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File Name: 22a0126p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHELLE L. SNYDER,

Plaintiff-Appellant,

v.

FINLEY & CO., L.P.A.,

Defendant-Appellee.

No. 21-3997

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:20-cv-02144—Donald C. Nugent, District Judge.

Argued: April 27, 2022

Decided and Filed: June 15, 2022

Before: CLAY, GRIFFIN, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Marc E. Dann, DANN LAW, Lakewood, Ohio, for Appellant. Boyd W. Gentry, LAW OFFICE OF BOYD W. GENTRY, LLC, Beavercreek, Ohio, for Appellee. **ON BRIEF:** Marc E. Dann, Brian D. Flick, DANN LAW, Lakewood, Ohio, for Appellant. Boyd W. Gentry, LAW OFFICE OF BOYD W. GENTRY, LLC, Beavercreek, Ohio, for Appellee.

OPINION

GRIFFIN, Circuit Judge.

Ohio's Necessaries Statute permits creditors to collect certain debts from one spouse incurred by the other. Ohio Rev. Code § 3103.03. Seeking to recover outstanding legal bills owed by plaintiff Michelle L. Snyder's husband, defendant Finley & Co., LPA filed a debt-

collection lawsuit against plaintiff and her husband, asserting joint liability under the Necessaries Statute. In this litigation, she contends that defendant's lawsuit was "objectively baseless" and thus violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e. *Van Hoven v. Buckles & Buckles, P.L.C.*, 947 F.3d 889, 896 (6th Cir. 2020). We agree. As the Ohio Supreme Court has clearly held, the Necessaries Statute "does not impose joint liability on a married person for the debts of his or her spouse." *Embassy Healthcare v. Bell*, 122 N.E.3d 117, 121 (Ohio 2018). Rather, "[a] creditor must . . . first seek satisfaction of its claim from the assets of the spouse who incurred the debt" and must show that the debtor-spouse is "unable to pay" for a nondebtor-spouse to be liable under the Necessaries Statute. *Id.* at 122. We therefore reverse and remand with instructions to enter judgment in plaintiff's favor and for further proceedings consistent with this opinion.

I.

Plaintiff's husband, Charles David Snyder, owned a technology-consulting company. *United States v. Snyder*, 789 F. App'x 501, 503–04 (6th Cir. 2019). In an unsuccessful attempt to keep his business afloat during the Great Recession, he funded the company's day-to-day operating expenses by diverting hundreds of thousands of dollars from employees' 401(k) contributions and Federal Insurance Contributions Act deductions to the company's coffers. *Id.* Charles was ultimately convicted of embezzlement and willful failure to pay over taxes.

The law firm of Zukerman, Lear & Murray Co. (Zukerman) assisted with his criminal defense and sent him invoices for legal fees. When some of Zukerman's invoices went unpaid, defendant Finley & Co., LPA (Finley) filed a debt-collection action in Ohio state court on behalf of Zukerman against Charles and his wife, plaintiff Michelle Snyder, jointly. Regarding plaintiff, Finley asserted a spousal-obligation-to-support claim under Ohio's Necessaries Statute. The Ohio trial court granted judgment in Michelle Snyder's favor on that claim, and the Ohio Court of Appeals dismissed Finley's interlocutory appeal for lack of a final, appealable order, reasoning that the "claim against Michelle is contingent on the merits of" the claims against Charles. *Zukerman, Lear & Murray Co., L.P.A. v. Snyder*, No. 110063, 2021 WL 2837215, at *1 (Ohio. Ct. App. July 8, 2021). Finley's claims against Charles remain pending in the Ohio state trial court.

Thereafter, plaintiff Michelle L. Snyder commenced this federal Fair Debt Collection Practices Act (FDCPA) lawsuit against Finley in an Ohio state court. Plaintiff claims that by filing a debt-collection claim under the spousal-obligation-to-support theory without an arguable legal basis, Finley engaged in debt-collection practices prohibited by the FDCPA. 15 U.S.C. § 1692e. Following removal to the Northern District of Ohio, the district court resolved the parties' cross-motions for summary judgment in favor of Finley, and Michelle L. Snyder now appeals. We review the district court's decision de novo. *Ferro Corp. v. Cookson Grp.*, 585 F.3d 946, 949 (6th Cir. 2009).

II.

The issue presented in this case is whether Finley violated the FDCPA when it sued plaintiff to recover her husband's criminal-defense legal fees under Ohio's Necessaries Statute.[1] The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This is an "extraordinarily broad[,] . . . strict-liability statute," and we "view any alleged violation through the lens of the least sophisticated consumer." *Stratton v. Portfolio Recovery Assocs.*, 770 F.3d 443, 448, 450 (6th Cir. 2014) (internal quotation marks and citations omitted). An FDCPA violation occurs when a debt collector's representation or action is materially false or misleading, *Wallace v. Wash. Mut. Bank, F.A.*, 683 F.3d 323, 326–27 (6th Cir. 2012), and had the purpose of inducing payment by the debtor, *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011).

Section 1692e applies to debt-collection efforts utilizing the legal process. *See Van Hoven*, 947 F.3d at 893–94. Merely advancing an ultimately unsuccessful claim for relief does not, in and of itself, rise to an FDCPA violation. *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995). Proscribed rather is what is alleged to have occurred here: a material misstatement about state law in a court filing that is "false, deceptive, or misleading" at the time it is made. *Van Hoven*, 947 F.3d at 893–94 (quoting 15 U.S.C. § 1692e).

[1]Finley's complaint also asserted accounting and unjust enrichment claims against "defendants," but plaintiff's FDCPA lawsuit and this appeal rest only on the propriety of Finley's Necessaries Statute claim.

So how do we distinguish between a non-winning claim that violates the FDCPA and a non-winning claim that does not? Our recent decision in *Van Hoven* instructs that when evaluating an alleged FDCPA violation in a legal action, "a lawyer does not 'misrepresent' the law by advancing a reasonable legal position later proved wrong." *Id.* at 896. Instead, we held, courts must determine "whether the legal contention was *objectively baseless at the time it was made*, making it legally indefensible or groundless in law." *Id.* (internal quotation marks and citation omitted and emphasis added). That would include, for example, "misquoting a case, relying on a statute no longer in existence, . . . invoking an overruled decision," "claim[ing] that a one-year statute of limitations runs for two years," "say[ing] today that the [FDCPA] does not apply to attorneys collecting debts," "suing on a time-barred debt," and "filing a writ of garnishment against a debtor current on his payments." *Id.* at 895–96 (collecting cases).

Finley sought to hold plaintiff liable for her husband's outstanding legal bills via Ohio's Necessaries Statute, Ohio Rev. Code § 3103.03. That law originates from coverture, wherein "a married woman's legal identity merged with her husband's," thus prohibiting her from owning property, entering into contracts, or receiving credit. *Embassy Healthcare*, 122 N.E.3d at 119. Given these "legal disabilities," courts developed the common-law "necessaries doctrine" to "encourage[] third parties to provide essential items and services to neglected wives." *Id.* So, under the common law, "a husband was liable to third parties for necessaries—i.e., food, shelter, clothing, and medical services—that those third parties provided to his wife." *Id.*

Section 3103.03 codified this doctrine, which has been subsequently modernized by abolishing the common law's antiquated view of the marital relationship—"the duty of support now extends to both spouses." *Id.* The Necessaries Statute thus currently provides that a "married person must support the person's self and spouse," and if one is "unable to do so, the spouse of the married person must assist in the support so far as the spouse is able." Ohio Rev. Code § 3103.03(A). And if one spouse fails to support the other, a third party may do so and then "recover the reasonable value of the necessaries supplied from the married person who neglected to support the spouse." § 3103.03(C).

The parties primarily focus on whether attorneys' fees constitute "necessaries" under the Necessaries Statute. So too did the district court. It concluded that Finley's claim against

plaintiff was "at the very least, arguable" because the Ohio Supreme Court has twice held that certain attorneys fees' are recoverable against a spouse. *See Wolf v. Friedman*, 253 N.E.2d 761, 765–67 (Ohio 1969); *Blum v. Blum*, 223 N.E.2d 819, 820–21 (Ohio 1967). Therefore, in the district court's view, no FDCPA liability could lie against Finley. But we need not consider whether the Necessaries Statute includes the attorneys' fees at issue here because Finley's lawsuit did not comply with the law's threshold procedural requirements.

A little less than a year before Finley filed its debt-collection claim against plaintiff, the Ohio Supreme Court expounded upon a nondebtor-spouses's liability under the Necessaries Statute. In *Embassy Healthcare*, the Ohio Supreme Court held that "each married person retains primary responsibility for supporting himself or herself from his or her own income or property," and a "nondebtor spouse becomes liable only if the debtor spouse does not have the assets to pay for his or her necessaries." 122 N.E.3d at 121. Because of this contingency, *Embassy Healthcare* requires a creditor to exhaust its debt-collection efforts against the debtor before attempting to collect from a spouse. Specifically, the Ohio Supreme Court held that "[*a*] *creditor must . . . first seek satisfaction of its claim from the assets of the spouse who incurred the debt.* [*The Necessaries Statute*] *does not impose joint liability on a married person for the debts of his or her spouse.*" *Id.* (emphasis added).

Embassy Healthcare clearly establishes that defendant's debt-collection lawsuit against plaintiff was objectively baseless. As the Ohio Court of Appeals recognized, Finley's "claim against Michelle is contingent" on its claims against Charles. *Zukerman*, 2021 WL 2837215, at *1. But when Finley sued Michelle, it had not satisfied the prerequisites to collect from her. There was no finding that its claims against Charles were meritorious or that he lacked the assets to pay for those claims. *Embassy Healthcare* required Finley to "first seek satisfaction of its claim from" Charles and prohibited it from filing a joint-liability suit against Charles and Michelle without clearly stating that its claim against Michelle was contingent. 122 N.E.3d at 121. Finley did not follow *Embassy Healthcare*'s express commands. If "misquoting a case, relying on a statute no longer in existence, . . . invoking an overruled decision, [or] . . . suing on a time-barred debt" runs afoul of the FDCPA, *Van Hoven*, 947 F.3d at 895–96, asserting a claim

against a party under circumstances in which a state supreme court has explicitly held that the party cannot be held liable certainly does as well.

III.

For these reasons, we reverse the district court's judgment, and remand with instructions to enter judgment in plaintiff's favor and for further proceedings consistent with this opinion.

[Cite as *Holmok v. Burke*, 2022-Ohio-2135.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

EDWARD HOLMOK,	:	
Plaintiff-Appellant,	:	No. 110900
v.	:	
HANNAH BURKE, ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 23, 2022

Civil Appeal from the Lakewood Municipal Court
Case No. 2020CVE01342

Appearances:

Jacobs & Lowder and Jospeh J. Jacobs, *for appellant*.

Burkes Law, LLC, and John F. Burke, III, *for appellee*.

LISA B. FORBES, J.:

{¶ 1} Appellant Edward Holmok ("Holmok") appeals the trial court's order granting judgment on the pleadings in favor of appellee Hannah Burke ("Burke"). After reviewing the facts of the case and the pertinent law, we affirm.

I. Facts and Procedural History

{¶ 2} Holmok filed a complaint for defamation and intentional infliction of emotional distress against John Virag ("Virag") and Burke.[1] In his complaint, Holmok alleged that on July 26, 2020, Virag tweeted, "When I was in his engineering class, I had been a part of a few reports filed against him. Some being racial and some being sexist. Nothing was ever done." Holmok claimed that Virag's tweet was about Holmok. The complaint further alleged that on the same day, Burke retweeted Virag's tweet and added the "@Lakewood_LHS" tag to her retweet. According to Holmok, he is a teacher at Lakewood High School, his "Lakewood School Board personnel file does not contain any complaints for racial or sexual discrimination," and he has "never been disciplined for racial or sexual discrimination in his teaching position[.]" Thus, Holmok alleges that Virag's tweet is false.

{¶ 3} Pertaining to Burke, Holmok alleged in his defamation claim that by retweeting Virag's allegedly false tweet, Burke "published the aforementioned false statement about [Holmok] to her 938 Twitter followers [and] the Lakewood High School community * * *." In doing so, Holmok contends that Burke "acted with malice" and that he "has suffered embarrassment, anxiety, and emotional distress" and "incurred costs for counseling[.]"

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[1] Only claims against Burke are pertinent to this appeal.

{¶ 4} Under his claim for intentional infliction of emotional distress, Holmok alleged that through Virag and Burke's "series of false accusations, [they] intended to cause [Holmok] emotional distress, or knew or should have known that their actions would result in serious emotional distress[.]" Further, Holmok alleged that Burke's "conduct has been extreme and outrageous[,]" that she has caused him psychological injury, and that he has "suffered serious mental anguish[.]"

{¶ 5} Burke filed an answer to Holmok's complaint in which she raised several affirmative defenses, including immunity under 47 U.S.C. 230, the federal Communications Decency Act ("CDA"). Burke also filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C).

{¶ 6} On September 9, 2021, the trial court granted Burke's motion for judgment on the pleadings finding that she was immune from liability under the CDA. It is from this order that Holmok appeals.

II. Law and Analysis

{¶ 7} Holmok raises the following two assignments of error:

> The trial court erred in granting defendant's motion for judgment on the pleadings since plaintiff's complaint properly pled the claim of Intentional infliction of emotional distress, and defendant's malicious and illegal conduct preclude her from claiming any protection under the Communications Decency Act.
>
> The trial court erred in granting defendant's motion for judgment on the pleadings since plaintiff's complaint properly pled the claim of defamation, and defendant's malicious and illegal conduct preclude her from claiming any protection under the Communications Decency Act.

{¶ 8} For ease of discussion, both assignments of error will be addressed together.

{¶ 9} Motions for judgment on the pleadings are governed by Civ.R. 12(C), which states "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

> Judgment on the pleadings is appropriate where, after considering the material allegations of the pleadings and all reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party, the court finds that the moving party is entitled to judgment as a matter of law.

Socha v. Weiss, 2017-Ohio-7610, 97 N.E.3d 818, ¶ 9 (8th Dist.). An appellate court's review of a trial court's decision on a motion for judgment on the pleadings is de novo. *Skoda Minotti Co. v. Novak, Pavlik & Deliberato, L.L.P.*, 8th Dist. Cuyahoga No. 101964, 2015-Ohio-2043, ¶ 10, citing *Coleman v. Beachwood*, 8th Dist. Cuyahoga No. 92399, 2009-Ohio-5560, ¶ 15.

{¶ 10} The affirmative defense of statutory immunity must be asserted in a responsive pleading. *Carswell v. Akron*, 9th Dist. Summit No. 29321, 2019-Ohio-4444, ¶ 13. A party asserting immunity may utilize a Civ.R. 12(C) motion if the validity of the defense can be determined from the allegations in the pleadings. *Id.*

{¶ 11} In his appellate brief, Holmok contends that the trial court erroneously based its decision solely on the July 26, 2020 retweet rather than a "malicious pattern of conduct" through "a series of messages * * * that [Burke] added her own disparaging and damaging statements." (Emphasis omitted.) Upon review, we find that in his complaint, Holmok complained of a single tweet by Virag that was subsequently retweeted by Burke. Accordingly, whether Burke is liable for Holmok's claims is limited to the July 26, 2020 retweet.

{¶ 12} Further, Holmok contends that the trial court only addressed his defamation claim against Burke. However, in its journal entry, the trial court stated:

> The plaintiff asserted two claims in his complaint, defamation and intentional infliction of emotional distress. Both of these claims arise out of a single statement retweeted by defendant Burke. The statement was not modified or enhanced when retweeted. The complaint does not allege any other act by defendant Burke as the cause of any injury to the plaintiff. As such, both claims are barred by the CDA.

Accordingly, we find that the trial court expressly addressed both the defamation claim and the intentional infliction of emotional distress claim.

A. Communications Decency Act

{¶ 13} The CDA establishes immunity "'against causes of action of all kinds'" for interactive service providers and users. *US Dominion, Inc. v. Byrne*, D.D.C. Civil Action No. 1:21-cv-02131 (CJN), 2022 U.S. Dist. LEXIS 72634, 19 (Apr. 20, 2022), quoting *Marshall's Locksmith Serv. Inc. v. Google, L.L.C.*, 925 F.3d 1263, 1267, 441 U.S. App. D.C. 196 (D.C.Cir.2019). Section 230(c)(1) of the CDA states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. 230(c)(1). Furthermore, the CDA expressly preempts civil claims under state law: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. 230(e)(3).

{¶ 14} The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or

services offered by libraries or educational institutions." 47 U.S.C. 230(f)(2). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* at 47 U.S.C. 230(f)(3). Section 230(c)(1) does not extend immunity to information content providers. While "user" is not defined within the statute, Merriam-Webster's dictionary defines "user" as "one that uses." *Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/user (accessed May 18, 2022); *See State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 39 ("In the absence of a definition of a word or phrase used in a statute, words are to be given their common, ordinary, and accepted meaning."); *State v. Jackson*, 12th Dist. Butler No. CA2011-06-096, 2012-Ohio-4219, ¶ 34 ("Courts have used dictionary definitions to determine the plain and ordinary meaning of a statutory term.").

{¶ 15} In both of Holmok's assignments of error he argues that Burke cannot claim immunity under the CDA because, "[a]t its core" the CDA "shields service providers from" liability. Holmok further argues that Burke is not immune from liability under the CDA because she is "an 'information content provider' because she created and sent her own content and further developed information that others created." However, based upon our de novo review of the material allegations in the complaint, we find that Burke's alleged retweeting of Virag's July 26, 2020 tweet does not convert her from a "user" into an "information content provider."

{¶ 16} Courts across the country have routinely found that Twitter falls within the CDA's definition of an interactive computer service. *See, e.g., Mezey v. Twitter, Inc.*, S.D.Fla. No. 1:18-cv-21069-KMM, 2018 U.S. Dist. LEXIS 121775, 1 (July 19, 2018); *Am. Freedom Defense Initiative v. Lynch*, 217 F.Supp.3d 100, 104 (D.D.C.2016); *Brittain v. Twitter, Inc.*, N.D.Cal. No. 19-cv-00114-YGR, 2019 U.S. Dist. LEXIS 97132, 2 (June 10, 2019). The allegations in the complaint related to Burke's claim that she used Twitter to retweet, making her a user of an interactive computer service.

{¶ 17} The act of retweeting can fall outside of the immunity provided by the CDA when a user couples the retweet with his or her own added speech. In *US Dominion*, D.D.C. Civil Action No. 1:21-cv-02131 (CJN), 2022 U.S. Dist. LEXIS 72634, the defendant, Byrne, claimed immunity under the CDA when he retweeted a story that "a Dominion voting machine had been hacked during the 2020 election." *Id.* at 18. The D.C. District Court noted that "[w]hile section 230 may provide immunity for someone who merely shares a link on Twitter,* * * it does not immunize someone for making additional remarks that are allegedly defamatory." *Id.* at 20; *see also Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp.3d 1311, 1321 (M.D.Fla.2015) (finding that CDA immunity can be lost by "substantively alter[ing] third-party content or becom[ing] directly involved in the alleged illegality"). The district court found that Byrne could not claim immunity under the CDA because he did not simply retweet a statement made by an information content provider. Rather, "Byrne himself made the following statements, which

accompanied the retweeted link: 'I vouch for this. I have seen the photographs, the computer forensics, the IP traces back to China. To a corporation whose name has long been linked to CP: Exam Indicates Georgia Tabulating Machine Sent Results to China.'" *Id*. at 18-19. Because Byrne coupled allegedly defamatory remarks with his retweet, the CDA did not protect him from liability.

{¶ 18} Here, as alleged by Holmok, Virag tweeted that when he was a student in Holmok's class, he was involved in "a few reports filed against him" that were "racist" and "sexist" in nature. On the same day, Burke retweeted Virag's tweet and added a tag to Lakewood High School's twitter account. Unlike the court in *Byrne*, we find that Burke did not substantively alter or add to Virag's content when she added the tag "@Lakewood_LHS." *See Roca Labs* at 1321 (finding "the addition of a handle that reads '@rocalabs' or '@pissedconsumer' and a link to the tweets" alone does not substantively alter the third-party content).

{¶ 19} Based on the allegations in the complaint, Burke cannot be "treated as the publisher or speaker," under the CDA, of Virag's tweet and "no liability may be imposed under any state * * * law that is inconsistent with [Section 230]." 47 U.S.C. 230(e)(3).

B. Defamation

{¶ 20} Holmok argues that Burke is liable for defamation because she "published false accusations against" him.

{¶ 21} The elements of a defamation claim are: "(1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was

published; (4) that the plaintiff suffered injury as a proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement." *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist.1996).

{¶ 22} However, under the CDA Burke cannot be "treated as the publisher or speaker" of Virag's tweet; accordingly, Holmok has not alleged an actionable statement published by Burke. Therefore, the trial court did not err when it granted Burke judgment on the pleadings dismissing Holmok's defamation claim.

C. Intentional Infliction of Emotional Distress

{¶ 23} Next, we turn to Holmok's intentional infliction of emotional distress claim.

> To establish a claim for intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) the defendant intended to cause, or knew or should have known that his actions would result in serious emotional distress; (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency and can be considered completely intolerable in a civilized community; (3) the defendant's actions proximately caused psychological injury to the plaintiff; and (4) the plaintiff suffered serious mental anguish of a nature no reasonable person could be expected to endure.

Lombardo v. Mahoney, 8th Dist. Cuyahoga No. 92608, 2009-Ohio-5826, ¶ 6.

{¶ 24} "Extreme and outrageous conduct is conduct that goes beyond all possible bounds of decency and is so atrocious that it is 'utterly intolerable in a civilized community.'" *Lloyd v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 107214, 2019-Ohio-1885, ¶ 14, quoting *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983). "'[M]ere insults, indignities, threats, annoyances, petty

oppressions, or other trivialities' are insufficient to sustain a claim for relief." *Id.*, quoting *Yeager* at 375.

{¶ 25} Holmok claims Burke's retweeting of Virag's statement was extreme and outrageous and caused him emotional distress. That is, Holmok's claim of intentional infliction of emotional distress against Burke is based exclusively on her status as a user of an interactive computer service. Because Burke cannot be "treated as the publisher or speaker" of Virag's tweet under the CDA, Burke is immune from liability for her retweet of Virag's original tweet. *See Yue v. Miao*, D.S.C. No. 3:18-3467-MGL-PJG, 2019 U.S. Dist. LEXIS 200404, 12-17 (June 27, 2019) (finding the defendant immune from liability under the CDA for plaintiff's intentional infliction of emotional distress claim where the conduct that plaintiff sought to hold defendant liable for was someone else's online speech). Upon review, we find the trial court did not err in dismissing Holmok's intentional infliction of emotional distress claim.

{¶ 26} Accordingly, both of Holmok's assignments of error are overruled.

{¶ 27} 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

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

[Cite as *WSB Rehab. Servs. Inc. v. Cent. Accounting Sys. Inc.*, 2022-Ohio-2160.]

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

WSB REHABILITATION SERVICES., INC.,	:	APPEAL NOS. C-210454 C-210467
	:	TRIAL NO. A-1901246
Plaintiff-Appellee/Cross-Appellant,	:	
vs.	:	*O P I N I O N.*
CENTRAL ACCOUNTING SYSTEMS, INC.,	:	
	:	
Defendant/Cross-Appellee,	:	
and	:	
C. MICAH RAND, INC., d.b.a BROOKWOOD RETIREMENT COMMUNITY,	:	
	:	
RAND LOVELAND LLC, d.b.a. LOVELAND HEALTHCARE NURSING AND REAHAB CENTER	:	
	:	
EVAN GRAY, LLC, d.b.a. FLORENCE PARK NURSING & REHAB CENTER	:	
MICAH CLOVERNOOK, LLC, d.b.a. CLOVERNOOK HEALTH CARE PAVILION	:	
	:	
and	:	
CRYSTALWOOD, INC., d.b.a. THE ALOIS ALZHEIMER CENTER	:	
	:	
Defendants-Appellants/Cross-Appellees.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Case Remanded.

Date of Judgment Entry on Appeal: June 24, 2022

Fultz Maddox Dickens PLC and *Daniel E. Hancock* for Plaintiff-Appellee/Cross-Appellant,

Rolf Goffman Martin Lang LLP, *Christopher G. Kuhn* and *Joseph F. Petros III*, for Defendant/Cross-Appellee and Defendants-Appellants/Cross-Appellees.

BOCK, Judge.

{¶1} Defendants-appellants C. Micah Rand, Inc., d.b.a Brookwood Retirement Community ("Brookwood"), Rand Loveland, LLC, d.b.a. Loveland Health Care Nursing & Rehab Center ("Loveland"), Evan Gray, LLC, d.b.a. Florence Park Nursing & Rehab Center ("Florence Park"), Micah Clovernook, LLC, d.b.a. Clovernook Health Care Pavilion ("Clovernook"), and Crystalwood, Inc., d.b.a. The Alois Alzheimer Center ("Alois") (collectively, "the nursing facilities"), along with defendant/cross-appellee Central Accounting Systems, d.b.a. Health Care Management Group ("HCMG"), (HCMG and the nursing facilities collectively are called "the facilities defendants") appeal the trial court's entry of summary judgment in favor of plaintiff-appellee WSB Rehabilitation Services, Inc., d.b.a. Blue Sky Therapy Management ("Blue Sky") on its breach-of-contract claim.

{¶2} Blue Sky cross-appeals, arguing that the trial court erred in (1) granting the facilities defendants' summary-judgment motion on their indemnification claim, (2) awarding improper damages on the facilities defendants' indemnification claim, and (3) denying its tortious-interference claim.

Relevant Facts and Procedural History

{¶3} In 2011, the nursing facilities entered into separate, but materially similar, agreements entitled "Agreement for Physical, Occupational, and Speech Therapy Services" ("agreements"), whereby Blue Sky provided therapy services to residents at each of the nursing facilities' locations. The nursing facilities are managed by HCMG. HCMG requested that Blue Sky also provide therapy services to Alois, which is also managed by HCMG. As each facility had its respective agreement with

Blue Sky, Alois and Blue Sky agreed that they would operate according to the terms of Blue Sky's agreement with Clovernook.

{¶4} Under "Schedule A" of the agreements, to receive payment, Blue Sky was to submit a monthly invoice that "shall" include the name of the therapist and the time spent providing services ("invoice requirement") within six months of the service date. Although Blue Sky's invoices from 2011 until July 2018 did not contain the invoice requirement, the facilities defendants paid the invoices. Moreover, early in the relationship, the parties implemented a direct data link between their medical record systems that instantly transferred data involving the services, such as the therapists' names and the time the therapists spent providing services.

{¶5} The agreements contained an "anti-waiver" clause: "The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be a waiver of any subsequent breach of the same or other provision hereof."

{¶6} In 2017, the government began investigating Blue Sky's provision of therapy services, the agreements between the nursing facilities and Blue Sky, the nursing facilities' operations, and the nursing facilities' submission of claims to federal payment programs. Blue Sky later learned that the investigation resulted from a qui tam complaint filed by a former Blue Sky employee.

{¶7} In August 2018, HCMG advised the nursing facilities that it was "on hold with payments" to Blue Sky. No further invoices were paid, but the facilities defendants continued to enter Blue Sky's invoices in their accounts-payable journals and reported the invoices as paid on their 2018 tax and Medicare forms.

{¶8} In January 2019, the nursing facilities contributed to a $500,000 "adequate assurance" payment to Blue Sky for future services after Blue Sky informed the nursing facilities that it was terminating the agreements. Blue Sky continued to provide therapy services until the facilities defendants terminated the agreements in February 2019. Blue Sky informed the facilities defendants that they owed $2,292,188.36 in unpaid invoices.

{¶9} The qui tam action—which was settled in December 2019 without any finding of liability—prompted the facilities defendants to demand that Blue Sky indemnify them for their costs incurred in responding to the government's investigation. Blue Sky refused to pay the indemnification, contending that the facilities defendants' failure to pay the outstanding invoices constituted a prior material breach of the agreements.

{¶10} Blue Sky sued the facilities defendants, asserting claims for (1) breach of contract, two counts of unjust enrichment, promissory estoppel, and account against Brookwood, Loveland, Florence Park, and Clovernook; (2) tortious interference against HCMG; and (3) a declaratory judgment that the facilities defendants' first material breach negated Blue Sky's duty to indemnify them.

{¶11} The facilities defendants filed counterclaims for indemnification under section 12(B) of the agreement, which provided that Blue Sky would hold the facilities defendants harmless for any costs, losses, etc. "arising out of or in any manner directly or indirectly related to Therapist's Services * * * except to the extent attributable to the gross negligence or willful conduct of [the facilities defendants]," and breach of a purported "pre-payment agreement" between the parties.

{¶12} Following discovery, the parties moved for summary judgment.

A. Summary-judgment motions

{¶13} Blue Sky's summary-judgment motion argued that it had performed all of its obligations under the agreements, and that the facilities defendants had access to the invoice information via the direct data link between the parties' medical record systems. Blue Sky contended that it had continued providing services through 2018 into 2019 because the facilities defendants made the assurance payment, but the facilities defendants refused to pay the previous unpaid invoices. Blue Sky argued that this breach of contract invalidated the facilities defendants' indemnification claim under the doctrine of first material breach.

{¶14} Blue Sky further asserted that the facilities defendants had impliedly or expressly waived the agreements' condition precedent that required Blue Sky to provide certain information in its invoices. It argued that, although the facilities defendants purposefully withheld the fact that they would no longer pay Blue Sky's invoices unless they contained the invoice requirement, the facilities defendants continued to enter Blue Sky's invoices in their accounts-payable journals and reported the invoices as paid on their 2018 tax and Medicare forms.

{¶15} Blue Sky further argued that HCMG had improperly interfered with the nursing facilities' performance under the agreements by advising them not to pay Blue Sky's invoices going forward, which was a violation of Medicare laws and invalidated HCMG's entitlement to indemnification.

{¶16} The facilities defendants filed a combined summary-judgment motion on their claims and response in opposition to Blue Sky's summary-judgment motion. They argued that Blue Sky could not sue to reap the benefits of the parties' agreements while also seeking to be absolved of its indemnification obligations under the same

agreements. They further asserted that it was undisputed that their expenses in defending the qui tam claim and the government investigation arose out of Blue Sky's services and obligations under the agreements, and were not attributable to the facilities defendants' gross negligence or willful misconduct. They contended that Blue Sky's breach-of-contract claim against them did not excuse Blue Sky from its obligation to indemnify them.

{¶17} The facilities defendants argued that they were not required to pay Blue Sky because it failed to perform conditions precedent which had not been waived or modified. They contended that there was no genuine issue of material fact that Blue Sky did not provide invoices according to the invoice requirement, Blue Sky continued to fail to provide appropriate invoices after receiving the adequate assurance payment, and that the agreements' anti-waiver clauses applied. The facilities defendants further asserted that the nursing facilities' tax returns and Medicare cost reports were not relevant to whether Blue Sky was entitled to payments.

{¶18} HCMG argued that Blue Sky could not maintain a tortious-interference claim against it as such a claim does not lie against an agent acting within the course and scope of its duties as the nursing facilities' manager, the facilities defendants did not violate Medicare law by failing to pay Blue Sky, and the tortious-interference claim is not viable under the Restatement of the Law of Torts.

B. The trial court's judgment

{¶19} The court concluded that the facilities defendants had waived the invoice condition precedent and that the anti-waiver clause did not apply to a failure to meet a condition precedent.

{¶20} Further, the trial court held the facilities defendants were entitled to indemnification for costs they had incurred defending the qui tam suit. The court did not address the dispute between the parties as to the amount of damages that the facilities defendants sought.

{¶21} Finally, the court entered a clarification order denying Blue Sky's motion for summary judgment on its tortious-interference claim as HCMG was acting "in its capacity as manager of the Facility Defendants" when it caused them not to pay Blue Sky's invoices, and therefore, was not liable for tortious interference.

Law and Analysis

{¶22} We conduct a de novo review of summary-judgment decisions. *Holloman v. Permanent Gen. Assur. Corp.*, 1st Dist. Hamilton No. C-180692, 2019-Ohio-5077, ¶ 8. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Id.* at ¶ 7, quoting *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

A. The facilities defendants' assignment of error

{¶23} In their sole assignment of error, the facilities defendants argue that the trial court erred in denying their motion for summary judgment and granting Blue Sky's motion for summary judgment on its breach-of-contract claim.

1. Breach of contract

{¶24} To prove a breach-of-contract claim, a party must show "the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." (Citations omitted.) *White v. Pitman*, 2020-Ohio-3957, 156 N.E.3d 1026, ¶ 37 (1st Dist.).

{¶25} It is undisputed that the facilities defendants stopped paying Blue Sky's invoices, which gave rise to an uncontested amount of damages. Further, the record establishes that the facilities defendants purposefully withheld from Blue Sky that they were not paying the invoices because of its failure to adhere to the invoice requirement. Thus, whether the facilities defendants breached the agreements rests on whether Blue Sky's nonperformance of the invoice requirement excused the facilities defendants' obligation to pay Blue Sky and whether Blue Sky's non-performance triggered the anti-waiver clause.

2. The invoice requirement was waived

{¶26} The parties do not dispute that the invoice requirement was a condition precedent. A condition precedent is an act or event that must occur before performance obligations arise. *Gilman v. Physna, LLC*, 1st Dist. Hamilton No. C-200457, 2021-Ohio-3575, ¶ 19; *see Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 22. An unsatisfied condition precedent can excuse performance under a contract and is a defense to a breach-of-contract claim. *Id.; see Great Water Capital Partners, LLC v. Down-Lite Internatl., Inc.*, 1st Dist. Hamilton Nos. C-150015 and C-150023, 2015-Ohio-4877, ¶ 16.

{¶27} But a party may waive a condition precedent by performing under the contract despite the nonfulfillment of the condition. *Corey v. Big Run Indus. Park,*

LLC, 10th Dist. Franklin No. 09AP-176, 2009-Ohio-5129, ¶ 19. A condition precedent "may be waived by the party to whom the benefit of the condition runs * * * expressly or by implication, and the key to its application in a particular case is a showing of some performance pursuant to the terms of the contract." *Id*. at ¶ 18, quoting *Mangan v. Prima Constr., Inc.*, 1st Dist. Hamilton No. C-860234, 1987 Ohio App. LEXIS 6375 (Apr. 9, 1987).

{¶28} A waiver is an intentional relinquishment of a known right, which may be made by express words or by conduct. *Father & Son Property Maintenance, LLC v. Maxim Ents., Inc.,* 5th Dist. Stark No. 2010 CA 00116, 2011-Ohio-689, ¶ 21. To establish a waiver, the party alleging it "must prove a clear, unequivocal, decisive act of the party against whom the waiver is asserted which amounts to an estoppel on his part." *Id*., quoting *Cornett v. Fryman*, 12th Dist. Warren No. CA91-04-031, 1992 Ohio App. LEXIS 248, *6 (Jan. 27, 1992).

{¶29} In *Father & Son Property Maintenance*, the parties had orally agreed that Maxim would pay Father & Son for completing jobs only after Maxim received payment from the bank. *Id*. at ¶ 5. But Maxim paid for work performed on late orders without first receiving payment from the bank. *Id*. at ¶ 23. The court found that Maxim had performed its part under the contract for at least the first month of the parties' agreement, and therefore was estopped from asserting conditions precedent. *Id*.; *see Erectors, Inc., v. Dellagnese Constr. Co.*, 9th Dist. Summit No. 12461, 1986 Ohio App. LEXIS 7903, *6 (Aug. 13, 1986) (waiver found where defendants paid 95 percent of the amount due to plaintiffs before plaintiffs filed their action).

{¶30} We find that the facilities defendants waived the invoice requirement by paying Blue Sky's invoices for seven years, despite those invoices not containing the

name of the therapist and the time spent providing therapy. Moreover, we note that Blue Sky provided the information that the facilities defendants assert was missing from the invoices via the direct data link between the parties' medical record systems. The facilities defendants did not seek replication of that information on Blue Sky's invoices for seven years. Accordingly, they waived the condition precedent.

3. The anti-waiver clause was never triggered

{¶31} The facilities defendants assert that despite not enforcing the invoice requirement for seven years, the anti-waiver clause allowed them to begin enforcing the invoice requirement and relieved them of the duty to pay Blue Sky for non-performance of the invoice requirement.

{¶32} Generally, anti-waiver provisions allow a party to waive a right in one instance without relinquishing rights to enforce other contract provisions. *See Snowville Subdivision Joint Venture Phase I v. Home S&L of Youngstown*, 8th Dist. Cuyahoga No. 96675, 2012-Ohio-1342, ¶ 16.

{¶33} The anti-waiver clause provides: "[t]he waiver by either party of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be a waiver of any subsequent breach of the same or other provision thereof."

{¶34} If a contractual provision is a promise, a party's failure to perform constitutes a breach of contract. *Corey*, 10th Dist. Franklin No. 09AAp-176, 2009-Ohio-5129, at ¶ 20. A party's failure to fulfill a condition precedent, however, is a merely a fact or event—it is not a promise that can be breached. *Morrison v. Bare*, 9th Dist. Summit No. 23667, 2007-Ohio-6788, ¶ 17.

{¶35} The invoice requirement was a condition precedent, not a promise. Nonperformance of a condition precedent is not a breach of the contract. "A failure to satisfy a condition precedent excuses performance under a contract, or, alternatively put, renders a contract unenforceable, but does not affect the validity of the contract." *Baumgardner v. Bimbo Food Bakeries Distrib., Inc.* 697 F. Supp.2d 801, 808 (N.D.Ohio 2010).

{¶36} We hold that Blue Sky's failure to perform the invoice requirement—a condition precedent—did not constitute a breach or violation of the agreements. The anti-waiver clause was limited to breaches or violations of the agreements. Because Blue Sky did not breach or violate the agreements, the anti-waiver clause was never triggered. The facilities defendants were obligated to continue paying Blue Sky for services it provided.

{¶37} There are no genuine issues as to any material fact on any element of Blue Sky's breach-of-contract claim. Therefore, we find that the facilities defendants breached the contract by failing to pay the invoices. The facilities defendants' sole assignment of error is overruled.

B. Blue Sky's Assignments of Error

1. The Facilities Defendants were entitled to indemnification

{¶38} In its first assignment of error, Blue Sky asserts that the trial court erroneously granted the facilities defendants' motion for summary judgment on their indemnification claim. Blue Sky asserts that the facilities defendants are not entitled to indemnification because the facilities defendants breached the agreements before their right to indemnity had vested.

{¶39} Indemnification "is a right of a person who has been compelled to pay what another should pay in full to require complete reimbursement." *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St.2d 11, 14, 321 N.E.2d 787 (1975).

{¶40} The indemnification clause required Blue Sky to indemnify the facilities defendants against any "damages, losses, liabilities, costs, expenses, including reasonable attorney's fees and fines from any governmental agency * * * arising out of or in any manner directly or indirectly related to the Therapist's Services."

{¶41} The indemnification clause is broadly worded and encompasses any damages that the facilities defendants incurred as a result of Blue Sky's services under the agreements. The facilities defendants' losses related to the qui tam lawsuit began before they breached the agreements. Accordingly, we hold that liability under the indemnification clause arose when the facilities defendants began to incur liability, such as expenses and attorney's fees, related to the qui tam lawsuit and the government investigation. To hold otherwise would allow Blue Sky to reap the benefit of payment without fulfilling its own obligations under the agreements. Blue Sky's first assignment of error is overruled.

2. Determinations of Amount Owed for Indemnification

{¶42} Blue Sky's second assignment of error argues that determinations as to the amount that is owed under an indemnification claim must be made on undisputed material facts during the summary-judgment phase. An indemnification clause for legal fees is generally enforceable, but a trial court retains the discretion to determine if an attorney fee is warranted. *Am. Premier Underwriters v. Marathon Ashland Pipeline*, 3d Dist. Mercer No. 10-03-12, 2004-Ohio-2222, ¶ 28. The nature of an indemnity relationship is determined by the intent of the parties as expressed by the

contractual language. *Id*. at ¶ 29. Where contract terms are unambiguous, a court will not create a new obligation by finding an intent that was not expressed in the clear language used by the parties. *Id*.

{¶43} Part of the facility defendants' indemnification claim included its employees' salaries. We find that it is improper to include these employees' salaries in the damages award. There was no evidence that the facilities defendants had to hire other employees to perform these employees' regular job duties. And with or without the investigation and qui tam lawsuit, the facilities defendants would have paid these employees' salaries.

{¶44} Moreover, "[t]he party seeking an award of attorney fees bears the burden of establishing the reasonableness of the requested fees." *Metron Nutraceuticals, L.L.C. v. Thomas*, 8th Dist. Cuyahoga No. 110280, 2022-Ohio-79, ¶ 36. Where there is a dispute of fact as to damages, there should be a trial. *See World Metals Inc. v. AGA Gas, Inc.*, 142 Ohio App.3d 283, 755 N.E.2d 434 (9th Dist.).

{¶45} Blue Sky disputed the reasonableness of the facility defendants' claimed damages. Blue Sky engaged an attorney with experience in False Claims Act cases to refute the facilities defendants' assertion that their attorney's fees were reasonable. The expert also opined that the charges paid for e-discovery services, medical record review, and document review were unreasonable.

{¶46} Thus, the trial court erred by granting summary judgment on the amount of damages. Blue Sky's second assignment of error is sustained.

3. Tortious Interference with a Contract

{¶47} Blue Sky's third assignment of error asserts that it was entitled to summary judgment on its tortious-interference-with-contractual-relations claim. Ohio law recognizes both the tort of intentional interference with a contract and the tort of intentional interference with a prospective contractual relationship. *West v. Visteon Corp.*, 367 F. Supp.2d 1160, 1163 (N.D.Ohio 2005).

{¶48} In *West*, the court found that there is no cause of action for an employee's claim that her supervisor tortiously interfered with her employment "when the act complained of is within the scope of the [supervisory employee's] duties." *Id.* at *9.

{¶49} Similarly, a party cannot sue an agent for allegedly interfering with a relationship between the party and the agent's principal. *Pannozzo v. Anthem Blue Cross and Blue Shield*, 152 Ohio App.3d 235, 2003-Ohio-1601, 787 N.E.2d 91, ¶ 19 (7th Dist.); *see Bodnovich v. ABF Freight Syst., Inc.*, 7th Dist. Belmont No. 93B36, 1994 Ohio App. LEXIS 5598 (Dec. 13, 1994) (agents or employees cannot be sued for alleged interference with relationship with principal or employer).

{¶50} Blue Sky cannot recover on a tortious-interference claim because HCMG and the nursing facilities have an agent/principal relationship. Blue Sky's third assignment of error is overruled.

Conclusion

{¶51} For the foregoing reasons, we affirm the trial court's judgment in favor of Blue Sky's breach-of-contract claim and the facilities defendants' indemnification claim. We further affirm the trial court's judgment against Blue Sky's tortious-interference claim. We reverse the trial court's judgment as to the amount of damages

awarded for the facilities defendants' indemnification claim and we remand this case to the trial court to conduct a trial as to the amount of damages.

Judgment affirmed in part, reversed in part, and case remanded.

ZAYAS, P.J., and **BERGERON, J.,** concur.

Please note:

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