the requirements, class certification is not proper. *Id.*

{¶10} Similarly, when reviewing a denial of class certification, we do not need to address each finding made by the trial court. Rather, if we find that the trial court acted within its discretion as to even a single requirement, we may affirm the denial of class certification. *See Brooks v. Personal Serv. Ins. Co.*, 1st Dist. Hamilton No. C-980116, 1998 Ohio App. LEXIS 4923, *7 (Oct. 23, 1998) ("Because we hold that there was no abuse of discretion with respect to the application of the numerosity requirement, we do not address the trial court's findings relating to commonality, typicality, or superiority, and we affirm the judgment of the trial court."); *Adair v. Dayton Walther Corp.*, 2d Dist. Montgomery No. 13429, 1993 Ohio App. LEXIS 573, *2 (Feb. 4, 1993) ("We are not required to pass specifically on each of [the class action] tests if, with respect to but one, we affirm the judgment of the trial court."); *MidFirst Bank v. Biller*, 3d Dist. Seneca No. 13-10-13, 2010-Ohio-6067, ¶ 28 (finding typicality and commonality to be lacking and noting that "[b]ecause all seven requirements must be met in order to grant class action certification, it is not necessary to examine the other Civ.R. 23 requirements").

{¶11} In this case, we hold that the trial court did not abuse its discretion when it found that the numerosity requirement was lacking. Civ.R. 23(A)(1) requires

a class to be "so numerous that joinder of all members is impracticable." Numerosity must be determined based on the facts of each case, though Ohio courts have provided approximate ranges to guide the analysis. *Warner* at 97. In *Warner*, the Ohio Supreme Court noted that greater than 40 members likely satisfies numerosity, but less than 25 likely does not, and that a gray area exists between 25 and 40 members. *Id.*, quoting Miller, *An Overview of Federal Class Actions: Past, Present and Future* at 45 (2 Ed.1977). Moreover, " 'impracticability of joinder must be positively shown, and cannot be speculative.' " *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir.2012), quoting *Golden v. City of Columbus*, 404 F.3d 950, 966 (6th Cir.2005).

{¶12} The Shipps proposed class includes 17 "residential structures." Fifteen of those structures are single-family homes, while two are multi-family residences. Altogether, that equates to 23 residences. The Shipps argue that by assuming two occupants per residence, their proposed class has at least 46 members.

{¶13} While the Shipps correctly note that we may draw reasonable inferences in determining class size, the only support they provide for their proposition that two people per residence is a suitable approximation is a reference to the 2010 United States Census which, they claim, found the average household size in St. Bernard to be 2.2 people. Given that the proposed class includes only 23 residences within a 500 foot radius of the signs, it was not unreasonable for the trial court to refuse to speculate as to the number of people per household, and to find that it would not be difficult or inconvenient to identify and join all members of the proposed class.

{¶14} The trial court found, "[p]laintiffs actually defeat their own argument by agreeing that the proposed class is easily identified and does not exceed seventeen parcels of property, involving owners or tenants of those seventeen parcels. While this limits the number and identifiability of potential plaintiffs, it likewise makes it reasonable for any owner/tenant who feels they have a compensable claim to join the pending litigation."

{¶15} The Shipps have not "positively shown" that joinder is impracticable. *See Young*, 693 F.3d at 541. Rather, they have broadly alleged that the modest incomes of some of the proposed class members may make joinder less practicable, due to the high cost of individual lawsuits and the low recovery potential. This speculation is not enough to satisfy Civ.R. 23(A)(1), particularly where the number of proposed class members is already low. *See id.*

{¶16} Based on the evidence before it, the trial court did not abuse its discretion in finding that the proposed class did not meet the Civ.R. 23(A)(1) numerosity requirement. We overrule the assignment of error and affirm the decision of the trial court, and do not address the other requirements that the trial court found to be lacking.

Judgment affirmed.

WINKLER and **BOCK JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion

[Cite as *Jones v. Sharefax Credit Union, Inc.*, 2022-Ohio-176.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

EILEEN JONES, as substituted Plaintiff-Appellant, for BRADLEY ENSINGER,	:	APPEAL NO. C-210260 TRIAL NO. A-1802940
and	:	
LYNN M. MCGOWAN-RUSSELL,	:	*O P I N I O N.*
Plaintiff,	:	
vs.	:	
SHAREFAX CREDIT UNION, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: January 26, 2022

Frederick & Berler, L.L.C., Ronald I. Frederick, Michael L. Berler and *Stephen A. Bailey,* for Plaintiff-Appellant,

Bricker & Eckler, L.L.P., and *Daniel C. Gibson*, for Defendant-Appellee.

CROUSE, Presiding Judge.

{¶1} Plaintiff-appellant Eileen Jones, as substituted for Bradley Ensinger,[1] has appealed from the trial court's judgment denying class-action certification. Jones argues: (1) the trial court erred in failing to perform a rigorous analysis of the Civ.R. 23 class-action-certification requirements; (2) the trial court abused its discretion to the extent it denied class certification on the basis of defendant-appellee Sharefax Credit Union, Inc.'s, ("Sharefax") mootness argument; and (3) assuming arguendo that the trial court did conduct a rigorous analysis of the Civ.R. 23 requirements, its decision denying class certification was an abuse of discretion.

Factual Background

{¶2} Plaintiffs Bradley Ensinger and Lynn M. McGowan-Russell[2] purchased vehicles in 2011 and 2015, respectively, from local automotive dealerships. They financed their purchases through separate retail installment sales contracts, which were assigned to Sharefax. Plaintiffs defaulted on their loans and Sharefax repossessed both vehicles in December 2017. After repossession, Sharefax sent plaintiffs notices of sale and notices of deficiency.

{¶3} On June 13, 2018, plaintiffs filed a class-action suit, contending, inter alia, that Sharefax engaged in commercially unreasonable sales and sent them deficient notices of sale and deficiency in violation of the Retail Installment Sales Act ("RISA") and the Ohio Uniform Commercial Code (OUCC").

[1] Per Civ.R. 25, Eileen Jones was substituted for plaintiff Bradley Ensinger due to Ensinger's death during the pendency of the case.
[2] McGowan-Russell did not appeal the trial court's judgment.

{¶4} Plaintiffs alleged that Sharefax's notices of sale violated RISA because the notices did not state the amount, by itemization, required to cure the default. *See* R.C. 1317.12. They claimed the notices of sale also violated the OUCC because the notices did not advise them they could attend the sale and bring bidders. *See* R.C. 1309.614. Plaintiffs alleged that the notices of deficiency violated the OUCC because the notices failed to explain the calculation of the deficiency in the specific order required by R.C. 1309.616(C). Finally, plaintiffs alleged that the sale of the vehicles was commercially unreasonable because Sharefax failed to notify them of their right to attend the sale and bring bidders, and then sold the vehicles for substantially less than the minimum bid price stated in the notices of sale. *See* R.C. 1309.610.

{¶5} Plaintiffs claimed that Sharefax had issued the same defective "form" notices and engaged in commercially unreasonable sales in other repossession cases involving retail installment sales contracts. Therefore, they requested class-action certification of three classes of debtors similarly situated: the RISA class, the notice-of-sale class, and the notice-of-deficiency class.

{¶6} Plaintiffs also requested the following forms of relief: declaratory judgment, actual damages, an injunction prohibiting Sharefax from collecting any deficiency and from continuing its improper practices, statutory damages, restitution/disgorgement of fees, costs and deficiency balances unlawfully collected, an order requiring removal of adverse credit information reported by Sharefax to outside credit reporting agencies, interest, and attorney fees.

{¶7} Several of the claims for relief were settled prior to the class-certification hearing. Through discovery, it became apparent plaintiffs had not paid any repossession fees or deficiency balances. On October 29, 2019, Sharefax

submitted an "Automated Universal Data" form to the credit reporting agencies requesting that all negative reporting regarding plaintiffs' credit be removed. On November 1, 2019, Sharefax filed notices waiving its right to collect any deficiencies owed by plaintiffs. Sharefax also sent two checks to plaintiffs on October 29, 2019—one to Ensinger for $5,500 and one to McGowan-Russell for $9,500—but plaintiffs returned the checks without cashing them. Sharefax filed for summary judgment on the ground of mootness, arguing they had provided complete relief to plaintiffs. The motion was denied by a judge who retired from the bench shortly thereafter.

{¶8} On November 11, 2019, plaintiffs filed their motion for class certification. The newly-elected judge held a hearing and denied certification without explanation by a written entry filed March 23, 2021.

Mootness

{¶9} Before we address Jones's assignments of error, we must address the mootness issue raised by Sharefax in its motion for summary judgment, in opposition to class-action certification, and on appeal. It argues the case is moot because it has provided complete relief to plaintiffs.

{¶10} Mootness concerns subject-matter jurisdiction and may be raised by an appellee on appeal without the necessity of a cross-appeal. *See WBCMT 2007-C33 Office 7870, LLC v. Breakwater Equity Partners, LLC*, 2019-Ohio-3935, 133 N.E.3d 607, ¶ 39 (1st Dist.), citing *Paulus v. Beck Energy Corp.*, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 29 (7th Dist.) (matters of subject-matter jurisdiction may be raised for the first time on appeal); *JG City LLC v. State Bd. of Pharmacy*, 10th Dist. Franklin No. 21AP-38, 2021-Ohio-4624 ("the filing of a cross-appeal is not a prerequisite to

challenging a court's subject-matter jurisdiction, as subject-matter jurisdiction cannot be waived and may be raised at any time").

{¶11} "The subject-matter jurisdiction of common pleas courts is limited to justiciable matters." *City of Cincinnati v. Fourth Natl. Realty, LLC*, 1st Dist. Hamilton Nos. C-180156 and C-180174, 2019-Ohio-1868, ¶ 25. "A justiciable matter indicates the existence of an actual controversy, a genuine dispute between adverse parties." *Id.* Where the claims of the named plaintiffs are moot, the certification question becomes moot as well. *Castillo v. Nationwide Fin. Servs.*, 10th Dist. Franklin No. 02AP-1393, 2003-Ohio-4766, ¶ 26.

{¶12} Jones argues that if the trial court considered the mootness question at the class-certification stage, that was improper because the question was already decided by the previous trial judge when he denied Sharefax's motion for summary judgment. However, we note that the trial court did not contradict the previous judge's order denying summary judgment because the court specifically did not hold that the case was moot. The court simply held, without explanation, that the motion for class certification was denied and allowed the case of the individual plaintiffs to proceed. Nevertheless, the trial court was free to revisit the issue of mootness. "[I]t is well settled that the denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal." *Meece v. Am. & Foreign Ins. Co.*, 1st Dist. Hamilton Nos. C-030088 and C-020818, 2003-Ohio-6504, ¶ 16. A trial court is free to "reconsider an interlocutory order entered in the same case." *Murphy v. Murphy*, 1st Dist. Hamilton No. C-130229, 2014-Ohio-656, ¶ 20. Therefore, the prior judge's denial of summary judgment on the basis of

mootness did not preclude the trial court from considering the mootness question at the class-certification stage.

{¶13} Next, Jones argues that (1) complete relief was not provided because Ensinger rejected the check sent by Sharefax, and (2) the potential recovery of the class representative incentive payment gives Jones a continuing interest in the litigation. We find that Jones's rejection of the check is dispositive of the issue, so we do not address whether the potential recovery of the class representative incentive payment provides Jones with the requisite interest in the litigation.

{¶14} Jones does not claim the amount of the check was inadequate. Rather, she argues the rejection of the check equated to a rejection of Sharefax's offer to settle the case.

{¶15} This issue was addressed by the United States Supreme Court in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016). In that case, the plaintiff filed a class-action complaint. Prior to the agreed-upon deadline for the plaintiff to file a motion for class certification, the defendant served plaintiff with an offer of judgment pursuant to Fed.Civ.R. 68. *Id.* at 157-158. The plaintiff let the offer lapse by failing to respond within the time required by the rule. *Id.* at 158. The defendant argued that despite the plaintiff's failure to accept the offer, the offer of judgment had satisfied the plaintiff's claims, and therefore, the claims were moot. *Id.*

{¶16} The *Campbell-Ewald* majority disagreed and adopted Justice Kagan's dissent in *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013), which stated that "an unaccepted offer of judgment cannot moot a case." *Campbell-Ewald* at 162 ("We now adopt Justice Kagan's analysis, as has

every Court of Appeals ruling on the issue post *Genesis Health Care*."). In *Genesis*, the Court "assumed, without deciding, that an offer of complete relief pursuant to Rule 68, even if unaccepted, moots a plaintiff's claim." *Id*. at 161. In rejecting the mootness argument, the *Campbell-Ewald* court relied on "basic principles of contract law" and adopted the following reasoning from Justice Kagan's *Genesis* dissent:

> When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

Id. at 162, citing *Genesis* at 81 (Kagan, J., dissenting), quoting *Minneapolis & St. Louis Ry. v. Columbus Rolling Mill*, 119 U.S. 149, 151, 7 S.Ct. 168, 30 L.Ed. 376 (1886), and Fed.Civ.R. 68(b).

{¶17} The Court held that the plaintiff's complaint was "not effaced" by the unaccepted offer to satisfy his individual claim. *Campbell-Ewald* at 162. Absent acceptance, the defendant's settlement offer remained only a proposal, binding neither party. *Id*. at 163.

{¶18} Following *Campbell-Ewald*, the United States Court of Appeals for the Sixth Circuit rejected the defendant's argument that its offer of judgment mooted the case in *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1127 (6th Cir.2016). The court held,

> "Under basic principles of contract law, * * * [an] offer of judgment, once rejected, has no continuing efficacy" and Top Flite may not rely on such lapsed offers "to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than" the offers Bridging Communities and Gamble declined to accept here.

Id., quoting *Campbell-Ewald* at 670.

{¶19} Jones agrees that the amount of the check sent by Sharefax would fully satisfy her monetary demands. But Ensinger rejected the offer and returned the check. The parties are in the same position monetarily as they were before the offer was made. Therefore, Jones's claim for monetary damages is still "live" and the case is not moot.

First Assignment of Error

{¶20} In her first assignment of error, Jones contends the trial court abused its discretion by not conducting a rigorous analysis of the Civ.R. 23 factors.

{¶21} "A class action is an exception to the usual rule that litigation is conducted by and on behalf of only the individually named parties. Therefore, to fall within the exception, the party bringing the class action must affirmatively demonstrate that each requirement of Civ.R. 23 has been satisfied." (Citations omitted.) *Safi v. Cent. Parking Sys. Ohio, Inc.*, 2015-Ohio-5274, 45 N.E.3d 249, ¶ 14 (1st Dist.). A party seeking certification bears the burden of proving by a

preponderance of the evidence that the proposed class meets each of the requirements in Civ.R. 23. *Id.* at ¶ 15.

> A trial court may not certify a class action pursuant to Civ.R. 23 unless seven prerequisites have been met: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied. Failure to satisfy any one of the requirements will result in the denial of class certification.

Robinson v. Johnston Coca-Cola Bottling Group, Inc., 153 Ohio App.3d 764, 2003-Ohio-4417, 796 N.E.2d 1, ¶ 2 (1st Dist.).

{¶22} "A trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion." *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). "[T]he appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded * * * in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Id.*

{¶23} "It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made. A finding of abuse of

discretion, particularly if the trial court has refused to certify, should be made cautiously." *Hinkston v. Fin. Co.*, 1st Dist. Hamilton No. C-980972, 2000 Ohio App. LEXIS 2010, *6 (May 12, 2000), quoting *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

{¶24} "However, the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a *rigorous analysis* into whether the prerequisites of Civ.R. 23 have been satisfied." (Emphasis added.) *Hamilton* at 70.

{¶25} A rigorous analysis "requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard," that the requirements of Civ.R. 23 have been met. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 16. Class-action certification does not go to the merits of the action. *Id.* at ¶ 17.

> However, deciding whether a claimant meets the burden for class certification pursuant to Civ.R. 23 requires the court to consider what will have to be proved at trial and whether those matters can be presented by common proof. Thus, * * * in resolving a factual dispute when a requirement of Civ.R. 23 for class certification and a merit issue overlap, a trial court is permitted to examine the underlying merits of the claim as part of its rigorous analysis, but only to the extent necessary to determine whether the requirement of the rule is satisfied.

(Citations omitted.) *Id.*; s*ee Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 26 ("there can be no dispute that a trial court's rigorous analysis of the evidence often requires looking into enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims").

{¶26} In *Hamilton*, the Ohio Supreme Court held that conducting a "rigorous analysis" does not require the trial court to make formal findings to support its decision. *Hamilton,* 82 Ohio St.3d at 70, 694 N.E.2d 442. But it recognized that formal findings are preferable. It stated:

> Aside from the obvious practical importance, articulation of the reasons for the decision tends to provide a firm basis upon which an appellate court can determine that the trial court exercised its discretion within the framework of Civ.R. 23, and discourages reversal on the ground that the appellate judges might have decided differently had they been the original decisionmakers. On the other hand, the failure to provide an articulated rationale greatly hampers an appellate inquiry into whether the relevant Civ.R. 23 factors were properly applied by the trial court and given appropriate weight, and such an unarticulated decision is less likely to convince the reviewing court that the ruling was consistent with the sound exercise of discretion.

Id. at 70-71.

> It is exceedingly difficult to apply an abuse-of-discretion standard to Civ.R. 23 determinations where, as here, the trial court fails not only to articulate its rationale, but also fails to disclose which of the seven class action prerequisites it found to be lacking with respect to the various

> alleged claims for relief. Accordingly, we suggest that in determining the propriety of class certification under Civ.R. 23, trial courts make separate written findings as to each of the seven class action requirements, and specify their reasoning as to each finding.

Id. at 71.

{¶27} In *Robinson*, 153 Ohio App.3d 764, 2003-Ohio-4417, 796 N.E.2d 1, at ¶ 3, the trial court merely recited each of the class-certification requirements and stated that plaintiffs had met the requirements. This court held, "Based on the record furnished to us, we are unable to discern whether the trial court conducted a thorough analysis into whether the prerequisites of Civ.R. 23 had been satisfied before certifying the class." *Id.* at ¶ 12.

> [T]he trial court's decision provided no articulated rationale that would enable a meaningful appellate inquiry. * * * [T]here is no indication in the record that the trial court applied the requirements of Civ.R. 23 when it granted class certification. This is not "one of those rare cases" in which separate findings on the part of the trial court are unnecessary for this court's review.

Id. at ¶ 11, quoting *Bardes v. Todd*, 139 Ohio App.3d 938, 943, 746 N.E.2d 229 (1st Dist.2000) (holding "this is one of those rare cases in which neither an evidentiary hearing nor separate findings on the part of the trial court are necessary" because certification of appellant's proposed class of "Ohio mothers" subject to various divorce and support statutes was clearly improper under Civ.R. 23(B)(2) and (3)). *Accord Dunkelman v. Cincinnati Bengals*, 170 Ohio App.3d 224, 2006-Ohio-6825, 866 N.E.2d 576, ¶ 15 (1st Dist.) ("Dunkelman II") (reversing the trial court's order

certifying the class because "the trial court's entry * * * is devoid of any rationale, yet alone any rigorous analysis, relating to any of the prerequisites for class certification. Given the inadequacy of the record before us, we cannot properly review the trial court's entry granting class certification with respect to the plaintiffs' remaining claims under an abuse-of-discretion standard."); *Gordon v. Erie Islands Resort & Marina*, 6th Dist. Ottawa No. OT-13-040, 2014-Ohio-4970, ¶ 21-22, citing *Maas v. Penn Cent. Corp.*, 11th Dist. Trumbull No. 2003-T-0123, 2004-Ohio-7233 (holding the same).

{¶28} There is a notable difference between a grant of certification and a denial. A party seeking class certification must prove all seven requirements in Civ.R. 23. Therefore, a trial court only needs to find that one requirement is lacking in order to deny certification. *See State ex rel. Davis v. Pub. Emp. Retirement Bd.*, 10th Dist. Franklin No. 04AP-1293, 2005-Ohio-6612, ¶ 10 ("if the trial court finds that one of the prerequisites is not present, the court need not continue in its rigorous analysis as the inquiry into class certification is at an end"). Thus, explicit findings are especially important in cases where certification has been granted. And deference to the trial court's decision is especially appropriate in cases where class certification has been denied. *Marks*, 31 Ohio St.3d at 201, 509 N.E.2d 1249.

{¶29} But that does not mean that findings are not necessary or important where certification has been denied. In *Hamilton*, the Ohio Supreme Court acknowledged the difficulty in reviewing a trial court's denial of certification where the trial court did not articulate its rationale or disclose which of the seven Civ.R. 23 requirements it found to be lacking. *Hamilton*, 82 Ohio St.3d at 71, 694 N.E.2d 442.

{¶30} That is the case here. The trial court did not provide any analysis in its written entry. It merely stated that it had reviewed the written memoranda and that the motion for class certification was denied. Sharefax argues that despite the lack of written findings, the record demonstrates the trial court did undertake a rigorous analysis because the court stated that it had read the parties' briefs thoroughly, held a hearing during which the parties articulated their arguments on certification and the court asked questions, and the court did not issue its ruling until 20 days after the hearing. Additionally, Sharefax contends that the majority of the Civ.R. 23 factors are not in dispute, which narrows the grounds upon which the trial court could have denied certification. Sharefax only challenges the following Civ.R. 23 requirements: class membership, representative adequacy, and the predominance and superiority factors under Civ.R. 23(B).

{¶31} First, this is not one of those "rare" cases where certification is clearly improper. *Compare Bardes,* 139 Ohio App.3d at 943, 746 N.E.2d 229 (certification was clearly improper where the pro se plaintiff sought to certify a class of all "Ohio mothers" subject to certain divorce and support statutes). Rather, this case presents complex issues, making it more like *Dunkelman*, 170 Ohio App.3d 224, 2006-Ohio-6825, 866 N.E.2d 576, at ¶ 15 ("this case presents complex issues related to class certification") than *Bardes*.

{¶32} Next, the fact that the trial court reviewed the briefs and conducted a hearing does not mean it conducted a rigorous analysis. *See Maas*, 11th Dist. Trumbull No. 2003-T-0123, 2004-Ohio-7233, at ¶ 30-31 (rejecting appellees' argument that the briefs filed by the parties and the hearing conducted by the court were sufficient to show that the court conducted a rigorous analysis); *Dunkelman* at

¶ 9 (even though the trial court conducted a one-hour hearing on the motions for summary judgment and class certification, this court reversed the trial court's order certifying the class because it failed to articulate its rationale). The transcript of the hearing in the present case was only 18 pages long and the trial court did not indicate during the hearing which Civ.R. 23 requirement it found to be lacking.

{¶33} Finally, this is not a case where the defendant opposed certification on a single basis. Because several of the Civ.R. 23 requirements are disputed, we are left to guess upon which basis the trial court denied certification. "The lynchpin of abuse-of-discretion review is the determination whether the trial court's decision is reasonable." *State v. Hunter*, 1st Dist. Hamilton No. C-200160, 2021-Ohio-2423, ¶ 25, quoting *State v. Chase*, 2d Dist. Montgomery No. 26238, 2015-Ohio-545, ¶ 17. "[U]nless the reason or reasons for the trial court's decision are apparent from the face of the record, it is not possible to determine if the decision is reasonable without some explanation of the reason or reasons for that decision." *Id.* "Thus, meaningful appellate review requires either a decision from the trial court that explains its reasoning, or a clear record from which the appellate court can discern the trial court's reasoning." *Hunter* at ¶ 25.

{¶34} We hold that because the record does not demonstrate that the trial court conducted a rigorous analysis, we are unable to properly review for an abuse of discretion. *See Dunkelman*, 170 Ohio App.3d 224, 2006-Ohio-6825, 866 N.E.2d 576, at ¶ 15; *Hamilton*, 82 Ohio St.3d at 71, 694 N.E.2d 442; *Gordon*, 6th Dist. Ottawa No. OT-13-040, 2014-Ohio-4970, at ¶ 24. Therefore, we sustain the first assignment of error.

Conclusion

{¶35} Our disposition of the first assignment of error renders the second and third assignments of error moot. The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

WINKLER and **BOCK, JJ.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.