RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0115p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MATTHEW DICKSON, on behalf of himself and others similarly situated,

Plaintiff-Appellant,

v.

DIRECT ENERGY, LP; TOTAL MARKETING CONCEPTS, INC.; SILVERMAN ENTERPRISES, LLC,

Defendants-Appellees.

No. 22-3394

Appeal from the United States District Court for the Northern District of Ohio at Akron.
No. 5:18-cv-00182—John R. Adams, District Judge.

Argued: January 17, 2023

Decided and Filed: June 1, 2023

Before: BATCHELDER, STRANCH, and DAVIS, Circuit Judges.

COUNSEL

ARGUED: Brian K. Murphy, MURRAY MURPHY MOUL + BASIL LLP, Columbus, Ohio, for Appellant. Michael D. Matthews, Jr., MCDOWELL HETHERINGTON LLP, Houston, Texas, for Appellee Direct Energy, LP. **ON BRIEF:** Brian K. Murphy, Jonathan P. Misny, MURRAY MURPHY MOUL + BASIL LLP, Columbus, Ohio, for Appellant. Michael D. Matthews, Jr., William B. Thomas, Diane S. Wizig, David L. Villarreal, MCDOWELL HETHERINGTON LLP, Houston, Texas, James M. Chambers, MCDOWELL HETHERINGTON LLP, Arlington, Texas, for Appellee Direct Energy, LP.

OPINION

DAVIS, Circuit Judge. Matthew Dickson brought this action under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, alleging that Direct Energy, LP sent him multiple ringless voicemails ("RVMs"). The district court determined that Dickson received only one RVM and dismissed the suit, finding that Dickson suffered no concrete harm and therefore lacked standing. Dickson now appeals the order dismissing his claim. We conclude that, regardless of the number of RVMs Dickson received, his asserted injury bears a close relationship to one recognized at common law. We further find that Direct Energy caused Dickson precisely the type of harm Congress sought to address through the TCPA. Accordingly, Dickson suffered a concrete injury for purposes of Article III standing. We therefore **REVERSE** the order of the district court and **REMAND** for further proceedings.

I

The TCPA is the product of public outrage over abusive telephone marketing practices. Pub. L. 102-243 § 2, ¶ 6 (1991). By the time it was enacted in 1991, companies had begun to use technology that could automatically dial telephone numbers and deliver prerecorded voice messages to potential consumers en masse—reportedly to more than 18 million Americans each day. *Id.* ¶¶ 1, 3; *see also* S. Rep. No. 102–178, at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (describing industry developments which expanded the use of robocalls). Many complained that these unsolicited calls tied up phone lines, crowded answering machines, imposed financial burdens, and disrupted public safety services. Pub. L. 102-243 § 2, ¶¶ 5, 9, 14; S. Rep. No. 102–178, at 1–2, *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. Consumers more generally criticized these robocalls as invasions of privacy "regardless of the content or the initiator of the message." Pub. L. 102-243 § 2, ¶ 10. Congress agreed. It found that unrestricted telemarketing *can* be "an intrusive invasion of privacy." *Id.* ¶ 5. Congress thus enacted the TCPA with individual privacy interests among its primary concerns. *Id.* ¶¶ 5, 9–10, 12; *see Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2348 (2020); S. Rep. No. 102–178, at 1–2, 4–5, 9, *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1968–69, 1972–73, 1976.

The TCPA accordingly restricts certain telemarketing practices. Among other things, it prohibits making any call, to any telephone number, "using any automatic telephone dialing system or an artificial or prerecorded voice" absent an emergency or the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). It similarly proscribes the use of robocalls to deliver unsolicited messages. *Id.* § 227(b)(1)(B). Congress delegated authority to the Federal Communications Commission to craft exceptions to the law, provided that those exceptions did not "adversely affect the privacy rights that [it] is intended to protect." *Id.* § 227(b)(2)(B)(ii)(I) (referring to subsection (b)(1)(B)); *see also id.* § 227(b)(2)(C) (stating essentially same in reference to subsection (b)(1)(A)(iii)). The TCPA includes a private right of action to enforce its provisions. *Id.* § 227(b)(3). The law contemplates both injunctive and monetary relief, allowing for an award of $500 for each violation of the statute with the possibility of recovering treble damages. *Id.*

II

This case arises from unauthorized prerecorded messages allegedly sent to Dickson by Direct Energy. Specifically, Dickson alleges that Direct Energy delivered multiple RVMs to his cell phone in 2017 advertising its services. RVM technology makes it possible to "deposit[] voicemails directly into a recipient's voicemail box, without placing a traditional call to the recipient's wireless phone." One RVM placed on November 3, 2017, explicitly stated that the call was from "Nancy Brown with Direct Energy." Dickson never consented to receiving these communications. He thus filed suit individually and on behalf of all others similarly situated, alleging that Direct Energy violated the TCPA's automated calling prohibitions under 47 U.S.C. § 227(b)(1) by sending RVMs.[1] Dickson claims that he was harmed by these communications because they tied up his phone line, cost him money, and were generally a nuisance. He also maintains that the calls disturbed his solitude and invaded his privacy.

[1]Whether an RVM is a prohibited "call" under this section is not at issue here. But the magistrate judge in this case found that RVMs *are* "calls," explaining that "to hold otherwise 'would elevate form over substance, thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA's protections, and potentially open a floodgate of unwanted voicemail messages to wireless consumers.'" In addition, the Federal Communications Commission recently issued a Declaratory Ruling and Order finding the same. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition for Declaratory Ruling of All About the Message, LLC*, No. 02-278, 2022 WL 17225556, at *1 ¶ 1, *3 ¶ 10, *4 ¶ 14 (Nov. 21, 2022).

Dickson's lawsuit proceeded to discovery. At his deposition, Dickson testified that he received eleven RVMs from Direct Energy and reiterated that they invaded his privacy. Regarding the November 3 RVM in particular, Dickson explained that he realized the voicemail was on his phone just a few minutes after receiving it. While he could not remember precisely what he was doing when he received that message, he was "sure it interrupted something" in his routine. Dickson also testified that he generally listened to every voicemail message he received from Direct Energy in its entirety. Direct Energy retained an expert witness to analyze Dickson's phone records. The expert concluded that of the eleven voicemails Dickson produced in discovery, only the one he received on November 3, 2017, was from Direct Energy.

Armed with this information, Direct Energy moved to dismiss Dickson's complaint for lack of standing, arguing that Dickson had suffered no concrete injury. In granting the motion, the district court stated that Dickson received only one RVM—seemingly in reference to the November 3 voicemail. The court held that Dickson's receipt of a single RVM did not constitute a concrete harm sufficient for Article III purposes because (a) he could not recall what he was doing when he received the RVM, (b) he was not charged for the RVM, (c) the RVM did not tie up his phone line, and (d) he spent an exceedingly small amount of time reviewing the RVM. Dickson now appeals, arguing that the district court made erroneous findings of fact and misapplied the law.

III

We review *de novo* the district court's decision to grant Direct Energy's motion to dismiss for lack of subject matter jurisdiction. *Lindke v. Tomlinson*, 31 F.4th 487, 490 (6th Cir. 2022) (quoting *Cartwright v. Garner*, 751 F.3d 752, 760 (6th Cir. 2014)). For the reasons set forth below, we conclude that the court erred in dismissing Dickson's TCPA claim for lack of standing.

A.

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies. U.S. Const. art. III, § 2. An essential component of the case-or-controversy requirement is the doctrine of standing, which "limits the category of litigants empowered to

maintain a lawsuit in federal court to [those who] seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To establish standing, plaintiffs bear the burden of showing (1) a concrete and particularized injury-in-fact which (2) is traceable to the defendant's conduct and (3) can be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Spokeo*, 578 U.S. at 338 n.6.

This court has not previously considered whether receipt of a single RVM for commercial purposes presents a concrete harm sufficient to confer standing to make a claim under the TCPA. Here, we find that Dickson's claims satisfy the demands of Article III because his alleged injury under the TCPA constitutes a concrete harm.

A concrete harm is one that is real and not abstract—*i.e.*, it "actually exist[s]." *Spokeo*, 578 U.S. at 340. A mere procedural violation of a statutory right does not amount to a concrete injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quotation omitted). Courts therefore must interrogate the concreteness requirement "even in the context of a[n alleged] statutory violation." *Spokeo*, 578 U.S. at 341. Notably, an injury need not necessarily be tangible (e.g., physical or monetary) to be concrete; intangible harms can create Article III standing. *TransUnion*, 141 S. Ct. at 2204; *Spokeo*, 578 U.S. at 340. And Congress's decision to create a statutory cause of action may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," so long as those injuries "'exist' in the real world." *TransUnion*, 141 S. Ct. at 2205 (first quoting *Spokeo*, 578 U.S. at 341, then quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

To determine whether an intangible harm—such as Dickson's receipt of an unsolicited RVM—rises to the level of a concrete injury, courts may look to (1) history and tradition and (2) Congress's judgment in enacting the law at issue. *TransUnion*, 141 S. Ct. at 2204–05; *Spokeo*, 578 U.S at 340. These considerations are addressed in turn below.

B.

We first consider whether Dickson's asserted injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 578 U.S. at 341 (citation omitted). The Court has clarified, however, that

"*Spokeo* does not require an exact duplicate in American history and tradition." *TransUnion*, 141 S. Ct. at 2204.

Then-Judge Barrett's opinion in *Gadelhak v. AT&T Services, Inc.* is instructive on this requirement. 950 F.3d 458 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2552 (2021). In *Gadelhak*, the plaintiff brought suit under the TCPA after receiving five unwanted text messages from AT&T, the defendant telephone company. *Id.* at 460. The court began by reviewing, in light of *Spokeo*, whether the plaintiff had Article III standing to sue for this intangible harm. *Id.* at 461–63. In analyzing whether sending unwanted texts resembled a tort at common law, the court looked to the common law tort of intrusion upon seclusion—a cause of action aimed at "defendants who invade[] the private solitude of another." *Id.* at 462 (citing Restatement (Second) of Torts § 652B (Am. L. Inst. 1977) [hereinafter Restatement]); *see also* Restatement § 652A(2)(a) (noting in part that intrusion-upon-seclusion claims vindicate people's "right to be let alone"). The court observed that this common law cause of action historically helped to address "irritating intrusions" into one's privacy, "such as when 'telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff.'" *Gadelhak*, 950 F.3d at 462 (citing Restatement § 652B cmt. d). The court reasoned that when AT&T sent Gadelhak unsolicited text messages, it made a similar intrusion into his privacy or seclusion. *Id.* It did not matter that "common law courts generally require a much more substantial imposition—typically, many calls—to support liability for intrusion upon seclusion," because:

> when *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a "close relationship" *in kind, not degree*. In other words, while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.

Id. at 462–63 (first emphasis added) (quoting *Spokeo*, 578 U.S. at 341); *see also id.* at 463 n.2 (further explaining, in this same vein, that even a single TCPA violation, such as receipt of one

unwanted text, could suffice for Article III standing so long as that alleged harm fundamentally resembled a common-law tort).

Gadelhak's approach is well-reasoned in view of the Supreme Court's guidance in *Spokeo* and *TransUnion*. We recently applied *Gadelhak* in a Fair Debt Collection Practices Act case where we determined that the plaintiff's receipt of one unwanted voicemail "is injury enough" to establish Article III standing because "[t]he intrusion caused by unwanted phone calls bears a 'close relationship' to the *kind* of harm" protected by common-law intrusion upon seclusion. *See Ward v. NPAS, Inc.*, 63 F.4th 576, 580–81 (6th Cir. 2023). In a similar vein, we recognized in *Norton v. Beasley* that "an intangible injury . . . generally suffices so long as it is the type of injury traditionally recognized by American courts," and that the relevant measure here "is one of kind and not degree." No. 21-6053, 2022 WL 17348385, at *7 (6th Cir. Dec. 1, 2022) (citations omitted). Other circuits apply similar (or identical) reasoning on this same point. *See, e.g.*, *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022) (courts should "focus[] on types of harms protected at common law, not the precise point at which those harms become actionable" (citation omitted)); *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 653–54 (4th Cir. 2019) (same); *Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184, 1192 (7th Cir. 2021) (ruling plaintiff had standing because her claimed intangible harm resembled a common-law intrusion upon seclusion, regardless of whether she would prevail on a stand-alone claim for that common-law harm); *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021) (one unsolicited call similar in kind to a common-law intrusion upon seclusion conferred standing); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351–52 (3d Cir. 2017) (same); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017) ("[T]he relevant point is that Congress has chosen to protect against a harm that is at least closely similar *in kind* to others that have traditionally served as the basis for lawsuit.").

In this case, Dickson argues that his receipt of an unwanted RVM resembled the common law tort of intrusion upon seclusion.[2] As explained above, courts at common law recognized

[2]In his reply brief, Dickson cursorily argues for the first time that Direct Energy's conduct also parallels the common-law tort of trespass to chattels. Because Dickson failed to appropriately develop this argument in his opening brief, it will not be addressed here. *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) (citing *Am. Trim,*

through this tort the "right to be let alone." Restatement § 652A(2)(a), cmts. a–b; *see also TransUnion*, 141 S. Ct. at 2204 (citing *Gadelhak*, 950 F.3d at 462) (affirming that the tort of intrusion upon seclusion is deeply rooted in the common law). And broadly speaking, unwanted telephone communications can qualify as injuries under this common law doctrine. Restatement § 652B cmt d.

The kind of harm vindicated by the intrusion-upon-seclusion tort is relatively broad. Foundationally, there is a common-law right to privacy, which simply "reflects an individual's 'right to be let alone.'" *Fultz v. Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991) (quoting Restatement § 652A cmt. A). The intrusion-upon-seclusion tort derives from this generalized privacy interest, s*ee* Restatement § 652A & cmt. a, and it safeguards the right to be secluded from and undisturbed by the public. *Fultz*, 942 F.2d at 401; *Yahoo! Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 913 F.3d 923, 924 (9th Cir. 2019); *see also* Restatement § 652B. In other words, the common law recognizes concrete harm where a defendant "intrude[s] into the private solitude of another." *E.g.*, *Lupia*, 8 F.4th at 1191; *see also Gadelhak*, 950 F.3d at 462; *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 801–02 (9th Cir. 2017). This is the kind of harm with which the intrusion-upon-seclusion tort is concerned, at its core—the right to maintain a sense of solitude in one's life and private affairs.

That said, the *scope of liability* for the actual tort of intrusion upon seclusion is more circumscribed and confines liability to cases where a defendant's conduct is "highly offensive to the ordinary reasonable man." Restatement § 652B cmt. d; *see also Charvat v. NMP, LLC*, 656 F.3d 440, 452–53 (6th Cir. 2011); *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 291, 293 (3d Cir. 2016) (to state a legally cognizable claim for intrusion upon seclusion, one must show that the intrusion was highly offensive to a reasonable person). A plaintiff's claims at common law thus may rise or fall based on the substantiality of the defendant's intrusions.

Here, Direct Energy placed an unsolicited call to Dickson's phone (the RVM) to publicize its services, interjecting itself into Dickson's private sphere. This implicates Dickson's common-law right to seclusion—that is, his right to be left alone from others, including by

---

L.L.C. v. Oracle Corp., 383 F.3d 462, 477 (6th Cir. 2004)) ("We have consistently held . . . that arguments made to us for the first time in a reply brief are waived.").

means of telephonic communications. *Id.* §§ 652A, 652B. From a lay perspective, we can see why members of the public and Congress, through the TCPA, deemed such calls intrusive. Pub. L. 102-243 § 2, ¶¶ 5–6, 10, 12. For example, some consider their phone number a matter of private information in and of itself. People commonly exercise discretion in publicizing their phone numbers, entrusting them only to their circle of friends, family, and select others on an as-needed basis. It follows that they may not wish for strangers or unfamiliar businesses to directly reach their personal phone lines. In addition, phone numbers are relatively fixed and attached to the individual. In the ordinary course of things, they are seldom changed—which could make it difficult to evade unwanted communications once one's phone number is discovered. And finally, receipt of unwanted voicemails (for example) to a personal telephone also undermines a sense of privacy, because being prompted to consider such messages for review and then disposal is disruptive of one's personal time—particularly given that the recipient might forever be prompted to do so until it is done. In these ways and others, telephones are logically part of one's private domain to which the right to be left alone extends. *See* Restatement § 652A cmt. a.

This conclusion aligns with numerous decisions in which courts have found invasion-of-privacy-like harms flowing from unwanted telephonic communications. For example, in *Gadelhak*, the court found that receipt of a small number of unwanted text messages (or even *one* such text) is a "modern relative" of the intrusion-upon-seclusion tort. *Gadelhak*, 950 F.3d at 462, 463 n.2. In *Susinno*, the plaintiff similarly prevailed on evidence of a single prerecorded call. *Susinno*, 862 F.3d at 348, 351–52. And in *Van Patten*, the court observed that "[u]nsolicited . . . phone calls or text messages, *by their nature*, invade the privacy and disturb the solitude of their recipients." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (emphasis added). The Ninth Circuit recently reaffirmed that holding, explaining that receipt of unsolicited phone calls closely resembles traditional claims for intrusion upon seclusion. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1118 (9th Cir. 2022). Again, it is immaterial that an independent common-law cause of action for intrusion upon seclusion requires evidence of calls "repeated with such persistence and frequency" amounting to "hounding" of the plaintiff. *See* Restatement § 652B cmt. d. That is because in measuring concreteness, the inquiry centers on the *kind* of harm at issue rather than the *degree* of that harm. *E.g.*, *Gadelhak*, 950 F.3d at 462–63. And here, Dickson's alleged injury—namely, that Direct

Energy disturbed his right to be left alone—is closely related to the *kind* of harm protected at common law by the intrusion-upon-seclusion tort. Thus, the first prong of the post-*Spokeo* and *TransUnion* standing inquiry is satisfied.

The district court here relied on Eleventh Circuit case law in granting Direct Energy's motion to dismiss. *See Grigorian v. FCA US LLC*, 838 F. App'x 390 (11th Cir. 2020); *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019). We diverge from those non-binding decisions. First, both cases predate *TransUnion*, where the Court clarified *Spokeo*'s standing requirements. *TransUnion*, 141 S. Ct. at 2204–07. And second, *Grigorian* and *Salcedo* do not adequately address the historical-analogue prong.

In *Grigorian*, the defendant allegedly violated the TCPA by transmitting one RVM to the plaintiff's cell phone.[3] 838 F. App'x at 391. The Eleventh Circuit affirmed the district court's dismissal of the plaintiff's claims for lack of Article III standing. *Id.* But *Grigorian* did not conduct the standing inquiry required by *Spokeo*. *Id.* at 392–94; *see* 578 U.S. at 341 (instructing courts to look to both history and the judgment of Congress to determine whether an intangible harm is sufficiently concrete to constitute an injury in fact). This omission leaves a gap in reasoning that greatly diminishes *Grigorian*'s persuasive value here.

And in *Salcedo*, the court found the plaintiff lacked standing where he received an unsolicited text in violation of the TCPA. 936 F.3d at 1165, 1172. But *Salcedo* seems to misapply *Spokeo* in reasoning that intrusion upon seclusion requires evidence of a *substantial* intrusion, and the plaintiff's "isolated," "momentary" injury fell short of that standard; therefore, the plaintiff lacked a historical analogue to his claimed harm. *Id.* at 1171 (citing Restatement § 652B cmt. d). We do not agree that this approach is an appropriate measure of concreteness, however, because it requires the plaintiff to show that his harms would suffice to state an independent claim at common law—a prerequisite which *TransUnion* has since unequivocally clarified is *not* the applicable standard. 141 S. Ct. at 2204 ("*Spokeo* does not require an exact duplicate in American history and tradition."). Instead, as *Gadelhak* and many other courts have observed, *Spokeo* requires a close common-law analogue in *kind*, not *degree*. 950 F.3d at 462.

[3] *Grigorian* appears to be the only circuit court decision to date addressing whether receipt of an RVM can create Article III standing.

Salcedo also found that the plaintiff's alleged injury was insufficient because, traditionally, intrusions upon seclusion specifically entailed conduct like eavesdropping and wiretapping. 936 F.3d at 1171 (citing Restatement § 652B cmt. b). It opined that these "severe kinds of actively intermeddling intrusions" were nothing like Salcedo's receipt of an unwanted phone communication. *Id.* Yet the common-law tort *does* protect against invasive telephone contacts. Restatement § 652B cmt. d. As a result, other courts have expressly declined to follow *Salcedo*. *See Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 693 (5th Cir. 2021) (rejecting *Salcedo* because its "focus on the substantiality of the harm in receiving a single text misunderstands *Spokeo*"); *Gadelhak*, 950 F.3d at 462–63 (explaining same and adopting the kind-versus-degree inquiry). We do the same.

For its part, Direct Energy insists that any harm Dickson may have personally suffered is insufficiently analogous to the tort of intrusion upon seclusion to state a claim. However, its arguments are unpersuasive. First, Direct Energy argues that "there is no evidence that [Dickson] was in a private place [e.g., his home] or state of seclusion that could have been intruded upon." Thus, because he was "not then in seclusion" when he noticed the RVM, there was no invasion of privacy. This argument is inapt. Intrusion upon seclusion occurs when someone "intrude[s] into a private place." Restatement § 652B cmt. c. Such an invasion of privacy can occur even when the victim is physically present in a public place. *Id.* Indeed, even outside the home, "there may be some matters about the plaintiff . . . that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." *Id.* Direct Energy similarly invaded Dickson's private sphere when it placed an unsolicited, prerecorded call to his cell phone. *See, e.g.*, *Gadelhak*, 950 F.3d at 462; *Susinno*, 862 F.3d at 351–52. And cell phones are, by their nature, private—regardless of whether they are carried in public places. *See Riley v. California*, 573 U.S. 373, 393–97 (2014) (discussing the "broad array" of private information stored on cell phones, including extensive records of phone communications, photos, and other indicia of an individual's "private interests [and] concerns").

Direct Energy offers no authority for its postulation that Dickson must present proof of any further indicia of privacy (*e.g.*, that he was at home when he received the RVM). Moreover, other courts have determined that plaintiffs had standing to sue after receiving unsolicited

communications to their cell phones by analogizing that harm to intrusion upon seclusion—without requiring plaintiffs to be physically located in a special, private location when they received those unwanted communications. *See, e.g.*, *Gadelhak*, 950 F.3d at 462–63; *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019); *Susinno*, 862 F.3d at 351–52. Nor do the TCPA's prohibitions appear to be so narrow. *E.g.*, *Barr*, 140 S. Ct. at 2343–44, 2344 n.1, 2356 (explaining that "Congress enacted a general restriction on robocalls to cell phones" and that the TCPA "generally prohibits robocalls to cell phones *and* home phones" (emphasis added)). Direct Energy fails to grapple with these authorities, and we therefore reject its suggestion to limit the scope of privacy.

Second, Direct Energy contends that an intrusion upon seclusion occurs only when a person's "peace and quiet" is disturbed by an audible sound like a ringing phone, or when a person's attention is otherwise taken away from what they are doing. By this measure, it argues that Dickson's solitude was never intruded upon since the RVM was silently delivered to his phone. That is to say: because Dickson's phone never buzzed or emitted a sound upon receipt of the RVM, and he did not notice it for several minutes, the RVM did not invade his privacy. Direct Energy underscores that the RVM "sat unnoticed until Mr. Dickson voluntarily decided to turn his attention away from what he was doing to review his notifications." It maintains that these facts are different in kind from the telephonic invasions of privacy recognized at common law which involve the ringing of a landline phone that cannot be ignored. This reasoning closely resembles the *Salcedo* court's rationale that we reject here. 936 F.3d at 1172 (dismissing case for lack of standing because plaintiff "ha[d] not alleged anything like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone"). Ultimately, Direct Energy suggests that no intrusion upon seclusion occurred here because its RVMs were relatively unobtrusive.

Like the suggestion that one RVM is not enough to intrude upon one's seclusion, however, this argument also challenges the *degree* of Dickson's harm. As we previously explained, and as counsel for Direct Energy conceded at oral argument, the decisive issue here is whether Dickson's claimed injury is similar in *kind* to one recognized at common law. We pause to disentangle these concepts as they pertain to this case.

Direct Energy asserts that Dickson's claim is unlike a tortious invasion of privacy because his "peace and quiet was [not] shattered by ringing phones or dinging text notifications." Yet Dickson need not make out a claim for tortious invasion of privacy for purposes of our analysis. Indeed, it could be that Dickson's claims would fail at common law for the reason Direct Energy offers, which is an issue we have no cause to decide. As pertinent here, the indicia of harm Direct Energy seeks to challenge—*i.e.*, how substantial or disruptive the defendant's conduct was—are matters of *degree*. They are irrelevant to the question of whether Dickson's claimed harm is similar *in kind* to an intrusion into his private affairs. *Gadelhak*, 950 F.3d at 462–63; *see also, e.g.*, *Perez*, 45 F.4th at 822; *Persinger*, 20 F.4th at 1192; *Lupia*, 8 F.4th at 1192; *Cranor*, 998 F.3d at 693; *Krakauer*, 925 F.3d at 654. Dickson suffered such a harm when Direct Energy deposited an unsolicited RVM into his phone. Therefore, Direct Energy's argument fails.

In conclusion, we find that Dickson has alleged an intangible harm that bears a sufficiently close relationship to the traditional common law tort of intrusion upon seclusion.

C.

Next, we turn to Congress's judgment. In *Spokeo*, the Supreme Court observed that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," and so found its judgment "instructive and important" in determining whether an intangible harm rises to an injury in fact. *Spokeo*, 578 U.S. at 341; *see also TransUnion*, 141 S. Ct. at 2204–05 (adding that Congress is empowered to identify concrete harms that are inadequate in law and recognize them, by statute, as legally cognizable injuries). Courts accordingly "afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *TransUnion*, 141 S. Ct. at 2204 (citation omitted). We thus review for whether a defendant's alleged misconduct aligns with the conduct Congress sought to regulate through federal law. *E.g.*, *Lupia*, 8 F.4th at 1192 (Congressional-judgment prong satisfied where defendant allegedly caused the specific kind of harm prohibited by the relevant statute); *Gadelhak*, 950 F.3d at 462 (same where plaintiff claimed he suffered "the very harm that the [TCPA] is designed to prevent").

The parties did not develop arguments on this point, so it appears not to be in dispute. In any event, Congress enacted the TCPA after finding that unrestricted telemarketing practices harm consumers. Pub. L. 102-243 § 2, ¶ 5. The law is intended to protect from invasions of privacy wrought by unauthorized automated and prerecorded calls. *Id.* ¶¶ 10, 12–14; *see also, e.g.*, *Yahoo! Inc.*, 913 F.3d at 925 ("The TCPA's explicit purpose 'is to protect privacy rights.'" (quoting *L.A. Lakers, Inc.*, 869 F.3d at 803)); *Cranor*, 998 F.3d at 690; *Gadelhak*, 950 F.3d at 460; *Krakauer*, 925 F.3d at 650; *Melito*, 923 F.3d at 88; *Parchman v. SLM Corp.*, 896 F.3d 728, 738–39 (6th Cir. 2018). Here, Dickson alleges that he received such an unsolicited marketing call from Direct Energy: the November 3 RVM. He also validly maintains that receipt of this message invaded his privacy. His injury therefore falls within the ambit of what Congress deemed to be an actionable harm when it enacted the TCPA. *See Gadelhak*, 950 F.3d at 462 (concluding same); *Melito*, 923 F.3d at 93 (same); *Susinno*, 862 F.3d at 351–52 (same). Accordingly, Dickson satisfies the second prong of our standing inquiry.

D.

Both prongs of the standing analysis set forth in *Spokeo* and *TransUnion* are satisfied here: Dickson's receipt of an unsolicited RVM bears a close relationship to the kind of injury protected by the common law tort of intrusion upon seclusion; and his claimed harm directly correlates with the protections enshrined by Congress in the TCPA. Therefore, Dickson suffered a concrete injury in fact sufficient for Article III standing purposes. Because the district court erred in dismissing Dickson's suit for want of standing, we reverse its judgment and remand for further consideration.

We address a few final points. First, Dickson argues that dismissal was improper under the law-of-the-case doctrine because the magistrate judge had previously found that RVMs are considered "calls" within the meaning of the TCPA. This argument misses the mark. Law of the case does not apply here because the magistrate judge's order at issue did not rule on Article III standing. Moreover, this doctrine has no applicability to rulings on subject-matter jurisdiction, which courts may revisit at any time. *Clark v. Adams*, 300 F. App'x 344, 351 (6th Cir. 2008) (quoting *Amen v. City of Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983)). Second, because we find that Dickson has standing regardless of the number of RVMs he received, we need not address

his argument that the district court erred in finding that he received only one RVM from Direct Energy. Whether he received one RVM or eleven (as he urges us to conclude), our standing analysis remains the same.

Finally, we decline Dickson's request for reassignment to a different judge on remand. This is another issue that was not properly presented to the court; it is raised for the first time in Dickson's reply brief. *Sanborn*, 629 F.3d at 579. In any case, Dickson failed to establish why this extraordinary remedy would be appropriate here. *United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 532–33 (6th Cir. 2012) (quoting *Solomon v. United States*, 467 F.3d 928, 935 (6th Cir. 2006)). He asserts that the district judge cannot fairly preside over these claims because he construed "a situation in which literally millions of illegal telemarketing calls were delivered to hundreds of thousands of putative class members" as "unworthy of having a place on [his] docket." The district court, however, properly inquired into *Dickson's* standing to bring suit based on the harms *he* claimed to have suffered. There is no reason to believe that the district court will have "substantial difficulty" setting aside its previous finding (that Dickson suffered no concrete harm) on remand and in keeping with our ruling here. *Renal Care Grp.*, 696 F.3d at 532–33 (quoting *Solomon*, 467 F.3d at 935).

IV

For the foregoing reasons, we **REVERSE** the district court's dismissal of Dickson's suit for failure to demonstrate an injury in fact and **REMAND** for further proceedings.

[Cite as *Total Quality Logistics, L.L.C. v. Leonard*, 2023-Ohio-2271.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

TOTAL QUALITY LOGISTICS, LLC,	:	
		CASE NO. CA2022-09-048
Appellant,	:	
		O P I N I O N
	:	7/3/2023
- vs -		
	:	
ERIN C. LEONARD, et al.,	:	
Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2020 CVH 00960

Graydon Head & Ritchey LLP, and Daniel J. Knecht and Scott K. Jones, for appellant.

Stites & Harbison, PLLC, and Robin D. Miller, for appellee.

M. POWELL, J.

{¶ 1} Appellant, Total Quality Logistics, LLC ("TQL"), appeals a decision of the Clermont County Court of Common Pleas declining to enforce a noncompete agreement against appellee, Erin Leonard, while she was on paid administrative leave for a competitor of TQL.

{¶ 2} TQL is a freight broker and third-party logistics company headquartered in

Clermont County, Ohio. TQL has offices throughout the United States, including Ohio and Massachusetts. As a third-party logistics company, TQL does not own its own trucks or trailers, but facilitates shipments through those means for other carriers. TQL typically hires new employees that have no prior logistics experience, thereby allowing TQL to extensively train its new employees on the specific sales methods developed and employed by TQL.

{¶ 3} Leonard was hired by TQL in February 2018 as a Logistics Account Executive Trainee. Prior to joining TQL, Leonard had no experience in third-party logistics. On her first day as a TQL employee, Leonard signed TQL's "Employee Non-Compete, Confidentiality, and Non-Solicitation Agreement" (the "NCA"). The NCA prohibited Leonard from being employed by a TQL competitor and soliciting TQL customers for a period of one year after termination of her employment with TQL. The NCA also prohibited Leonard from disclosing or using any of TQL's trade secrets and confidential information. Leonard agreed that if she breached any restriction in the NCA, TQL would be entitled to an injunction restraining such activity. Leonard further agreed that the running of the one-year restrictive covenant would be tolled for any time in which she was in violation of the NCA.

{¶ 4} TQL provided Leonard with 22 weeks of training. Her training included using TQL's software platforms, such as Load Manager which houses information related to loads, customers, carriers, margins, rates, lanes, and particular information about customers' freight. As her employment with TQL progressed, Leonard was promoted to Saturday Group Leader. In February 2020, TQL transferred Leonard to its Boston, Massachusetts office at her request. During her employment with TQL, Leonard developed friendships with employees of three TQL customers, Rita Tucker, Sean Coborn, and Daryl Simpson. Leonard's contact with Tucker, Coborn, and Simpson extended beyond the workday and regularly took place on Leonard's own time. Leonard and these individuals exchanged their personal cell phone numbers.

{¶ 5} While employed by TQL, Leonard was contacted by a recruiter for a position with Ally Global Logistics, LLC ("Ally"), a competitor of TQL. Ally is a family business headquartered in Massachusetts whose primary business was lumber and exports. In March 2020, Ally set up Domestic Division, a domestic truck brokerage division within the company focused on third-party logistics. In this sense, Ally was a direct competitor of TQL. Leonard interviewed with Ally. During her interview, Leonard advised that she was subject to a noncompete agreement with TQL. Stephen Zambo, Ally's president, advised Leonard not to be concerned about her NCA because he understood that noncompete agreements were not enforceable in Massachusetts. Leonard accepted a freight broker position with Ally, resigned from her position with TQL on September 16, 2020, and began working for Ally on September 28, 2020. Leonard signed a two-year noncompete agreement with Ally and was trained over two days, learning Ally's computer systems and sales practices.

{¶ 6} Kristiana Lorgeree, the head of Ally's Domestic Division and Leonard's supervisor, encouraged Leonard to contact TQL customers to secure their business with Ally. Leonard actively solicited some TQL customers; other TQL customers initiated contact with her. Leonard also continued to communicate with Tucker, Coborn, and Simpson. Between October 2, 2020, and November 11, 2020, Leonard generated $24,978.93 in profit for Ally from eight TQL customers.

{¶ 7} Marc Bostwick, TQL's risk manager, learned that Leonard was employed by Ally through LinkedIn. On September 30, 2020, Bostwick emailed Zambo to confirm that Leonard was employed by Ally, to inquire concerning the position she held, and to advise that Leonard was subject to a noncompete agreement. Zambo requested a copy of Leonard's NCA with TQL. Bostwick forwarded the noncompete provisions of Leonard's NCA; he did not include the NCA's clause governing the choice of law (i.e., Ohio law) and forum selection (i.e., Ohio).

{¶ 8} On November 12, 2020, TQL filed a complaint in the trial court asserting claims for breach of contract and misappropriation of trade secrets against Leonard and claims for misappropriation of trade secrets and tortious interference with contract against Ally. TQL sought damages, injunctive relief, and a declaration that the running of the one-year restrictive covenants in the NCA was tolled due to Leonard's employment by Ally in violation of the NCA. TQL also sought a temporary restraining order ("TRO") and preliminary injunction against Leonard and Ally.

{¶ 9} An agreed TRO was journalized on November 25, 2020. It provided that Leonard would be on paid administrative leave until expiration of the TRO during which time she would not conduct any business regarding freight, shipping, brokerage, or logistics services, either on her own behalf or Ally's behalf. The parties subsequently extended the agreed TRO to December 30, 2020, and on March 29, 2021, an agreed preliminary injunction was journalized. Both the extended TRO and the preliminary injunction included the same terms as the agreed TRO. The preliminary injunction further provided, "By entering into this Agreed Injunction no party waives, and each hereby expressly reserves, any and all arguments, defenses, and objections concerning the subject matter hereof."

{¶ 10} The parties filed cross-motions for summary judgment. On January 6, 2022, the trial court granted in part and denied in part TQL's motion for summary judgment regarding its breach-of-contract claim. The trial court found that Leonard breached the NCA during the two-month period she was employed by Ally prior to the journalization of the November 25, 2020 agreed TRO. The trial court found, however, that there were genuine issues of material fact regarding whether the NCA was breached after November 25, 2020. The trial court denied TQL's motion for summary judgment regarding its claims for misappropriation of trade secrets and tortious interference with contract, and denied Ally's motion for summary judgment.

{¶ 11} Ally moved to dissolve the agreed preliminary injunction after one year had passed from the issuance of the November 25, 2020 agreed TRO. On January 27, 2022, the trial court dissolved the preliminary injunction, finding that there had been a significant change in circumstances since the issuance of the November 25, 2020 agreed TRO, to wit, Leonard had provided no services to Ally for one year as provided by the NCA.

{¶ 12} The case proceeded to a bench trial on February 14, 2022. Leonard, Zambo, and Bostwick testified. The evidence at trial revealed that despite the TROs and preliminary injunction, from November 25, 2020, to May 25, 2021, Leonard had at least 30 contacts with Tucker, Coborn, and Simpson. Leonard characterized these contacts as strictly personal in nature. Leonard testified that she did not access Ally's online databases during her administrative leave, and such was verified by Zambo based upon Ally's records. There was no evidence contrary to Leonard's and Zambo's assertions in this regard.

{¶ 13} The trial evidence included TQL's historical sales data regarding the TQL customers Leonard had contact with during the two-month period she was employed by Ally prior to being placed on paid administrative leave on November 25, 2020. The data revealed that some of these customers ceased doing business with TQL, and there was a reduction in business with the other customers. However, TQL did not offer evidence as to why customers ceased doing business with TQL. Zambo's unrefuted testimony was that once Leonard was placed on administrative leave, Ally did not do any business with TQL customers.

{¶ 14} On June 22, 2022, the trial court found that Leonard did not breach the NCA in the year following the November 25, 2020 issuance of the TRO. Specifically, the trial court found that (1) Leonard did not compete with TQL or provide any services to Ally contrary to TQL's business interests after November 25, 2020, (2) Leonard's communications with three of her former TQL customers did not violate the NCA, and (3)

Leonard did not breach the NCA by simply being on paid administrative leave where she did not perform any work for Ally and while she awaited expiration of the NCA's one-year restriction on employment with a TQL competitor. The trial court found that Ally tortiously interfered with Leonard's NCA by hiring her away from TQL. As damages for Leonard's breach of the NCA prior to November 25, 2020, and Ally's tortious interference with Leonard's NCA, the trial court awarded TQL $24,978.93. The amount represents the profit Ally realized from Leonard's contacts with TQL customers between September 28, 2020, the date Leonard began employment with Ally, and November 25, 2020, the date the TRO was issued and Leonard went on paid administrative leave. The trial court denied TQL's request to issue a permanent injunction against Leonard and Ally. The trial court further limited TQL's claim for attorney fees to those incurred prior to the November 25, 2020 issuance of the agreed TRO, awarding TQL $7,885 in attorney fees.

{¶ 15} TQL now appeals, raising four assignments of error.

{¶ 16} Assignment of Error No. 1:

{¶ 17} THE TRIAL COURT ERRED BY DENYING TQL'S MOTION FOR SUMMARY JUDGMENT ON ITS CLAIM THAT MS. LEONARD CONTINUED TO BREACH THE NON-COMPETE AGREEMENT WHILE ON PAID LEAVE FROM ALLY.

{¶ 18} The trial court denied TQL's motion for summary judgment regarding its claim that Leonard breached the NCA after November 25, 2020, the date the TRO was issued and Leonard went on paid administrative leave, as follows:

> [T]he Court finds that there is a potential conflict between the [NCA] which expressly prohibits employment with a competing business, and the restrictions on non-competition agreements announced by the Supreme Court of Ohio in *Raimonde v. Van Vlerah*. Under *Raimonde*, a noncompete agreement is reasonable, and thus enforceable, only if its restrictions are not greater than that which is required to protect the employer. Here, the Defendants assert that Leonard has continued to receive a paycheck from Ally for doing absolutely nothing.

{¶ 19} Continuing, the trial court held,

> If Leonard, in fact, performed no work whatsoever for Ally nor had business contacts with former TQL customers during her administrative leave, it is difficult to see how preventing Leonard from receiving a paycheck from Ally during that period was necessary to protect TQL. This conflict between the express terms of the [NCA] and the holding in *Raimonde* creates an ambiguity that the Court finds cannot be determined as a matter of law. In other words, the reasonability of the [NCA's] restriction on "employment" under these particular circumstances is an issue better suited for the trier of fact.

{¶ 20} TQL argues that the trial court erred in denying its motion for summary judgment on its claim Leonard breached the NCA while she was on paid administrative leave from Ally. TQL challenges the trial court's ruling as improperly holding that TQL's legitimate business interests to be protected by the NCA are limited to preventing former employees from actively engaging in the freight brokerage business. TQL asserts that the legitimate business interests it seeks to protect also include retention of employees in which it has invested substantial time, money, and other resources. TQL further asserts that the trial court's interpretation of *Raimonde* turns TQL into a "farm system" for its competitors and relieves them of having to identify and train potentially promising employees, and provides its competitors a pathway to "poach" its employees.

{¶ 21} Ally argues that the trial court did not err in denying TQL's motion for summary judgment because the gist of the matter was whether the NCA is reasonable—a question of fact. Ally further argues that the purpose of the NCA was to keep Leonard from competing for 12 months and that TQL undisputedly "received the benefit of its bargain" when Leonard and Ally agreed to the TRO and injunction and Leonard was placed on paid administrative leave.

{¶ 22} An appellate court reviews a trial court's decision on a motion for summary judgment de novo, independently and without deference to the decision of the trial court. *A*

N Bros. Corp. v. Total Quality Logistics, L.L.C., 12th Dist. Clermont No. CA2015-02-021, 2016-Ohio-549, ¶ 18. Civ.R. 56(C) provides that summary judgment shall be granted when the filings in the action, including depositions and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Bliss v. Johns Manville*, Slip Opinion No. 2022-Ohio-4366, ¶ 12.

{¶ 23} Generally, any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if the motion is denied due to the existence of genuine issues of material fact, and a subsequent trial results in a verdict in favor of the nonmoving party. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156, 1994-Ohio-362; *Clarkwestern Dietrich Bldg. Sys., L.L.C. v. Certified Steel Stud Assn., Inc.*, 12th Dist. Butler No. CA2016-06-113, 2017-Ohio-2713, ¶ 12. However, an error in the denial of a motion for summary judgment that presents a purely legal question is not rendered harmless by a subsequent trial on the merits. *Bliss* at ¶ 14; *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 14 (10th Dist.). When the alleged error in the denial of summary judgment is based purely on a question of law that must be answered without regard to issues of fact, the denial of summary judgment is reviewable. *Clarkwestern* at ¶ 13.

{¶ 24} "A 'question of law' is '[a]n issue to be decided by the judge, concerning the application or interpretation of the law.'" *Wheatley v. Marietta College*, 4th Dist. Washington No. 14CA18, 2016-Ohio-949, ¶ 55, quoting *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 148, 2000-Ohio-493. A question of law does not become a question of fact simply because a court must consider facts or evidence. *Id.*

{¶ 25} The construction of a written contract is a question of law. *Mercer v. 3M Precision Optics, Inc.*, 181 Ohio App.3d 307, 2009-Ohio-930, ¶ 9 (12th Dist.). Likewise, the issue of whether a noncompete contract is enforceable is a question of law for the court to decide. *Facility Servs. & Sys. v. Vaiden*, 8th Dist. Cuyahoga No. 86904, 2006-Ohio-2895,

¶ 36. Therefore, we will consider the merits of TQL's argument that the trial court erred in denying its summary judgment motion on its claim Leonard breached the NCA while she was on paid administrative leave from Ally.

{¶ 26} "[O]nly reasonable noncompetition agreements are enforceable." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, ¶ 22. "A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public." *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 26 (1975). An agreement not to compete "which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests." *Id.* at 25-26.

{¶ 27} One legitimate purpose of a noncompete agreement is to prevent the disclosure of a former employer's trade secrets or the use of the former employer's proprietary customer information to solicit the former employer's customers. *See Brentlinger Enterprises v. Curran*, 141 Ohio App.3d 640 (10th Dist.2001). We have recognized that another legitimate purpose of a noncompete agreement is the retention of employees in which an employer has invested time and other resources. In a recent case involving TQL's noncompete agreement, we held that TQL's legitimate business interest "includes limiting unfair competition after training Schaap and providing him with access to TQL's confidential information." *Total Quality Logistics, L.L.C. v. Alliance Shippers, Inc.*, 12th Dist. Clermont No. CA2020-06-031, 2021-Ohio-781, ¶ 107. We further held,

> When considering the legitimate business interest of TQL in this instance, we find this factor weighs in favor of finding Alliance's interference was improper. As noted by the trial court, such noncompete agreements are commonplace in the logistics field, and due to the competitive nature of the industry, such agreements are vital in protecting the interests of companies, like TQL, who elect to hire and extensively train new employees

> with no prior experience in the field. Thus, we find TQL had a legitimate interest in restricting Schaap from immediately transitioning to Alliance and providing Alliance with an unfair advantage as TQL's competitor.

Id. at ¶ 108.

{¶ 28} Leonard, who had no prior experience in the logistics industry, was hired by TQL in February 2018, received 22 weeks of extensive training to become a successful freight broker, was promoted during her employment with TQL, continued in the employ of TQL for two years before resigning, and began working for Ally, a TQL competitor, in a substantially similar capacity 12 days after terminating her employment with TQL. While employed at Ally and before she was placed on paid administrative leave, Leonard solicited and contracted business with TQL customers, generating $24,978.93 in profits for Ally from eight TQL customers in less than six weeks.

{¶ 29} It is undisputed that through her extensive training and employment with TQL, Leonard had access to TQL's customer data and confidential information such as expense information, pricing, profitability and margin information, the individualized needs and requirements of TQL customers, and the contact information for customers, and that she knew TQL's software and its marketing and business strategy. In addition to its legitimate business interest in keeping its proprietary customer information and marketing and business strategy confidential, TQL had a legitimate business interest in retaining its employees. Leonard obtained her experience and skills as a freight broker in the logistics industry while being trained extensively by and working for TQL. Leonard had a proven track record of success, was demonstrably skilled at developing customer relationships, and was a promising broker as evidenced by her promotions through TQL's ranks, and once she began working for Ally, by her being contacted by former TQL customers and the profits she generated for Ally in less than six weeks.

{¶ 30} The upshot of Ally's and Leonard's argument is that the NCA restricts them only from competing with TQL for customers. However, the NCA is not so limited as it also restricts "employment" with a TQL competitor. Moreover, the purpose of the NCA is to prevent not only unfair competition for customers but also for the human resources necessary to conduct business. The NCA promotes this purpose by, among other things, disincentivizing TQL employees from leaving the employ of TQL to work for a competitor. Adopting Ally's and Leonard's narrow construction of the NCA would permit competitors to acquire TQL's key and high-performing employees and placing them on paid administrative leave for a year, thus depriving TQL of the benefit of its investment in the employee and the employee's services while avoiding liability for tortious interference and breach of contract. The trial court erred by ignoring this aspect of the legitimate interests TQL sought to protect with the NCA.

{¶ 31} In light of the foregoing, we find that the trial court erred in denying TQL's motion for summary judgment on its claim Leonard breached the NCA while she was on paid administrative leave from Ally. TQL's first assignment of error is sustained.

{¶ 32} Assignment of Error No. 2:

{¶ 33} THE TRIAL COURT ERRED BY FINDING THAT THE WORD "EMPLOYED" DID NOT ENCOMPASS MS. LEONARD'S POST NOVEMBER 25, 2020 EMPLOYMENT BY ALLY.

{¶ 34} TQL argues the trial court erred in finding that Leonard did not breach the NCA after November 25, 2020, when she was on paid administrative leave.

{¶ 35} Following the trial court's denial of TQL's motion for summary judgment on its claim Leonard breached the NCA when she was on paid administrative leave, the matter proceeded to a bench trial. After the trial, the trial court found that while Leonard breached the NCA prior to November 25, 2020, she did not breach the NCA after November 25, 2020,

when she was placed on paid administrative leave and performed no services for Ally.

{¶ 36} In support of its ruling, the trial court found that TQL's interpretation of "employed" as used in the NCA was unreasonable and in conflict with *Raimonde*: "[T]he word 'employed' does not refer [to] a situation in which an employee receives payment, but confers absolutely no benefit upon the new employer, and performs no actions contrary to TQL's business interests." The trial court found that "Leonard passively sitting by and conferring absolutely no benefit upon Ally" could not be construed as "competing," found that Leonard was "an 'employee' of Ally only in the very limited sense that she receives pay and benefits. However, such pay and benefits have been entirely gratuitous on Ally's part," and concluded that, under these circumstances, preventing Leonard from receiving a paycheck from Ally was a restriction greater than necessary to protect TQL's business interests under *Raimonde*.

{¶ 37} TQL challenges the trial court's determination that Leonard's post-November 25, 2020 paid administrative leave did not constitute "employment" under the NCA. TQL argues that Leonard remained an Ally employee after being placed on administrative leave in violation of the NCA because she was paid a salary and received benefits, retained access to Ally's software programs, and continued having contact with employees of three companies she had serviced while she was employed by TQL.

{¶ 38} TQL also challenges the trial court's evaluation of whether Leonard's continued employment while on paid administrative leave adversely affected TQL's business interests. TQL argues that the trial court focused only upon the freight brokerage aspect of TQL's business interest and whether Ally, through Leonard, had "competed" with TQL during Leonard's administrative leave, and ignored TQL's legitimate business interest in retaining employees it has extensively trained and compensated during training, and preventing its competitors from recruiting those employees away. TQL further argues the

trial court misapplied *Raimonde* by focusing exclusively on whether Leonard's association with Ally conferred a benefit on Ally as opposed to how it affected TQL's interests.

{¶ 39} The NCA expressly provides that for one year after termination of employment with TQL, "Employee will not, directly or indirectly, * * * be employed by" a competitor of TQL. Trial testimony established that Leonard signed a two-year noncompete agreement on her first day as an Ally employee, and that while on administrative leave, she continued to be on Ally's payroll, was paid her regular salary, paid taxes on her income, and continued to receive benefits. Leonard and Zambo both identified Leonard as a current employee of Ally. It is axiomatic that only an employee can be placed on paid administrative leave. The trial court focused on the fact that although she was paid during her administrative leave, Leonard did not conduct business of any kind on behalf of Ally and that her pay and benefits were "entirely gratuitous on Ally's part." That Leonard was paid for doing nothing during her administrative leave because Zambo purportedly felt responsible for Leonard's situation does not make Leonard a non-employee of Ally for purposes of the NCA. The fact that Ally paid Leonard her full salary and benefits during her administrative leave shows that it received a reciprocal benefit. It is no different than an employee going on a paid FMLA, jury duty, or military leave and performing no services for the employer during such leave. From the time Leonard was hired to date, nothing in Leonard's status as an Ally employee changed. By being hired by Ally and by continuing to be employed by Ally, Leonard violated the noncompete provision of the NCA prohibiting its employees from being "employed" by a competitor of TQL.

{¶ 40} In finding that TQL's interpretation of "employed" as used in the NCA was unreasonable and in conflict with *Raimonde*, the trial court summarily recognized TQL's right to prevent former employees from competing with TQL for a period of time. However, the trial court mainly focused on the freight brokerage aspect of TQL's business interest

and whether Ally, through Leonard, "competed" with TQL during Leonard's administrative leave. The trial court concluded that Leonard did not compete with TQL in any way, did not perform any actions contrary to TQL's business interests, and conferred no benefit on Ally.

{¶ 41} Leonard's continued and multiple communications with three of her former TQL customers during her administrative leave belies the trial court's finding that Leonard did not perform any action contrary to TQL's business interests. Trial testimony established that when Leonard was a TQL logistics account executive, she was trained in how to build trust, relationships, and friendships with customers, that she did establish friendly relationships with the three individuals employed by TQL customers, and that she was the assigned or primary broker for the accounts for those customers.

{¶ 42} In ruling that the term "employed" in the NCA was unreasonable and in conflict with *Raimonde*, the trial court focused on whether Leonard's association with Ally conferred a benefit upon Ally. Ally had an interest in acquiring experienced, trained, and skilled employees to jump start its new freight brokerage division. Despite the trial court's finding to the contrary, Ally's retention of Leonard was a benefit to Ally from the outset, and a benefit Ally was able to hold onto by maintaining Leonard as an employee after November 25, 2020. However, the test established in *Raimonde* plainly focuses upon the former employer and its legitimate interests and need for protection, not on the competitor's benefit, and thus requires that noncompete agreements be viewed through the interests of the former employer, not the offending competitor.

{¶ 43} As discussed in the first assignment of error, TQL has a legitimate business interest in retaining its employees after it has invested time, money, and other resources in them, and preventing its competitors from recruiting those employees away. Before being employed at TQL, Leonard had no prior experience, clients, or contacts in the logistics industry. At TQL, Leonard received extensive training learning how to become a successful

freight broker and was promoted due to her recognized leadership qualities. Trial testimony established that Leonard had a proven track record of success, was extremely skilled at developing customer relationships, and was a promising asset in the logistics industry. Ally's hiring of Leonard undermined TQL's legitimate business interest in retaining Leonard as its employee. The trial court erred by ignoring TQL's legitimate business interest in the retention of its experienced and skilled employees after investing time and other resources in them.

{¶ 44} The trial court found that "[h]ad Leonard been terminated [by Ally] or had she resigned after November 25, 2020, and then been rehired by Ally after a year had elapsed, the effect upon TQL would have been exactly the same as it is in the current circumstances." Not so. While the result of Leonard not working for the logistics industry for a year in compliance with the NCA or her sitting out for a year while on paid leave might have been the same in that Leonard performed no services in the logistics industry, Leonard would have been less inclined to leave employment with TQL if there were no other employment prospects in the industry. Allowing a competitor to circumvent a noncompete agreement by simply hiring an employee and placing the employee on paid administrative leave for the duration of the noncompete agreement would defeat the purpose of noncompete agreements, reward former employees and the competitors hiring them, and ignore the employer's legitimate business interests.

{¶ 45} In light of the foregoing, we find that the trial court erred in finding that Leonard was not "employed" for purposes of the NCA while she was on paid administrative leave and that she did not breach the NCA during such leave. TQL's second assignment of error is sustained.

{¶ 46} Assignment of Error No. 3:

{¶ 47} THE TRIAL COURT COMMITTED CLEAR ERROR BY FINDING TQL WAS

NOT ENTITLED TO INJUNCTIVE RELIEF.

{¶ 48} The NCA provides that "[i]f there is a breach or threatened breach of any part of this Agreement, TQL shall be entitled to an injunction restraining Employee from such breach or threatened breach." By signing the NCA, Leonard agreed that the running of the one-year period "shall be tolled during any time period during which Employee violates any provision of this Agreement." After the trial, the trial court declined to grant TQL injunctive relief beyond the November 25, 2020 agreed TRO and the agreed preliminary injunction based upon its finding that Leonard did not breach the NCA after November 25, 2020, when she was on paid administrative leave. TQL argues it is entitled to injunctive relief because the NCA was not tolled during the time Leonard was on paid administrative leave as the leave constituted "employment" by a TQL competitor under the NCA.

{¶ 49} Injunctive relief is an equitable remedy that is available only where there is no adequate remedy at law. *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 510 (1992). A party seeking a permanent injunction must first prevail on the merits of its claim. *MWL Ents., L.L.C. v. Mid-Miami Invest Co.*, 2d Dist. Montgomery No. 28915, 2021-Ohio-1742, ¶ 37. The Ohio Supreme Court has recognized that a party claiming the breach of a noncompete agreement can obtain both damages and injunctive relief. *See Rogers v. Assn., Inc.*, 57 Ohio St.3d 5 (1991).

{¶ 50} To obtain a permanent injunction, a party must show by clear and convincing evidence that immediate and irreparable injury, loss, or damage will result to the applicant. *Dunning v. Varnau*, 12th Dist. Brown Nos. CA2016-09-017 and CA2016-10-018, 2017-Ohio-7207, ¶ 26. Irreparable harm is an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. *Id.* In actions to enforce noncompete agreements, "a threat of harm warranting injunctive relief can be shown by facts establishing that an employee with detailed and

comprehensive knowledge of an employer's trade secrets and confidential information has begun employment with a competitor of the former employer in a position that is substantially similar to the position held during the former employment." *P&G v. Stoneham*, 140 Ohio App.3d 260, 274 (1st Dist.2000).

{¶ 51} In light of our holding in the second assignment of error that Leonard breached the NCA after November 25, 2020, when she was on paid administrative leave, we find that the trial court erred in denying TQL injunctive relief beyond November 25, 2020. TQL is entitled to injunctive relief to enforce the NCA. The trial court should have enjoined Leonard from being employed by Ally for a period of one year, less the 12 days between Leonard's date of resignation from TQL and her first day as an Ally employee.

{¶ 52} TQL's third assignment of error is sustained.

{¶ 53} Assignment of Error No. 4:

{¶ 54} THE TRIAL COURT ERRED BY FINDING TQL WAS NOT ENTITLED TO ANY ATTORNEYS' FEES INCURRED AFTER NOVEMBER 25, 2020.

{¶ 55} Leonard's NCA provides that "[i]f Employee is found by a court of competent jurisdiction to have violated the terms of this Agreement, Employee shall be liable for costs, expenses, and reasonable attorneys' fees incurred by TQL." The trial court awarded TQL $7,885 in attorney fees for Leonard's breach of the NCA between September 28, 2020, and November 25, 2020. The trial court, however, found that TQL was not entitled to attorney fees from Leonard after November 25, 2020, because Leonard was no longer in breach of the NCA.

{¶ 56} In light of our holding that Leonard's employment with Ally while on paid administrative leave breached the NCA, we sustain TQL's fourth assignment of error and reverse and vacate the portion of the trial court's decision finding that TQL was not entitled to attorney fees for Leonard's breach of the NCA after November 25, 2020. The matter is

remanded for the trial court to conduct an evidentiary hearing to determine the amount of attorney fees incurred by TQL after November 25, 2020.

{¶ 57} Judgment reversed and remanded.

S. POWELL, P.J., and HENDRICKSON, J., concur.

[Cite as *Buckeye Hoya, L.L.C. v. Brown Gibbons Lang & Co., L.L.C.*, 2023-Ohio-2177.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BUCKEYE HOYA, LLC, :

Plaintiff-Appellant, :

No. 111982

v. :

BROWN GIBBONS LANG & COMPANY LLC, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 29, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-939285

Appearances:

Cooper & Elliot, LLC, Barton R. Keyes, and Jonathan N. Bond, *for appellant*.

Frantz Ward LLP and James B. Niehaus, *for appellees*.

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Plaintiff-appellant, Buckeye Hoya, LLC, appeals the trial court's decision entering summary judgment in favor of defendants-appellees, Brown Gibbons Lang & Company, LLC, Brown Gibbons Lang & Company, Inc., and Brown Gibbons Lang & Company Securities, Inc. d.b.a. Brown Gibbons Lang & Company

(collectively "BGL"), and denying Buckeye Hoya's motion for summary judgment. For the reasons that follow, this court affirms the trial court's judgment.

I. Factual Background

{¶ 2} In September 2010, Joseph Concheck ("Concheck") and Anthony Calabrese ("Calabrese") founded Buckeye Hoya — a transactional advisory business that provided services related to mergers and acquisitions, tax-credit transactions, and other real estate business deals. Concheck and Calabrese each owned 50 percent of the business at the time of its formation.[1]

{¶ 3} In late 2010, Concheck learned that National Entertainment Network ("NEN") needed an advisor because it was looking to sell part of its business. Calabrese contacted Nico Bolzan ("Bolzan"), a prior associate who now worked for BGL, an independent investment bank and financial advisory firm, which provided services relating to mergers and acquisitions, capital markets, financial restructuring, valuations and opinions, real estate, and other advisory services. Bolzan connected Concheck with BGL's founder, Mike Gibbons ("Gibbons"), to facilitate a potential business relationship. As a result, on December 16, 2010, Buckeye Hoya entered into a Consulting Agreement ("the Agreement") with BGL.

{¶ 4} Calabrese, a licensed attorney at the time, drafted the Agreement on behalf of Buckeye Hoya. The scope of the Agreement provided that "services shall be limited to assisting [BGL] in making introductions to certain entities that may

---

[1] *See North Hill Holdings v. Concheck*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, ¶ 9. ("*North Hill*")

engage [BGL's] services, including, but not limited to, [NEN] and its affiliates." The Agreement provided that in exchange for Buckeye Hoya's performance, "[BGL] shall pay to [Buckeye Hoya] twenty percent (20.0%) of any amounts paid to [BGL] relating to any introduction to any entity that engages [BGL]." Pursuant to its terms, either party could terminate the Agreement "immediately upon written notice to the other Party," but Buckeye Hoya would still "receive any compensation it is owed" calculated in accordance with the Agreement. Gibbons signed the Agreement on behalf of BGL. It is undisputed that Concheck was an authorized member of Buckeye Hoya and thus, signed the Agreement on behalf of Buckeye Hoya. No other member of Buckeye Hoya signed the Agreement.

{¶ 5} After entering into the Agreement, Buckeye Hoya connected BGL to NEN, with NEN retaining BGL to assist with the sale of its business. BGL's managing director, John Tilson, oversaw the NEN transaction and worked closely with Concheck during this time. In fact, it is undisputed that during the course of the deal with NEN, Concheck was the sole contact between the parties and even worked closely with NEN during the transaction.

{¶ 6} On September 5, 2012, Tilson sent an email to Concheck regarding the "Referral Agreement." He expressed BGL's concern, stating that BGL believed "that you would need to be registered as a broker dealer in order to receive payment from BGL Securities for your services on the NEN transaction. We understand that NEN will be paying you for your services on this transaction." Tilson, with the assistance of legal counsel, sent another email hours later to Concheck with the

subject line: "National Entertainment Network," reiterating exactly what the prior email stated, with the exception of two additional sentences — "Therefore, we cannot make a payment *to your company* since *you* are not a registered broker. * * * Please consider this email as notice that our [Agreement] dated December 16, 2010 between BGL Securities and Buckeye Hoya LLC is null and void." (Emphasis added.)

{¶ 7} Conchek testified at deposition that he interpreted these emails to mean that BGL could not honor the Agreement because it arguably violated FINRA regulations, and that BGL would not pay Buckeye Hoya directly.[2] Tilson testified at deposition that he meant to convey in his second email that BGL would not pay Buckeye Hoya directly despite the terms of the Agreement. He stated that out of an abundance of caution and upon the advice of legal counsel, it was his intention to have NEN pay Buckeye Hoya directly. (Tilson deposition tr. 56.) Tilson testified further that the email terminating the Agreement or indicating a direct payment by NEN did not absolve BGL of having to pay a finder's fee to Buckeye Hoya — "we were going to still make sure that they received their money. It was going to happen through the funds flow rather than in a wire transfer or check coming from BGL." (Tilson deposition tr. 60-61.)

{¶ 8} In anticipation of the NEN transaction closing, on September 17, 2012, Tilson emailed Concheck requesting that he submit an invoice to NEN for

---

[2] FINRA is an acronym for Financial Industry Regulatory Authority.

$230,581 for "consulting services" and not "finder's fee." On that same day, Concheck sent NEN an invoice for "Advisory fee/Consulting Services" in the amount of $230,581, and provided wiring instructions, including his name, account number, and bank routing number. Concheck admitted that this information was his personal banking information, not Buckeye Hoya's account information.[3]

{¶ 9} On September 24, 2012, NEN sold most of its business to Monitor Clipper Partners for approximately $57 million. As result of the sale, BGL requested payment from NEN for its services in the amount of $1,152,907. Pursuant to the Agreement, BGL was required to pay Buckeye Hoya 20 percent of this amount, or approximately $230,581.

{¶ 10} On September 26, 2012, the NEN transaction closed, and NEN paid BGL by wire transfer from the closing escrow funds 80 percent or $922,326 of the invoice amount. Additionally, NEN paid Concheck by virtue of a wire transfer out of the same closing escrow funds flow the invoiced amount of $230,581. The NEN closing documentation breaks down these payments under "Sellers Transaction Expenses." It lists "BGL and Consulting Fee" and then itemizes the expenses as "BGL" in the amount of $922,326, and "Joe Concheck (Consulting Fee)" in the amount of $230,581, for a "Total" of $1,152,907.

{¶ 11} It is undisputed that Concheck accepted and received $230,581 from NEN. Concheck testified at deposition that he deposited an unknown portion of the

---

[3] Concheck's motivation for providing his personal banking information is uncertain from the record, but his reasoning is not pertinent to deciding whether BGL breached the Agreement.

funds he received from the NEN transaction into Buckeye Hoya's Huntington Bank account. (Concheck deposition tr. 105-106.)

{¶ 12} In November 2012, Calabrese and North Hill Holdings, L.L.C.[4] learned that BGL had not paid Buckeye Hoya for the NEN transaction and expressed their concern to Paul Garofolo, a friend of Calabrese and Gibbons. Tilson learned of the concern and emailed Gibbons and Garofolo that BGL terminated the Agreement because Buckeye Hoya was not a registered broker-dealer, but that BGL honored the Agreement when Concheck accepted the contracted-for payment directly from NEN. In the email, Tilson explained the situation and stated that at the time of the Agreement, "we had no idea that [Concheck] had partners in [Buckeye Hoya]."[5] (Tilson deposition tr. 72; July 10, 2013 email.). Tilson further explained his hope that if Calabrese understood that Concheck was paid the full amount by NEN, Calabrese would not pursue legal action. *Id.*

{¶ 13} In 2014, North Hill filed a lawsuit against Concheck and Buckeye Hoya, contending that it was a 50 percent member of Buckeye Hoya, and thus, was entitled to a portion of the money Concheck and/or Buckeye Hoya received in connection with NEN Transaction. *North Hill*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, at ¶ 1-4. In 2016, relating to that litigation, Calabrese provided

---

[4] North Hill Holdings, L.L.C., was solely owned by Calabrese's wife, Maria Calabrese. *See North Hill*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, at ¶ 2.

[5] The record contains affidavits from NEN executives who averred that they did not authorize NEN to pay Anthony or Maria Calabrese ("the Calabreses") or any company involving them any fees in connection with the NEN transaction.

deposition testimony during which he acknowledged that NEN paid Concheck the fee that BGL owed Buckeye Hoya under the Agreement. (Calabrese deposition, June 9, 2016, tr. 285-286.) In fact, he stated that Concheck, not BGL, owed the money to Buckeye Hoya. *Id.* at tr. 286-287.[6] ("Joe Concheck owes the money to Buckeye Hoya, not [BGL].")

{¶ 14} In July 2020, the Calabreses and Concheck entered into a Confidential Settlement Agreement ("Settlement Agreement"). Among the terms of the Settlement Agreement, Concheck assigned his 50 percent membership interest in Buckeye Hoya to North Hill and the Calabreses.

II. Procedural History

{¶ 15} On November 2, 2020, Buckeye Hoya filed an amended complaint against BGL asserting causes of action for (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment; and (4) accounting. The complaint alleged that pursuant to the Agreement, BGL owed Buckeye Hoya approximately $184,400, which purportedly represented 20 percent of the monies paid to BGL by NEN for services rendered in connection with NEN transaction.

{¶ 16} BGL filed its answer denying the allegation but averring that it paid Buckeye Hoya its "commission in full compliance and satisfaction of its obligations" pursuant to the Agreement. According to BGL, payment was directed and received

---

[6] In *North Hill*, this court affirmed the trial court's decision finding that at the time of the Agreement, North Hill was not a 50 percent member of Buckeye Hoya and thus, it lacked standing to assert its claims against Concheck and Buckeye Hoya. *North Hill* at ¶ 21.

by Buckeye Hoya, upon the instructions of its member and agent, Concheck, who had the authority to directly act on behalf of Buckeye Hoya. Specific to Buckeye Hoya's cause of action for breach of contract, BGL averred that it paid Buckeye Hoya in accordance with the Agreement. Regarding affirmative defenses, BGL raised payment, performance under the contract, unjust enrichment, and the doctrines of waiver, estoppel, laches, and unclean hands, and other equitable defenses.

{¶ 17} The parties filed cross-motions for summary judgment, with the exhibits supporting each motion filed under seal. Buckeye Hoya asserted it was entitled to judgment as a matter of law because BGL did not directly pay Buckeye Hoya under the terms of the Agreement. BGL contended that summary judgment was proper in its favor because Buckeye Hoya was paid its full commission under the Agreement when NEN paid the contracted-for percentage under the Agreement to Concheck, a member and authorized agent of Buckeye Hoya.

{¶ 18} The trial court agreed with BGL, finding that no breach of contract occurred because Concheck received payment from NEN to satisfy the amounts BGL would have paid if permissible under the Agreement. The trial court concluded that the dispute is between the Calabreses or Buckeye Hoya and Concheck; not with BGL. Accordingly, the trial court granted summary judgment in favor of BGL, while also denying Buckeye Hoya's motion for summary judgment.

{¶ 19} Buckey Hoya now appeals, raising as its sole assignment of error that the trial court erred by granting BGL's motion for summary judgment while also denying its motion for summary judgment.

III. Summary Judgment

A. Standard of Review

{¶ 20} We review the trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶ 21} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

{¶ 22} Buckeye Hoya's only claim on appeal is that the trial court erred in granting summary judgment in favor of BGL on its breach-of-contract claim in connection with the NEN transaction.

B. Breach of Contract

{¶ 23} To establish a breach of contract, a plaintiff must demonstrate (1) the existence of a contract; (2) that the nonbreaching party performed on the contract; (3) that the breaching party failed to perform its contractual obligations without legal excuse; and (4) the breaching party suffered damages as a result of the breach. *Telecom Acquisition Corp. I v. Lucic Ents.*, 2016-Ohio-1466, 62 N.E.3d 1034, ¶ 23 (8th Dist.).

{¶ 24} The trial court issued a written decision entering summary judgment in favor of BGL on the breach-of-contract claim, finding that "Buckeye's breach of contract claim fails because the Consulting Agreement was illegal and is void; BGL terminated the contract pursuant to its terms; and despite the lack of a contractual relationship, still performed its duty under the contract."

{¶ 25} Buckeye Hoya contends that the trial court improperly sua sponte raised and relied on the affirmative defense of illegality to award summary judgment in favor of BGL. It further contends that the trial court's decision finding that Concheck acted as an authorized agent to accept payment on behalf of Buckeye Hoya was inadequately pleaded in BGL's answer, and even if it were adequate, BGL did not satisfy its burden of proving agency to warrant an award of summary judgment. Finally, Buckeye Hoya maintains that the evidence is uncontroverted that BGL did not pay Buckeye Hoya pursuant to the Agreement, and thus, summary judgment in favor of BGL and against Buckeye Hoya was improper.

1. Illegality of the Consulting Agreement

{¶ 26} BGL did not raise illegality as an affirmative defense, and it did not raise this argument as justification for granting summary judgment in its favor. Nevertheless, the trial court found that BGL was entitled to summary judgment on the breach-of-contract claim because the Agreement was illegal. According to the trial court, the Agreement was void because Buckeye Hoya and its active employees or members were not registered as brokers or dealers with the U.S. Securities and Exchange Commission, which would allow them to receive a commission for a sale of a publicly traded corporation.

{¶ 27} Buckeye Hoya contends that because BGL did not raise illegality as an affirmative defense as required by Civ.R. 8(C), or in its motion for summary judgment, BGL waived this argument and the trial court erred in sua sponte raising the defense on BGL's behalf. We agree.

{¶ 28} "Civ.R. 8(C) designates specific defenses that must be set forth in an answer or other responsive pleading, and the failure to do so constitutes a waiver." *State ex rel. Bey v. Bur. of Sentence Computation*, 166 Ohio St.3d 497, 2022-Ohio-236, 187 N.E.3d 526, ¶ 17. Specifically listed as an affirmative defense under Civ.R. 8(C), is "accord and satisfaction," * * * estoppel, * * * illegality, * * * payment, * * * release * * * statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

{¶ 29} This court has consistently held that "a trial court cannot sua sponte raise an affirmative defense on behalf of a defendant." *O'Brien v. Olmsted Falls*, 8th

Dist. Cuyahoga Nos. 89966 and 90336, 2008-Ohio-2658, ¶ 14, citing *Thrower v. Olowo*, 8th Dist. Cuyahoga No. 81873, 2003-Ohio-2049, ¶ 23; *see also State ex rel. Bey* at ¶ 17. Further, even if a defendant raises in its answer an affirmative defense, the defense must also be asserted in the motion for summary judgment. *O'Brien* at ¶ 13, citing *Leibson v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 84 Ohio App.3d 751, 761, 618 N.E.2d 232 (8th Dist.1992). In *O'Brien*, this court found that the trial court erred in sua sponte raising the affirmative defense of immunity when granting summary judgment in favor of defendants because it was not raised in their answer or argued in their motion for summary judgment. *Id.* at ¶ 14-15.

{¶ 30} In this case, the trial court found that BGL did not breach the Agreement because the contract was illegal.[7] The court supported its determination by relying on case law that prevents courts from enforcing illegal agreements. The trial court was correct that "Ohio courts may not enforce an illegal contract," *Snyder v. Snyder*, 170 Ohio App.3d 26, 2007-Ohio-122, 865 N.E.2d 944, ¶ 32 fn. 7 (11th Dist.), and that "a court will not lend its aid to any illegal contract, but on the contrary will leave the parties where it finds them and where they have placed themselves." *C.A. King & Co. v. Horton*, 116 Ohio St. 205, 211, 156 N.E. 124 (1927).

---

[7] The effect of Buckeye Hoya or its members not being an authorized broker does not itself affect the legality of the entire Agreement. Buckeye Hoya's status as a nonbroker would only affect its ability to recover payment by BGL under the express terms of the Agreement as a "fee," not that the Agreement as a whole is rendered void or illegal. Buckeye Hoya's status merely limits enforceability. *See, e.g., Dobson v. Archibald*, 523 P.3d 1190, ¶ 29, 34 (Wash.2023) (a contractor's failure to comply with registration requirements does not render the underlying contract illegal or void, but rather "merely limits its enforceability for public policy reasons.").

See also Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland, 8th Dist. Cuyahoga No. 94361, 2010-Ohio-5597.

{¶ 31} However, BGL did not raise illegality as an affirmative defense, nor did it assert in its request for summary judgment or in defense against summary judgment that the Agreement was invalid or illegal. Accordingly, Buckeye Hoya was not afforded any opportunity to defend against this defense. In *N. Olmsted Auto Paint & Supply Co. v. Lettieri*, 9th Dist. Lorain No. 91CA005211, 1992 Ohio App. LEXIS 3835 (July 22, 1992), the Ninth District aptly stated:

> It is not the trial court's function to define and resolve the issues or to assert one party's personal defenses for him. * * * The unfairness of the trial court's action is highlighted by the fact that the trial court never permitted [the plaintiff] to respond to the unpled defense. [The plaintiff] must be given a fair opportunity to respond to an affirmative defense.

(Citations omitted). *Id.* at 9.

{¶ 32} Accordingly, we find that the trial court erred in sua sponte raising an affirmative defense on behalf of BGL and relying on that defense to award summary judgment. Nevertheless, this determination does not warrant a reversal of the trial court's decision in favor of BGL. A reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof. *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990), citing *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944). "'[A]n appellate court must affirm the judgment if it is legally correct on other grounds, that is, it achieves the right result for the wrong reason, because such

an error is not prejudicial.'" *Shaut v. Roberts*, 2022-Ohio-817, 186 N.E.3d 302, ¶ 14 (8th Dist.), quoting *Reynolds v. Budzik*, 134 Ohio App.3d 844, 846, 732 N.E.2d 485 (6th Dist.1999).

2. Agency

{¶ 33} The trial court also found that Buckeye Hoya's breach-of-contract claim fails because even if the contract was valid, "performance under its terms is complete and no breach has occurred by BGL" because Concheck acted as Buckeye Hoya's authorized agent in accepting payment from NEN.

{¶ 34} Buckeye Hoya contends that the trial court erred in making this finding because BGL inadequately pleaded the theory of agency in its answer, and even if it were pleaded sufficiently, BGL failed to satisfy its burden of proving that Concheck was an authorized agent of Buckeye Hoya to warrant an award of summary judgment.

{¶ 35} BGL did not specifically list "agency" in its answer as a defense. However, it did not need to do so under either Civ.R. 8(C) or 12(B). Pursuant to Civ.R. 8(E), the averments made in a pleading need not be of any particular substance and Civ.R. 8(F) requires that pleadings are to be construed as to do substantial justice. *See MacDonald v. Bernard*, 1 Ohio St.3d 85, 86, 438 N.E.2d 410 fn 1, (1982), (pleadings shall also be construed liberally in order that the substantive merits of the action may be served).

{¶ 36} In *SMS Fin. XXVI, L.L.C. v. Waxman Chabad Ctr.*, 2021-Ohio-4174, 180 N.E.3d 730, ¶ 59 (8th Dist.), this court recognized that Civ.R. 8(C) provides a

nonexhaustive list of affirmative defenses and Civ.R. 8(E)(1) directs that "[e]ach averment of a pleading shall be simple, concise, and direct." Further, under Civ.R. 8(B), a defendant "shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 688 N.E.2d 506 (1998). Pursuant to the liberal pleading requirements of Civ.R. 8, the pleadings of the parties to an action need only be in general terms. *Thompson Thrift Constr. v. Lynn*, 2017-Ohio-1530, 89 N.E.3d 249, ¶ 87 (5th Dist.), citing *New Lexington City School Dist. Bd. of Edn. v. Muzo Invest. Group*, 5th Dist. Perry No. 15-CA-00012, 2016-Ohio-1338. Further, a defendant's answer is subject to the same notice-pleading standards as a plaintiff's complaint, and an affirmative defense is generally adequate as long as the plaintiff receives fair notice of the defense. *Id.*

{¶ 37} BGL claimed in its answer:

> Defendants paid Plaintiff a commission in full compliance with and satisfaction of its obligations to Plaintiff under the Consulting Agreement, which payment was directed and received by the Plaintiff, Buckeye Hoya, LLC, upon the instructions of its member and agent, Joseph Concheck, who is a member of the LLC and as its agent had the power and authority to directly bind, and to act on behalf of, Plaintiff.

(BGL's Answer, paragraph No. 1, filed Jan. 29, 2021.) Based on this statement, this court finds that BGL sufficiently pleaded "agency" in its answer to give notice to Buckeye Hoya that it was asserting that Concheck, acting as an agent of Buckeye Hoya, accepted payment for the NEN transaction.

{¶ 38} Buckeye Hoya next contends that the trial court erred in granting summary judgment on a theory of agency because BGL did not satisfy its burden of proof that Concheck was an authorized agent of Buckeye Hoya.

{¶ 39} In *North Hill*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, this court concluded that because Buckeye Hoya, a limited liability company, did not have an operating agreement, R.C. Chapter 1705 sets forth the rights and responsibilities of the members. *Id.* at ¶ 14-15. It is undisputed that Concheck was a 50 percent member of Buckeye Hoya at the time of the formation of the Agreement and when he received payment from NEN.

{¶ 40} Accordingly, under former R.C. 1705.25(A),[8]

> (1) Every member is an agent of the company for the purpose of its business, and the act of every member, including the execution in the company name of any instrument for apparently carrying on in the usual way the business of the company binds the company, unless the member so acting has in fact no authority to act for the company in the particular matter, and the person with whom he is dealing has knowledge of the fact that he does not have that authority.
>
> (2) Unless the act is authorized by the other members, an act of a member that is not apparently for the carrying on the business of a limited liability company in the usual way does not bind the company.

{¶ 41} Buckeye Hoya contends that BGL failed to prove that when Concheck accepted the NEN payment he acted (1) with authority, or (2) for the carrying on the

[8] In 2022, the General Assembly repealed Revised Code Chapter 1705, and enacted Chapter 1706, "Ohio Revised Limited Liability Company Act." *See* 2020 S.B. No. 276, effective February 11, 2022.

business of an LLC in the usual way, as required by former R.C. 1705.25(A). We disagree.

{¶ 42} The parties do not dispute that Concheck acted as Buckeye Hoya's authorized and actual agent when he alone signed the Agreement with BGL. In fact, Calabrese knew of the contractual relationship between Buckeye Hoya and BGL because he drafted the Agreement, including the fact that only Concheck signed the agreement on behalf of Buckeye Hoya. The evidence is therefore irrefutable that Concheck was an authorized agent of Buckeye Hoya.

{¶ 43} Even if Concheck was not an "actual agent" of Buckeye Hoya in accepting payment under the Agreement, he was an apparent agent of Buckeye Hoya. In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority. *DeFranco v. Shaker Square*, 158 Ohio App.3d 105, 2004-Ohio-3864, 814 N.E.2d 93, ¶ 11 (8th Dist.), citing *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus. Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agents own conduct has created the apparent authority. *Master Consol.* at 576-577.

{¶ 44} No genuine issue of material fact exists that Buckeye Hoya publicly held out Concheck as an authorized agent. Concheck was the only member who signed Buckeye Hoya's articles of organization with Ohio's Secretary of State.[9] Moreover, if Concheck was an authorized agent to legally bind Buckeye Hoya on the Agreement with BGL, both NEN and BGL had a reasonable belief that Concheck was an authorized agent to accept payment on behalf of Buckeye Hoya. We agree with the trial court's finding that Concheck acted as Buckeye Hoya's authorized agent — whether with actual or apparent authority — in accepting payment from NEN for services rendered in connection with the NEN transaction and as provided for in the Agreement. Accordingly, this court finds that BGL did not breach the Agreement because Buckeye Hoya, through its agent Concheck, was paid the exact amount contracted for pursuant to the Agreement.

3. Satisfaction — Payment

{¶ 45} Buckeye Hoya's final challenge on appeal pertains to the trial court's decision granting summary judgment in favor of BGL. It contends that the trial court erred because the evidence is uncontroverted that BGL, itself, did not pay Buckeye Hoya pursuant to the Agreement. While this fact is technically true, BGL honored the Agreement by ensuring that payment was issued to Buckeye Hoya via

---

[9] *See North Hill* at ¶ 2 ("Anthony Calabrese prepared and filed [Buckeye Hoya's] articles of organization with the Ohio Secretary of State. The company's articles of organization was signed by Concheck alone and no other signature appears on the document. While there is no indication whether Concheck signed * * * as a member, manager, or other representation, it is undisputed by the parties that Concheck was a 50 percent managing member of Buckeye [Hoya].")

Concheck in accordance with the Agreement. The record supports that BGL acted under a reasonable belief that it could not pay Buckeye Hoya directly without subjecting itself to legal scrutiny. Arguably, BGL's failure to strictly comply with its contractual obligations under the Agreement is justified by legal excuse. Nevertheless, Buckeye Hoya through Concheck received payment under the Agreement for the NEN transaction.

{¶ 46} In fact, Calabrese stated his understanding about the payment under the Agreement in his June 9, 2016 deposition:

> My understanding is [BGL] directed NEN to make the payment that they owed to Buckeye Hoya at the closing, so the amount that was owed by [BGL] was actually paid by NEN. So it had the same effect as if [BGL] had paid the funds. * * * I'm assuming there is some sort of agreement between [BGL] and [NEN] that the $230,000 and some odd cents that is owed to Buckeye Hoya be paid by NEN for [BGL]. My assumption is that that exact amount was paid at closing to Joe Concheck.

(Calabrese deposition, June 9, 2016, tr. 285-286).

{¶ 47} Calabrese was further asked, "[I]f Buckeye Hoya is owed by [BGL] and [BGL] does not pay that money, is there some agreement that shifts the agreement * * * that makes NEN responsible to pay Buckeye Hoya?" Calabrese responded, "Joe Concheck owes the money to Buckeye Hoya, not [BGL]." *Id.* at tr. 286-287.

{¶ 48} Buckeye Hoya contends that Calabrese's deposition should not be considered, or at least creates an issue of fact, because, as he explained in his subsequent affidavit, at the time he provided this deposition testimony he did not

have a complete understanding of what occurred between BGL and Concheck. He averred that he now believes that either "NEN paid Concheck for independent services or that BGL colluded with Concheck to cut Buckeye Hoya out." The record belies Calabrese's new belief because Buckeye Hoya concedes that "within a few months of closing, Calabrese and North Hill learned that BGL had cut Buckeye Hoya out of closing." (Appellant's Brief, p. 13.) Accordingly, Calabrese knew as early as November 2012 that BGL did not pay Buckeye Hoya directly.

{¶ 49} Moreover, under either of Calabrese's now-beliefs, the constant is Concheck — Concheck, whether personally or on behalf of Buckeye Hoya, received the funds that Buckeye Hoya was entitled to receive under the Agreement. Accordingly, Calabrese's 2016 understanding is correct — any issue is with Concheck, not NEN or BGL. Whether Buckeye Hoya or Calabrese can bring an action against Concheck is not before this court, but the record contains a Settlement Agreement and an admission by Calabrese that based on the Settlement Agreement, Concheck may be released from these claims. *See* Calabrese 2021 deposition, tr. 119-120.

{¶ 50} Accordingly, there are no genuine issues of material fact and BGL is entitled to judgment as a matter of law because reasonable minds can come to but one conclusion that BGL satisfied its obligation under the Agreement when it honored the spirit and intent of the Agreement by ensuring that Buckeye Hoya was compensated for its services. It is undisputed that Concheck received payment in the exact amount Buckeye Hoya would have been entitled to under the Agreement.

Accordingly, and as Calabrese admitted, Concheck, and not BGL, would have owed the money to Buckeye Hoya. Viewing the evidence in favor of Buckeye Hoya, this court finds no genuine issues of material fact and that BGL is entitled to judgment as a matter of law. Having found that summary judgment was properly granted in favor of BGL, we further find that the trial court did not err when it denied Buckeye Hoya's motion for summary judgment contending that BGL breached the Agreement by failing to pay it for the NEN transaction.

{¶ 51} The assignment of error is overruled.

{¶ 52} Judgment affirmed.

It is ordered that appellee recover from appellants 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR