The Bullet Point: Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

***Henson v. Santander Consumer USA Inc.*, 582 U.S. __ (2017).**

The question in this appeal to the United States Supreme Court was whether a company who collected debts it bought for itself fit the definition of "debt collector" under the Fair Debt Collection Practices Act (FDPCA). A unanimous Supreme Court found that it did not.

In reaching this decision, the Court looked to the plain language of the FDCPA, finding that a debt collector is defined as an entity who "regularly collects or attempts to collect…debts owed or due… another." The Court found that the defendant in this lawsuit, who purchased defaulted debts and then sought to collect them for itself, did not regularly seek to collect debts "owed…another" and was therefore not a "debt collector" subject to the FDCPA.

The Bullet Point: While *Henson* clarifies who is considered a "debt collector" subject to the FDCPA, the Court made clear that it was only deciding the narrow issue before the court regarding a business who acquires debts to collect on its own. In so doing, and perhaps most notably, the entire Supreme Court declined to consider the spirit of the FDCPA or what Congress would have done if it knew entities would buy defaulted debt.

The Court made clear that it would not rewrite constitutionally valid text and that it would not accept speculative policy arguments as reasonable legislators could differ how defaulted debt purchasers should be treated.

The business community should take note of the Supreme Court's unanimous decision to limit its analysis to the specific situation and text as it may indicate how the Court will review future legislation of interest to business. This pragmatic rule of construction will undoubtedly have ripple effects for the economy.

***Town of Chester v. Laroe Estates, Inc.,* No. 16-605, 581 U.S. ___ (2017).**

This appeal to the United States Supreme Court involved the question of whether a party seeking to intervene in a lawsuit must establish "standing" to do so. The Court held that it did.

The lawsuit involved a land developer who brought suit against the Town of Chester, alleging that the Town's regulations around building a housing subdivision amounted to a regulatory taking. A residential development company moved to intervene in the lawsuit alleging that it had paid the land developer $2.5 million in relation to the project and that the equitable interest it held in the property would be impaired if it could not intervene in the suit. The District Court denied the motion for intervention on the basis that the real estate development company lacked standing to bring a takings claim, and the Second Circuit reversed, holding Article III standing was not required.

The Supreme Court reversed. It found that a litigant seeking to intervene must establish Article III standing and establish that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Because any plaintiff in a federal lawsuit must establish standing to sue, the Court reasoned, an intervenor seeking relief above and beyond what is originally requested must also establish standing.

The Bullet Point: A prior issue of *The Bullet Point* analyzed how Ohio law viewed intervention, explaining that if you have an interest in property or a transaction subject of a lawsuit mechanisms exist to protect your interests. The Supreme Court's *Laroe Estates* case essentially adds another element to establish a right to intervene in a lawsuit. In addition to establishing that the intervenor "claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest…" as required by Fed. R. Civ. P. 24(a)(2), the party seeking to intervene must also establish an actual and concrete injury giving it standing to intervene.

As we counseled before, though businesses might have a right to intervene, they should carefully consider whether they should. Businesses must establish not only an interest in the property or transaction at issue but must also allege or show that if they are not permitted to intervene, their interests would be impaired.

***Estate of Kuzda v. PRF Enterprises, Inc.,* 8th Dist. Cuyahoga No. 104961, 2017-Ohio-4185.**

This case was an appeal of the trial court's decision to grant a default judgment as a discovery sanction. The trial court found that the defendant failed to properly and timely respond to discovery requests and it ordered the opposing party to move for default judgment. The matter was set for a hearing but no hearing took place. Instead, the court indicated a written entry would be issued shortly. That order granted the cross-claim plaintiff $500,000 against the defendant through a default judgment as a discovery sanction.

On appeal, the Eighth Appellate District reversed. It noted that if default judgment is awarded as a discovery sanction then "the notice and hearing requirements of Civ.R. 55 are applicable." The court noted that when a court is considering such a drastic sanctions remedy a party has a right to be heard and explain why discovery sanctions should not be ordered. Here, the court found that the trial court erred in granting default judgment without first holding a hearing and reversed.

The Bullet Point: Ohio law permits various sanctions for failure to comply with discovery rules. One of the most drastic sanctions is to hold the offending party in default and awarding judgment to the other party. However, in order for such a sanction to withstand judicial scrutiny, notice and a hearing are required to give the offending party a chance to explain or correct the sanctionable conduct.

***Cruz v. English Nanny & Governess School Inc.*, 8th Dist. Cuyahoga No. 103714, 2017-Ohio-4176.**

This appeal involved, among other things, the question of whether an attorney could be sanctioned for frivolous conduct for sharing publicly available information about the lawsuit with a newspaper reporter. The trial court found that such conduct violated R.C. 2323.52, Ohio's vexatious litigator statute. The Eighth Appellate District disagreed and reversed that finding on appeal.

In so ruling, the court noted that "[a] review of the case law demonstrates that sanctions are typically imposed under R.C. 2323.51 for frivolous conduct involving pleadings and discovery. We can find no law supporting the award of sanctions under R.C. 2323.51 for the type of conduct here — communicating with the media about a pending case." The court further noted that Ohio law and the Rules of Professional Conduct do not and cannot impose a blanket prohibition of an attorney communicating with the media. Such a ban would violate the attorney's First Amendment free speech rights although exceptions apply (such as for defamatory statements). Here, the information shared by the attorney to the newspaper reporter was publicly available information and did not rise to the level of frivolous conduct.

The Bullet Point: Ohio law provides a mechanism to sanction an opposing party or attorney for frivolous conduct in litigation. However, that statute cannot be used to sanction an attorney for undertaking conduct protected by the First Amendment and that do not violate the Rules of Professional Conduct.

***Tomaydo-Tomahhdo LLC v. Vozary*, 8th Dist. Cuyahoga No. 104446, 2017-Ohio-4292.**

This appeal involved a claim for misappropriation of trade secrets. The parties were partners in a restaurant and when the partnership ended, the parties signed a noncompete agreement. The partner who left the partnership eventually joined a catering business. Eventually, the plaintiff filed suit against the departed partner, alleging that his catering business used similar recipes, food preparation methods, marketing strategies, and other trade secrets. The trial court granted the departed partner summary judgment and the plaintiff appealed.

On appeal the Eighth Appellate District affirmed. In so ruling the court noted that certain things alleged to have been taken did not have an "independent economic value" as required to establish a claim for misappropriation of trade secrets. Rather, things like recipes and food lists were common items typical in catering businesses.

The Bullet Point: For many businesses, intellectual property — patents, trade secrets, customer lists — are their most important assets that must be protected at all costs. In order to prevail on a misappropriation-of-trade-secret claim, a party has to show by a preponderance of the evidence: (1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret. If the purported trade secret is not something that derives independent economic value, that is, the device/technique/plan is itself valuable, then a court is unlikely to find that a trade secret has been misappropriated.

While the law provides some common law and statutory protections, the best way to protect intellectual property is by contractual nondisclosure and noncompete agreements. In some instances, especially when, as in this case the "independent economic value" of information may be difficult for a court to establish, it may be best to set a sum certain for alleged breaches. This will set a disincentive for misappropriation and misuse of intellectual property.

***Konarzewski v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 104681, 2017-Ohio-4297.**

This was an appeal of the trial court's decision to certify a class on claims against a car dealership under the Ohio Consumer Sales Practices Act (CSPA) and other claims. The claims were based on supposedly false or misleading statements contained in retail installment contracts used by the dealer in the purchase of vehicles.

The Eighth Appellate District reversed the trial court's decision to certify a class because the plaintiffs failed to establish actual damages as required to certify a class. As the court noted, relying on a recent Ohio Supreme Court decision, "although the precise amount of damages incurred by each class member need not be shown, the "fact of damage," which requires that "all class members suffered *some* injury," must be shown by common evidence." The court noted that this requires an individualized determination as to whether there exists common proof that each class member was damaged by the defendant's conduct. When actual damages cannot be established through common evidence, certifying a class is improper "[b]ecause resolution of the issue of actual damages would require a case-by-case analysis of each transaction, we cannot say that common questions of law or fact predominate over

individualized inquiries. The need for such individualized inquiries precludes class certification under Civ.R. 23(B)(3)."

The Bullet Point: All businesses should be aware of the risk of class actions. In a typical class action, a plaintiff sues a defendant or a number of defendants on behalf of a group, or class, of others who are not present. This differs from a traditional lawsuit, where one party sues another party for redress of a wrong, and all of the parties are present in court. However, in order to proceed as a class, and get a class certified, the plaintiff must show through common evidence that *each member* of the proposed class suffered actual damages as a result of the defendant's conduct. The failure to prove this will preclude class certification. Moreover, when actual damages turn on looking at each and every class plaintiff and their transaction with the defendant, class certification is not appropriate because common questions of fact do not exist as required to certify a class.

This case follows an important Ohio Supreme Court case, *Felix v. Ganley Chevrolet, Inc.,* 2015-Ohio-3430 (August 27, 2015), establishing that that all members of a plaintiff class alleging violations of the CSPA must have suffered injury as a result of the conduct challenged in a suit under the act, making clear that:

- Ohio's class action rules and consumer protection statutes do not permit "windfall awards" to parties who were not actually injured by a business' allegedly improper commercial practices; and
- "No-injury" consumer class actions will not be allowed in Ohio.

These decisions are particularly important to companies (and their management and boards) providing consumer services and holding consumer information, which includes, among other companies and industries, manufacturers, distributors, and/or retailers of consumer goods and/or providers of consumer services (banking, insurance, credit, utilities, etc.). Moreover, at least in Ohio, class actions cannot be based upon allegations that are akin to "we bought a product, other people had a problem with it, and we want our money back, even though it worked fine for us." or, in the data breach context, claims based upon the fact that a data breach occurred even though all affected individuals have not been damaged. While *Felix* and *Konarzewski* certainly apply to CSPA claims — which has been used to assert class action claims related to, among other thing, auto purchase and repair, advertising, collections/credit reporting/financial services, data breaches, and predatory lending/finance scams/mortgage fraud — the Ohio Supreme Court's analysis of Civ. R. 23 class action requirement and its determination that failing to demonstrate that all purported class members have suffered an injury in fact precludes class certification will definitely affect class actions of every flavor.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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HENSON ET AL. *v*. SANTANDER CONSUMER USA INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16–349. Argued April 18, 2017—Decided June 12, 2017

The Fair Debt Collection Practices Act authorizes private lawsuits and weighty fines designed to deter the wayward practices of "debt collector[s]," a term embracing anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another." 15 U. S. C. §1692a(6). The complaint filed in this case alleges that CitiFinancial Auto loaned money to petitioners seeking to buy cars; that petitioners defaulted on those loans; and that respondent Santander then purchased the defaulted loans from CitiFinancial and sought to collect in ways petitioners believe violated the Act. The district court and Fourth Circuit held that Santander didn't qualify as a debt collector because it did not regularly seek to collect debts "owed . . . another" but sought instead only to collect debts that it purchased and owned.

Held: A company may collect debts that it purchased for its own account, like Santander did here, without triggering the statutory definition in dispute. By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the statute's plain language seems to focus on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself.

Petitioners' arguments to the contrary do not dislodge the statute's plain meaning. Petitioners point out that the word "owed" is the *past* participle of the verb "to owe," and so suggest that the debt collector definition must exclude loan originators (who never seek to collect debts previously owed someone else) but embrace debt purchasers like Santander (who necessarily do). But past participles like "owed" are routinely used as adjectives to describe the present state of a thing. Congress also used the word "owed" to refer to present debt relationships in neighboring provisions of the Act, and petitioners have

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not rebutted the presumption that identical words in the same statute carry the same meaning. Neither would reading the word "owed" to refer to present debt relationships render any of the Act's provisions surplusage, contrary to what petitioners suggest.

Petitioners also contend that their interpretation best furthers the Act's perceived purposes because, they primarily argue, if Congress had been aware of defaulted debt purchasers like Santander it would have treated them like traditional debt collectors because they pose similar risks of abusive collection practices. But it is not this Court's job to rewrite a constitutionally valid text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. And neither are petitioners' policy arguments unassailable, as reasonable legislators might contend both ways on the question of how defaulted debt purchasers should be treated. This fact suggests for certain but one thing: that these are matters for Congress, not this Court, to resolve. Pp. 3–11.

817 F. 3d 131, affirmed.

GORSUCH, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 16–349

RICKY HENSON, ET AL., PETITIONERS *v.*
SANTANDER CONSUMER USA INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 12, 2017]

JUSTICE GORSUCH delivered the opinion of the Court.

Disruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry. From that scrutiny emerged the Fair Debt Collection Practices Act, a statute that authorizes private lawsuits and weighty fines designed to deter wayward collection practices. So perhaps it comes as little surprise that we now face a question about who exactly qualifies as a "debt collector" subject to the Act's rigors. Everyone agrees that the term embraces the repo man—someone hired by a creditor to collect an outstanding debt. But what if you purchase a debt and then try to collect it for yourself—does that make you a "debt collector" too? That's the nub of the dispute now before us.

The parties approach the question from common ground. The complaint alleges that CitiFinancial Auto loaned money to petitioners seeking to buy cars; that petitioners defaulted on those loans; that respondent Santander then purchased the defaulted loans from CitiFinancial; and that Santander sought to collect in ways petitioners believe troublesome under the Act. The parties agree, too,

that in deciding whether Santander's conduct falls within the Act's ambit we should look to statutory language defining the term "debt collector" to embrace anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another." 15 U. S. C. §1692a(6).

Even when it comes to that question, the parties agree on at least part of an answer. Both sides accept that third party debt collection agents generally qualify as "debt collectors" under the relevant statutory language, while those who seek only to collect for themselves loans they originated generally do not. These results follow, the parties tell us, because debt collection agents seek to collect debts "owed . . . another," while loan originators acting on their own account aim only to collect debts owed to themselves. All that remains in dispute is how to classify individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account. Does the Act treat the debt purchaser in that scenario more like the repo man or the loan originator?

For their part, the district court and Fourth Circuit sided with Santander. They held that the company didn't qualify as a debt collector because it didn't regularly seek to collect debts "owed . . . another" but sought instead only to collect debts that it purchased and owned. At the same time, the Fourth Circuit acknowledged that some circuits faced with the same question have ruled otherwise—and it is to resolve this conflict that we took the case. Compare 817 F. 3d 131, 133–134, 137–138 (2016) (case below); *Davidson* v. *Capital One Bank (USA), N. A.*, 797 F. 3d 1309, 1315–1316 (CA11 2015), with *McKinney* v. *Caldeway Properties, Inc.*, 548 F. 3d 496, 501 (CA7 2008); *FTC* v. *Check Investors, Inc.*, 502 F. 3d 159, 173–174 (CA3 2007).

Before attending to that job, though, we pause to note two related questions we do not attempt to answer today.

First, petitioners suggest that Santander can qualify as a debt collector not only because it regularly seeks to collect for its own account debts that it has purchased, but also because it regularly acts as a third party collection agent for debts owed to others. Petitioners did not, however, raise the latter theory in their petition for certiorari and neither did we agree to review it. Second, the parties briefly allude to another statutory definition of the term "debt collector"—one that encompasses those engaged "in any business the principal purpose of which is the collection of any debts." §1692a(6). But the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it either.

With these preliminaries by the board, we can turn to the much narrowed question properly before us. In doing so, we begin, as we must, with a careful examination of the statutory text. And there we find it hard to disagree with the Fourth Circuit's interpretive handiwork. After all, the Act defines debt collectors to include those who regularly seek to collect debts "owed . . . another." And by its plain terms this language seems to focus our attention on third party collection agents working for a debt owner—not on a debt owner seeking to collect debts for itself. Neither does this language appear to suggest that we should care how a debt owner came to be a debt owner—whether the owner originated the debt or came by it only through a later purchase. All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for "another." And given that, it would seem a debt purchaser like Santander may indeed collect debts for its own account without triggering the statutory definition in dispute, just as the Fourth Circuit explained.

Petitioners reply that this seemingly straightforward reading overlooks an important question of tense. They observe that the word "owed" is the *past* participle of the

verb "to owe." And this, they suggest, means the statute's definition of debt collector captures anyone who regularly seeks to collect debts *previously* "owed . . . another." So it is that, on petitioners' account, the statute excludes from its compass loan originators (for they never seek to collect debts previously owed someone else) but embraces many debt purchasers like Santander (for in collecting purchased debts they necessarily seek to collect debts previously owed another). If Congress wanted to exempt all present debt owners from its debt collector definition, petitioners submit, it would have used the *present* participle "owing." That would have better sufficed to do the job—to make clear that you must collect debts *currently* "owing . . . another" before implicating the Act.

But this much doesn't follow even as a matter of good grammar, let alone ordinary meaning. Past participles like "owed" are routinely used as adjectives to describe the present state of a thing—so, for example, *burnt* toast is inedible, a *fallen* branch blocks the path, and (equally) a debt *owed* to a current owner may be collected by him or her. See P. Peters, The Cambridge Guide to English Usage 409 (2004) (explaining that the term "past participle" is a "misnomer[ ], since" it "can occur in what is technically a present . . . tense"). Just imagine if you told a friend that you were seeking to "collect a debt owed to Steve." Doesn't it seem likely your friend would understand you as speaking about a debt *currently* owed to Steve, not a debt Steve *used* to own and that's now actually yours? In the end, even petitioners find themselves forced to admit that past participles can and regularly do work just this way, as adjectives to describe the present state of the nouns they modify. See Brief for Petitioners 28; see also B. Garner, Modern English Usage 666 (4th ed. 2016) (while "*owing* . . . is an old and established usage . . . the more logical course is simply to write *owed*").

Widening our view to take in the statutory phrase in

which the word "owed" appears—"owed or due . . . another"—serves to underscore the point. Petitioners acknowledge that the word "due" describes a debt *currently* due at the time of collection and not a debt that *was* due only in some previous period. Brief for Petitioners 26–28. So to rule for them we would have to suppose Congress set two words cheek by jowl in the same phrase but meant them to speak to entirely different periods of time. All without leaving any clue. We would have to read the phrase not as referring to "debts that *are* owed or due another" but as describing "debts that *were* owed or *are* due another." And supposing such a surreptitious subphrasal shift in time seems to us a bit much. Neither are we alone in that assessment, for even petitioners acknowledge that theirs "may not be the most natural interpretation of the phrase standing in isolation." *Id.,* at 26–27.

Given that, you might wonder whether extending our gaze from the narrow statutory provision at issue to take in the larger statutory landscape might offer petitioners a better perspective. But it does not. Looking to other neighboring provisions in the Act, it quickly comes clear that Congress routinely used the word "owed" to refer to present (not past) debt relationships. For example, in one nearby subsection, Congress defined a creditor as someone "to whom a debt is owed." 15 U. S. C. §1692a(4). In another subsection, too, Congress required a debt collector to identify "the creditor to whom the debt is owed." §1692g(a)(2). Yet petitioners offer us no persuasive reason why the word "owed" should bear a different meaning here, in the subsection before us, or why we should abandon our usual presumption that "identical words used in different parts of the same statute" carry "the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005).

Still other contextual clues add to petitioners' problems. While they suggest that the statutory definition before us implicitly distinguishes between loan originators and debt

purchasers, a pass through the statute shows that when Congress wished to distinguish between originators and purchasers it left little doubt in the matter. In the very definitional section where we now find ourselves working, Congress expressly differentiated between a person "who offers" credit (the originator) and a person "to whom a debt is owed" (the present debt owner). §1692a(4). Elsewhere, Congress recognized the distinction between a debt "originated by" the collector and a debt "owed or due" another. §1692a(6)(F)(ii). And elsewhere still, Congress drew a line between the "original" and "current" creditor. §1692g(a)(5). Yet no similar distinction can be found in the language now before us. To the contrary, the statutory text at issue speaks not at all about originators and current debt owners but only about whether the defendant seeks to collect on behalf of itself or "another." And, usually at least, when we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning. See, *e.g., Loughrin* v. *United States*, 573 U. S. ___, ___ (2014).

Even what may be petitioners' best piece of contextual evidence ultimately proves unhelpful to their cause. Petitioners point out that the Act exempts from the definition of "debt collector" certain individuals who have "obtained" particular kinds of debt—for example, debts not yet in default or debts connected to secured commercial credit transactions. §§1692a(6)(F)(iii) and (F)(iv). And because these exemptions contemplate the possibility that someone might "obtain" a debt "owed or due . . . another," petitioners submit, the word "owed" must refer only to a *previous* owner. *Ibid.* This conclusion, they say, necessarily follows because, once you have "obtained" a debt, that same debt just cannot be *currently* "owed or due" another.

This last and quite essential premise of the argument, however, misses its mark. As a matter of ordinary Eng-

lish, the word "obtained" can (and often does) refer to taking possession of a piece of property without also taking ownership—so, for example, you might obtain a rental car or a hotel room or an apartment. See, *e.g.,* 10 Oxford English Dictionary 669 (2d ed. 1989) (defining "obtain" to mean, among other things, "[t]o come into the possession or enjoyment of (something) by one's own effort or by request"); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 532–533 (2013) (distinguishing between ownership and obtaining possession). And it's easy enough to see how you might also come to possess (obtain) a debt without taking ownership of it. You might, for example, take possession of a debt for servicing and collection even while the debt formally remains owed another. Or as a secured party you might take possession of a debt as collateral, again without taking full ownership of it. See, *e.g.*, U. C. C. §9–207, 3 U. L. A. 197 (2010). So it simply isn't the case that the statute's exclusions imply that the phrase "owed . . . another" must refer to debts *previously* owed to another.

By this point petitioners find themselves in retreat. Unable to show that debt purchasers regularly collecting for their own account always qualify as debt collectors, they now suggest that purchasers sometimes qualify as debt collectors. On their view, debt purchasers surely qualify as collectors at least when they regularly purchase and seek to collect *defaulted* debts—just as Santander allegedly did here. In support of this narrower and more particular understanding of the Act, petitioners point again to the fact that the statute excludes from the definition of "debt collector" certain persons who obtain debts before default. 15 U. S. C. §1692a(6)(F)(iii). This exclusion, petitioners now suggest, implies that the term "debt collector" must embrace those who regularly seek to collect debts obtained after default. Others aligned with petitioners also suggest that the Act treats everyone who

attempts to collect a debt as either a "debt collector" or a "creditor," but not both. And because the statutory definition of the term "creditor" excludes those who seek to collect a debt obtained "in default," §1692a(4), they contend it again follows as a matter of necessary inference that these persons must qualify as debt collectors.

But these alternative lines of inferential argument bear their own problems. For while the statute surely excludes from the debt collector definition certain persons who acquire a debt before default, it doesn't necessarily follow that the definition must include anyone who regularly collects debts acquired after default. After all and again, under the definition at issue before us you have to attempt to collect debts owed *another* before you can ever qualify as a debt collector. And petitioners' argument simply does not fully confront this plain and implacable textual prerequisite. Likewise, even spotting (without granting) the premise that a person cannot be both a creditor and a debt collector with respect to a particular debt, we don't see why a defaulted debt purchaser like Santander couldn't qualify as a creditor. For while the creditor definition excludes persons who "receive an assignment or transfer of a debt in default," it does so only (and yet again) when the debt is assigned or transferred "*solely* for the purpose of facilitating collection of such debt *for another*." *Ibid.* (emphasis added). So a company collecting purchased defaulted debt for its own account—like Santander—would hardly seem to be barred from qualifying as a creditor under the statute's plain terms.

Faced with so many obstacles in the text and structure of the Act, petitioners ask us to move quickly on to policy. Indeed, from the beginning that is the field on which they seem most eager to pitch battle. Petitioners assert that Congress passed the Act in large measure to add new incentives for independent debt collectors to treat consumers well. In their view, Congress excluded loan originators

from the Act's demands because it thought they already faced sufficient economic and legal incentives to good behavior. But, on petitioners' account, Congress never had the chance to consider what should be done about those in the business of purchasing defaulted debt. That's because, petitioners tell us, the "advent" of the market for defaulted debt represents "'one of the most significant changes'" to the debt market generally since the Act's passage in 1977. Brief for Petitioners 8 (quoting Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014, p. 7 (2014)). Had Congress known this new industry would blossom, they say, it surely would have judged defaulted debt purchasers more like (and in need of the same special rules as) independent debt collectors. Indeed, petitioners contend that no other result would be consistent with the overarching congressional goal of deterring untoward debt collection practices.

All this seems to us quite a lot of speculation. And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. See *Magwood* v. *Patterson*, 561 U. S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent"). Indeed, it is quite mistaken to assume, as petitioners would have us, that "whatever" might appear to "further[ ] the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) (*per curiam*) (emphasis deleted). Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known "pursues its [stated] purpose[ ] at all costs." *Id.,* at 525–526. For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law

but will presume more modestly instead "that [the] legislature says . . . what it means and means . . . what it says." *Dodd* v. *United States*, 545 U. S. 353, 357 (2005) (internal quotation marks omitted; brackets in original).

Even taken on its own terms, too, the speculation petitioners urge upon us is far from unassailable. After all, is it really impossible to imagine that reasonable legislators might contend both ways on the question whether defaulted debt purchasers should be treated more like loan originators than independent debt collection agencies? About whether other existing incentives (in the form of common law duties, other statutory and regulatory obligations, economic incentives, or otherwise) suffice to deter debt purchasers from engaging in certain undesirable collection activities? Couldn't a reasonable legislator endorsing the Act as written wonder whether a large financial institution like Santander is any more or less likely to engage in abusive conduct than another large financial institution like CitiFinancial Auto? Especially where (as here) the institution says that its primary business is loan origination and not the purchase of defaulted debt? We do not profess sure answers to any of these questions, but observe only that the parties and their *amici* manage to present many and colorable arguments both ways on them all, a fact that suggests to us for certain but one thing: that these are matters for Congress, not this Court, to resolve.

In the end, reasonable people can disagree with how Congress balanced the various social costs and benefits in this area. We have no difficulty imagining, for example, a statute that applies the Act's demands to anyone collecting any debts, anyone collecting debts originated by another, or to some other class of persons still. Neither do we doubt that the evolution of the debt collection business might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made

in the past. After all, it's hardly unknown for new business models to emerge in response to regulation, and for regulation in turn to address new business models. Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world. But neither should the proper role of the judiciary in that process—to apply, not amend, the work of the People's representatives.

The judgment of the Court of Appeals is

Affirmed.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TOWN OF CHESTER, NEW YORK *v.* LAROE ESTATES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 16–605. Argued April 17, 2017—Decided June 5, 2017

Land developer Steven Sherman paid $2.7 million to purchase land in the town of Chester (Town) for a housing subdivision. He also sought the Town's approval of his development plan. About a decade later, he filed this suit in New York state court, claiming that the Town had obstructed his plans for the subdivision, forcing him to spend around $5.5 million to comply with its demands and driving him to the brink of personal bankruptcy. Sherman asserted, among other claims, a regulatory takings claim under the Fifth and Fourteenth Amendments. The Town removed the case to a Federal District Court, which dismissed the takings claim as unripe. The Second Circuit reversed that determination and remanded for the case to go forward. On remand, real estate development company Laroe Estates, Inc. (respondent here), filed a motion to intervene of right under Federal Rule of Civil Procedure 24(a)(2), which requires a court to permit intervention by a litigant that "claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Laroe alleged that it had paid Sherman more than $2.5 million in relation to the development project and the subject property, that its resulting equitable interest in the property would be impaired if it could not intervene, and that Sherman would not adequately represent its interest. Laroe filed, *inter alia,* an intervenor's complaint asserting a regulatory takings claim that was substantively identical to Sherman's and seeking a judgment awarding Laroe compensation for the taking of Laroe's interest in the property at issue. The District Court denied Laroe's mo-

Syllabus

tion to intervene, concluding that its equitable interest did not confer standing. The Second Circuit reversed, holding that an intervenor of right is not required to meet Article III's standing requirements.

Held:

1. A litigant seeking to intervene as of right under Rule 24(a)(2) must meet the requirements of Article III standing if the intervenor wishes to pursue relief not requested by a plaintiff. To establish Article III standing, a plaintiff seeking compensatory relief must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___. The "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 734 (internal quotation marks omitted). The same principle applies when there are multiple plaintiffs: At least one plaintiff must have standing to seek each form of relief requested in the complaint. That principle also applies to intervenors of right: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that requested by the plaintiff. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names. Pp. 4–6.

2. The Court of Appeals is to address on remand the question whether Laroe seeks different relief than Sherman. If Laroe wants only a money judgment of its own running directly against the Town, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene. The record is unclear on that point, and the Court of Appeals did not resolve that ambiguity. Pp. 6–8.

828 F. 3d 60, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 16–605

TOWN OF CHESTER, NEW YORK, PETITIONER *v.* LAROE ESTATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 5, 2017]

JUSTICE ALITO delivered the opinion of the Court.

Must a litigant possess Article III standing in order to intervene of right under Federal Rule of Civil Procedure 24(a)(2)? The parties do not dispute—and we hold—that such an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a plaintiff. In the present case, it is unclear whether the intervenor seeks different relief, and the Court of Appeals did not resolve this threshold issue. Accordingly, we vacate the judgment and remand for that court to determine whether the intervenor seeks such additional relief.

I

In 2001, land developer Steven Sherman paid $2.7 million to purchase nearly 400 acres of land in the town of Chester, New York (Town). Sherman planned to build a housing subdivision called MareBrook, complete with 385 housing units, a golf course, an onsite restaurant, and other amenities. Sherman applied for approval of his plan and thus began a "journey through the Town's ever-changing labyrinth of red tape." *Sherman* v. *Chester*, 752

F. 3d 554, 557 (CA2 2014).

In 2012, Sherman filed this suit against the Town in New York state court. The suit concerned "the decade's worth of red tape put in place" by the Town and its regulatory bodies. *Id.*, at 558. According to Sherman, the Town obstructed his plans for the subdivision and forced him to spend around $5.5 million to comply with the Town's demands. *Id.*, at 558, 560. All of this, Sherman claimed, left him financially exhausted and on the brink of personal bankruptcy. *Id.*, at 560. Sherman brought nine federal- and state-law claims against the Town, including a regulatory takings claim under the Fifth and Fourteenth Amendments. See App. 98–122. The Town removed the case to a Federal District Court, which dismissed Sherman's takings claim as unripe. Opinion and Order in No. 1:12–cv–00647 (SDNY), Dkt. 14, p. 25. The Court of Appeals for the Second Circuit reversed the ripeness determination and remanded for the case to go forward. *Chester*, *supra*, at 557.[1]

On remand, real estate development company Laroe Estates, Inc. (the respondent here) filed a motion to intervene of right under Federal Rule of Civil Procedure 24(a)(2). This Rule requires a court to permit intervention by a litigant that "claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Laroe alleged that in 2003 it had entered into an agreement with Sherman regarding the MareBrook property. Under this agreement, Laroe was to make $6 million in payments to Sherman, secured by a mortgage on all of the development, and Sherman was to sell Laroe

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[1] Sherman died in 2013, and his estate replaced him as the plaintiff. App. to Pet. for Cert. 21a, n. 2.

parcels of land within the proposed subdivision when the MareBrook plan was approved. However, Laroe reserved the right to terminate the entire agreement if Sherman was unable to obtain Town approval for a sufficient number of lots. While this agreement was in place and Sherman continued his futile quest for regulatory approval, Laroe paid Sherman more than $2.5 million.

In 2013, TD Bank commenced a foreclosure proceeding on Sherman's property. In an effort to save the deal, Laroe and Sherman entered into a new agreement. That agreement provided that the purchase price of the property would be the $2.5 million that Laroe had already advanced Sherman plus any amount Sherman had to pay to settle with TD Bank. Once the Town approved the plan, Laroe was required to transfer a certain number of lots back to Sherman. In addition to imposing this transfer obligation, the agreement deemed Laroe to have paid for the land in full. Laroe was also given the authority to settle the debt Sherman owed TD Bank and to terminate the agreement if the settlement failed. The settlement did fail, and TD Bank took over the property. But Laroe never terminated its agreement with Sherman.

In support of its motion to intervene, Laroe argued that, under New York law, it is "the equitable owner of the Real Property" at issue in Sherman's suit. App. 131, 135–139. Laroe asserted that its status as equitable owner gave it an interest in the MareBrook property; that its interest would be impaired if it could not intervene; and that Sherman "ha[d] his own agenda" and consequently could not adequately represent Laroe's interest. *Id.*, at 143–145. Along with its other intervention-related pleadings, Laroe filed an intervenor's complaint asserting a regulatory takings claim that was substantively identical to Sherman's. Laroe's complaint sought, among other things, a "judgment against [the Town] awarding [Laroe] damages," namely, "compensation for the taking of Laroe's interest in

the subject real property." *Id.*, at 162.

The District Court denied Laroe's motion to intervene on the ground that Laroe lacked standing to bring a takings claim "based on its status as contract vendee to the property." App. to Pet. for Cert. 57a. The District Court interpreted Second Circuit precedent—specifically, *United States Olympic Comm.* v. *Intelicense Corp., S. A.*, 737 F. 2d 263, 268 (1984)—to mean that Laroe's equitable interest did not confer standing. App. to Pet. for Cert. 55a–56a.[2]

The Court of Appeals reversed. 828 F. 3d 60, 62 (CA2 2016). Acknowledging a division among the Courts of Appeals on whether an intervenor of right must meet the requirements of Article III, the Second Circuit sided with the courts that have held that Article III standing is not required. *Id.*, at 64–65.

We granted certiorari. 580 U. S. ___ (2017).

II

Article III of the Constitution limits the exercise of the judicial power to "Cases" and "Controversies." §2, cl. 1. This fundamental limitation preserves the "tripartite structure" of our Federal Government, prevents the Federal Judiciary from "intrud[ing] upon the powers given to the other branches," and "confines the federal courts to a properly judicial role." *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___ (2016) (slip op., at 5–6). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 341 (2006).

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo*, *supra*, at

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[2] We assume for the sake of argument only that Laroe does not have Article III standing. If resolution of this question becomes necessary on remand, the Court of Appeals will be required to determine whether the District Court's decision was correct.

___ (slip op., at 6). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2013). Our standing doctrine accomplishes this by requiring plaintiffs to "alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 38 (1976) (internal quotation marks omitted). To establish Article III standing, the plaintiff seeking compensatory relief must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, *supra*, at ___ (slip op., at 6). "Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon*, *supra*, at 38.

Our standing decisions make clear that "'standing is not dispensed in gross.'" *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 734 (2008) (quoting *Lewis* v. *Casey*, 518 U. S. 343, 358, n. 6 (1996); alteration omitted). To the contrary, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis*, *supra*, at 734 (internal quotation marks omitted); see, *e.g.*, *DaimlerChrysler*, *supra*, at 352 ("[A] plaintiff must demonstrate standing separately for each form of relief sought"); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 185 (2000) (same); *Los Angeles* v. *Lyons*, 461 U. S. 95, 105–106, and n. 7 (1983) (a plaintiff who has standing to seek damages must also demonstrate standing to pursue injunctive relief). The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the com-

plaint. Both of the parties accept this simple rule.[3]

The same principle applies to intervenors of right. Although the context is different, the rule is the same: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests. This result follows ineluctably from our Article III case law, so it is not surprising that both parties accept it (as does the United States as *amicus curiae*). See Brief for Petitioner 13 (arguing that an intervenor must always demonstrate standing); Brief for Respondent 28 ("[A]n intervenor who . . . seeks relief beyond that requested by a party with standing must satisfy Article III"); Brief for United States as *Amicus Curiae* 16 (An intervenor must demonstrate its own standing if it "seek[s] damages" or "injunctive relief that is broader than or different from the relief sought by the original plaintiff(s)").

In sum, an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names. Cf. *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 402, n. 22 (1982) (declining to address the State's standing "until [it] obtains relief different from that sought by plaintiffs whose standing has not been questioned").

That principle dictates the disposition of this case. It is

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[3] See Brief for Petitioner 23 ("If different parties raising a single issue seek different relief, then standing must be shown for each one"); Brief for Respondent 15 ("[A] case or controversy as to one claim does not extend the judicial power to *different* claims or forms of relief").

unclear whether Laroe seeks the same relief as Sherman or instead seeks different relief, such as a money judgment against the Town in Laroe's own name. Laroe's complaint—the best evidence of the relief Laroe seeks—requests a judgment awarding damages *to Laroe*. App. 162. Unsurprisingly, Sherman requests something different: specifically, compensation for the taking of *his* interest in the property. *Id.*, at 122. In other words, as Laroe's counsel conceded at oral argument, the complaint plainly seeks separate monetary relief for Laroe directly against the Town. Tr. of Oral Arg. 43–44. And, as Laroe's counsel conceded further, if Laroe *is* "seeking additional damages in [its] own name," "at that point, an Article III inquiry would be required." *Id.*, at 47.

To be sure, at some points during argument in the Court of Appeals, Laroe made statements that arguably indicated that Laroe is not seeking damages different from those sought by Sherman. In particular, Laroe's counsel stated that he was "not saying that Sherman and [Laroe's] damages are not the same damages," and insisted that there is "exactly one fund, and the town doesn't have to do anything except turn over the fund." Tr. 16, 33; see also Reply Brief in No. 15–1086 (CA2), p. 12 (similar). At other points, however, the same counsel made statements pointing in the opposite direction. When asked directly whether "there would be separate awards to you and to the Sherman estate" if Sherman's suit was successful, Laroe's counsel admitted that he "ha[d] never contemplated how [damages] ge[t] allocated at the end of the day" and suggested bifurcated proceedings so that once liability was settled, Laroe and Sherman could "duke it out" over damages if necessary. Tr. 32–35. And in its Court of Appeals briefing, Laroe argued that it—not Sherman—would be entitled to most of the damages from the takings claim, flagging the allocation issue as one that the District Court would have to resolve. Brief for Appellant in No. 15–1086

(CA2), p. 32 ("[T]he trier of fact will have to determine the relative allocation of rights over the fund . . . . Specifically, what is the value of Sherman's bare legal title as compared to Laroe's equitable title in the subject property"); Reply Brief in No. 15–1086, at 15 ("[M]ost, if not all of the benefits" of this litigation "will accrue [to] Laroe"); see also 828 F. 3d, at 70 (noting that Sherman and Laroe "may disagree about . . . the issue of damages were they to prevail"). Taken together, these representations at best leave it ambiguous whether Laroe is seeking damages for itself or is simply seeking the same damages sought by Sherman.[4]

Unfortunately, the Court of Appeals did not resolve this ambiguity. In fact, the section of its opinion concerning standing did not discuss whether Laroe sought different relief than Sherman. *Id.*, at 64–66. Elsewhere, in a different context, the court did acknowledge Laroe's statement that it sought "essentially the same" damages as Sherman. *Id.*, at 66. But the court also found that "it is unclear from the record whether Laroe believes the Town is directly liable to Sherman or Laroe for the taking." *Ibid.*

This confusion needs to be dispelled. If Laroe wants only a money judgment of its own running directly against the Town, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene. We leave it to the Court of Appeals to address this question on remand.

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[4] Before this Court, Laroe's counsel represented that Laroe is not seeking damages of its own and is seeking only to maximize Sherman's recovery. Tr. of Oral Arg. 43–44. But in light of the ambiguous record and the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not first view").

* * *

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[Cite as *Estate of Kuzda v. PRF Ents., Inc.*, 2017-Ohio-4185.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104961

ESTATE OF CHARLENE VARGO KUZDA

PLAINTIFF-APPELLEE

vs.

PRF ENTERPRISES, INC., ET AL.

DEFENDANTS-APPELLEES

[Appeal By Dougout One Pub & Grill, L.L.C., Defendant-Appellant]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-800249

BEFORE: Blackmon, J., S. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: June 8, 2017

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PATRICIA ANN BLACKMON, J.:

{¶1} Defendant DougOut One Pub & Grill, L.L.C., d.b.a. DougOut Pub & Grill ("DougOut") appeals from the orders of the trial court entering default judgment against DougOut in favor of PRF Enterprises, Inc. d.b.a. Musketeers Bar & Grille ("PRF"), and denying DougOut's motion for relief from that judgment. DougOut assigns the following errors for our review:

> I. The trial court erred in failing to conduct a hearing on the motion for default judgment, inasmuch as appellant DougOut would have been able to demonstrate at a hearing: (1) that it had a meritorious defense to the liability claims that were being advanced by appellee [PRF] on its cross claim; (2) that all discovery that was relevant to the liability claims of [PRF] had been produced; and (3) that claims by [PRF's] counsel to the contrary were not accurate.
>
> II. The trial court erred in denying DougOut's motion for relief from judgment pursuant to Civ.R. 60(B).

{¶2} Having reviewed the record and pertinent law, we reverse the trial court's decision awarding PRF default judgment, and we remand for further proceedings consistent with this opinion.

{¶3} This appeal arises out of an automobile accident caused by Jennifer Jilek ("Jilek") in 2011, when her vehicle struck and killed Charlene Vargo Kuzda ("Kuzda"). It was determined that Jilek was under the influence of alcohol.[1]

{¶4} In 2013, Kuzda's estate sued DougOut, Jilek's employer PRF, and another

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[1]Jilek was sentenced to ten years of imprisonment in connection with Kuzda's death. *See State v. Jilek*, Summit C.P. No. CR-2011-0440.

bar, Corkscrew Johnny's, Inc. All the defendants were bars that sold alcohol. They were alleged to be liable for Jilek's alcohol consumption under the dram shop law.

{¶5} On March 29, 2013, PRF requested discovery from DougOut; however, DougOut was not served with Kuzda's complaint until April 11, 2013. PRF renewed its discovery request. Because discovery was not responded to, the trial court granted PRF's motion to compel responses to the March 29, 2013 discovery.

{¶6} In January 2014, PRF submitted a second set of discovery requests to DougOut, and filed a cross-claim against DougOut for indemnity, contribution, and spoliation of evidence. On March 17, 2014, PRF settled with Kuzda's estate for $500,000, and the estate later dismissed its claims against PRF and Jilek with prejudice.

{¶7} In August 2014, PRF filed a second motion to compel, again complaining that DougOut did not initially respond to the first discovery request, sent before DougOut was served with the complaint in this matter, and that following the trial court's earlier order compelling DougOut to respond, DougOut submitted responses that "were largely incomplete." PRF also complained that DougOut did not respond to another request for discovery sent in January 2014. On August 27, 2014, the trial court granted PRF's second motion to compel, ordering DougOut to provide complete responses within 14 days. Also on August 27, 2014, the trial court granted PRF a protective order barring the parties from learning the terms of its settlement with the estate.

{¶8} On October 23, 2014, PRF filed a motion to show cause, complaining that although DougOut provided additional answers and documents, the responses "were

largely incomplete" and that DougOut objected without explanation to most of the requested information.

{¶9} The trial court scheduled a hearing on PRF's motion to show cause on December 3, 2014. DougOut's counsel appeared as required, and the court then continued the matter until January 22, 2015. On that date, the trial court granted PRF's motions to compel in an order that provided for monetary sanctions in the event of future noncompliance, and stated:

> Defendant DougOut * * * is hereby ordered to [respond] on or by 02/02/2015. Any information withheld on the basis that it is privileged, proprietary or confidential must be appropriately identified in a contemporaneously-produced privilege log. Defendant DougOut One Pub & Grill's failure to comply with this order will result in sanctions as follows: $50.00 per day for the first 10 days following 02/02/2015; $100.00 per day for the 10 day period thereafter; $250.00 per day for the subsequent 10 day period; $500.00 per day for the following 10 days; and $1,000.00 per day thereafter, until the production is complete.

{¶10} In August 19, 2015, PRF filed a motion to impose $167,000 in sanctions from DougOut. PRF complained that it learned of a new bank account during the deposition of DougOut's owner. PRF also complained that counsel for DougOut advised that, "[i]f you would like to look at the boxes of supporting documentation, please contact me to arrange for your review as they are voluminous and you will need to copy them at your client's expense."

{¶11} In opposition, DougOut advised the trial court that it had fully complied with discovery, stating as follows:

> Every financial document was provided or made available to counsel for [PRF] that is in the possession or control of the management of DougOut.

> * * * The remaining financial documents responsive to [PRF's] discovery requests are in the possession of undersigned counsel. * * * The documents occupy four (4) copier size storage boxes and contain the receipts and other documentation that have no relevance to this litigation but are responsive to the discovery requests. * * * Counsel for [PRF] agreed to come to [DougOut's counsel's] office to review the irrelevant documentation and a mutually agreeable date was confirmed. [PRF's] counsel came as scheduled, spent approximately two hours in the conference room with the boxes and then advised undersigned counsel that she would be in contact with him as to whether [PRF] would be willing to copy the contents of the boxes. To date, undersigned counsel has not been made aware of the final decision regarding the copying of the documents, yet [PRF] is now requesting the Court to issue sanctions against DougOut when [PRF] has not taken advantage of the opportunity to secure copies of the documents that they have already viewed.
>
> All financial documents in the possession of [DougOut], responsive to the requests made by [PRF] * * * have been timely presented to counsel for [PRF]. * * * The motion of [PRF] is devoid of exactly what * * * documents they believe have not been produced, and in fact, they have not provided the Court with any evidence that the unidentified documents even exist.

{¶12} Additionally, on September 4, 2015, counsel for DougOut notified the trial court that "he has been dealing with unidentified medical issues that have precluded him from maintaining a full work schedule."

{¶13} The trial court set a "sanctions hearing" for September 22, 2015. The record indicates that counsel for DougOut did not appear at this hearing because he did not know of it and he was at a medical appointment at the Cleveland Clinic. Immediately upon learning of the hearing, he drove directly from the Cleveland Clinic to court, spoke with opposing counsel and met with the court's staff attorney, informing her of the reason for not appearing sooner.

{¶14} The following day, the trial court issued an entry ordering PRF to file a

motion for default judgment:

> This case was called for hearing on PRF Enterprises' motion to show cause against [DougOut] on 09/22/2015. Counsel for PRF Enterprises appeared; no one appeared on behalf of [DougOut]. A courtesy call to [DougOut's] counsel was not returned. *Counsel for PRF Enterprises is hereby ordered to file a motion for default judgment on its crossclaim against [DougOut] based upon its failure to comply with the prior orders of this court and to defend the motion to impose sanctions.* The motion shall be supported by PRF Enterprises's affidavit regarding damages.

(Emphasis added.)

{¶15} In response to this order, PRF filed a motion for default judgment, and the trial court set a default hearing for October 20, 2015. On that date, however, according to counsel for DougOut, no hearing took place. Rather, the court's staff attorney informed the parties that an order would be issued in the matter. On October 22, 2015, the court issued an order awarding PRF $500,000 and stating, in relevant part, as follows:

> A hearing was set for 10/20/2015 for which counsel for both parties and a representative for [DougOut] appeared. [DougOut] has failed to make discovery and obey this court's multiple orders to provide complete discovery to [PRF]. Accordingly, pursuant to Civ.R. 37, [PRF's] motion for default judgment on its cross claim, filed on 10/08/2015, is granted. Judgment is hereby granted to [PRF] against [DougOut] in the amount of $500,000.00, plus interest at the statutory rate per annum from this date, and court costs.

{¶16} DougOut filed a motion for relief from judgment, and also requested a

hearing. The trial court denied the motion without a hearing.[2]

{¶17} On August 30, 2016, various outstanding claims and cross-claims were dismissed and the court's default judgment became final.[3] DougOut filed a motion for relief from judgment in the trial court. In relevant part, DougOut averred that through inadvertence, its counsel did not know of the September 22, 2015 sanctions hearing, and was in a medical appointment at the Cleveland Clinic. Immediately upon learning of the hearing, he drove from the Cleveland Clinic to the court and advised the staff attorney of the reason for missing the hearing. Additionally, DougOut's counsel averred that "every document requested in discovery and every interrogatory propounded [had been] provided" prior to the court's September 23, 2015 order.

{¶18} As to a meritorious defense, DougOut asserted that the deposition testimony in the matter demonstrated that while at work at PRF, Jilek consumed her own beer and also consumed alcohol provided by patrons and coworkers. DougOut also presented evidence that Jilek was only at DougOut's for 30-40 minutes and did not "overly consume alcohol" during that time. Two witnesses later observed Jilek in the parking lot of Corkscrew Johnny's, located minutes from the accident scene, and the fatal

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[2]DougOut appealed from both the October 22, 2015 order awarding PRF $500,00 and the denial of its motion for relief from judgment. This court dismissed the appeals for lack of a final appealable order. *See Estate of Vargo Kuzda v. PRF Ents., Inc.*, 8th Dist. Cuyahoga Nos. 103812 and 104048 (July 28, 2016). On August 24, 2016, DougOut next filed a motion for reconsideration, which the trial court denied.

[3]On August 25, 2016, the estate dismissed its claims against Corkscrew Johnny's with prejudice, and against DougOut, without prejudice. Also on August 25, 2016, Corkscrew Johnny's dismissed its outstanding cross-claims against DougOut and PRF, with prejudice.

accident occurred 45-55 minutes after Jilek left DougOut. DougOut also maintained that there was no viable claim upon which to award a default judgment in favor of PRF in the amount of $500,000.

{¶19} One day later, the trial court denied DougOut's motion for relief from the default judgment without holding a hearing. DougOut now appeals, assigning two errors for our review.

No Hearing Prior to Default Judgment Against DougOut

{¶20} In its first assigned error, DougOut asserts that the trial court abused its discretion by entering a default judgment against it without holding a hearing, where the record demonstrated that it provided discovery, and its counsel experienced medical issues.

{¶21} It is clear from the record, and PRF acknowledged during oral argument, that the trial court issued the default as a sanction for the discovery violations. The concern for this court is whether PRF is entitled to $500,000 and under what rule of law, especially when no hearing was held to determine whether the $500,000 is indemnification, contribution, or an assigned judgment.

{¶22} Under Civ.R. 37(B)(1), "[i]f any party * * * fails to obey an order to provide or permit discovery, * * * the court may issue further just orders." Sanctions may include the following:

> (a) Directing that * * * facts shall be taken as established for purposes of the action as the prevailing party claims;
>
> (b) Prohibiting the disobedient party from supporting or opposing

designated claims or defenses, * * *;

(c) Striking pleadings in whole or in part;

(d) Staying further proceedings * * *;

(e) Dismissing the action or proceeding in whole or in part;

(f) Rendering a default judgment against the disobedient party; or

(g) Treating as contempt of court the failure to obey any orders.

Id.

{¶23} When a default judgment is issued as a discovery sanction, the notice and hearing requirements of Civ.R. 55 are applicable. *Amtrust N. Am., Inc. v. Novus Credit Solutions, Inc.*, 8th Dist. Cuyahoga No. 97499, 2012-Ohio-4272, ¶ 19; *Gunton Corp. v. Architectural Concepts*, 8th Dist. Cuyahoga No. 89725, 2008-Ohio-693, ¶ 7; *LaRiche v. Delisio*, 8th Dist. Cuyahoga No. 77352, 2000 Ohio App. LEXIS 5592 , at 7 (Nov. 30, 2000). In *LaRiche*, this court held that it is essential to "provide the party in default an opportunity to explain the default or to correct it, or to explain why the case should not be dismissed with prejudice." *Id.* at 8. In general, this court reviews a trial court's order granting discovery sanctions for an abuse of discretion. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996); *Fone v. Ford Motor Co.*, 128 Ohio App.3d 492, 495, 715 N.E.2d 600 (8th Dist.1998). However, "that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits." *Jones v. Hartranft*, 78 Ohio St.3d 368, 372 678 N.E.2d 530 (1997). In *Jones*, the court cited the fundamental principle that disposition of cases on their merits is

favored in the law. *Id.* That principle, the court noted, "has spawned decisions to curtail the trial court's discretion" to grant a default judgment. *Id*., citing *Toney v. Berkemer*, 6 Ohio St.3d 455, 458, 453 N.E.2d 700 (1983).

{¶24} In *Toney*, the Ohio Supreme Court adopted the United States Supreme Court's holding in *Societe Internationale v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), that "the harsh remedies of dismissal and default should only be used when the failure to comply has been due to willfulness, bad faith, or any fault." Likewise, the *Toney* court held that "[t]he granting of a default judgment * * * is a harsh remedy which should only be imposed when the actions of the faulting party create a presumption of willfulness or bad faith." *Id*. at 458. *Accord State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 49.

{¶25} The *Toney* court considered whether the trial court abused its discretion in entering a default judgment against a party for deficiencies in the party's responses to interrogatories and requests for production of documents, where the noncomplying party was experiencing medical problems, and also advised opposing counsel that "they were welcome to examine his entire case file and that he would gladly furnish them copies of anything they desired." In determining that the trial court abused its discretion, the Ohio Supreme Court noted that the records sought, while relevant, were not so sufficiently relevant to the conduct of the instant case to justify the "the drastic sanction of default judgment." *Id*. at 458-459. Additionally, the court found that the noncomplying party had a valid health-related excuse for his noncompliance, and was willing to provide

additional information. *Toney*, 6 Ohio St.3d at 458.

{¶26} Ohio appellate courts have likewise held that it is inappropriate for a trial court to order dismissal or default against a party when the party has produced evidence demonstrating that the inability to comply with a discovery order was due to health problems. *Barbato v. Miller*, 8th Dist. Cuyahoga No. 76536, 2000 Ohio App. LEXIS 2101 (May 18, 2000); *Dater v. Charles H. Dater Found*., 1st Dist. Hamilton Nos. C020675 and C-020784, 2003-Ohio-7148.

{¶27} Further, in *Gray v. Newman*, 8th Dist. Cuyahoga No. 89549, 2008-Ohio-1076, this court applied the considerations outlined in *Toney* and determined that the trial court abused its discretion in entering a default judgment and monetary damages as a discovery-related sanction. In *Gray*, the complaining party asserted that certain documents were never produced. This court noted that the trial court failed to hold a hearing, and concluded that the sanction was disproportionate to the noncompliant party's conduct. This court stated:

> The propriety of the sanction imposed should be evaluated after considering the history of the case, the facts and circumstances surrounding the noncompliance, including the number of opportunities and the length of time within which the faulting party had to comply with the discovery or the order to comply, what efforts were made to comply, the ability or inability of the faulting party to comply, and any other appropriate factors.

Id. at ¶ 20, quoting *Toney* at 458-459. *Accord Gunton* (affirming the vacating of a default judgment entered without warning, hearing, or evidence as to damages). *Cuyahoga Metro. Hous. Auth. v. Watson, Rice & Co.*, 8th Dist. Cuyahoga Nos. 83230 and 83633, 2004-Ohio-6413 (reversing a default judgment ordered as sanction for failing

to schedule a deposition).

{¶28} Additionally, we note that a party cannot be charged with a delay in providing discovery for that portion of time when he or she was not actually served with the complaint and joined as a party in the action. *Wells Fargo Bank v. Poling*, Franklin C.P. No. 09CV-232, 2009 Ohio Misc. LEXIS 6134, 7 (Sept. 1, 2009) ("Clearly, Plaintiff attempted to serve Susan Poling with a discovery request before she had been served with the Complaint. Therefore, Susan Poling was under no obligation to answer the requests for admission.").

{¶29} Finally, as this court noted in *Gray*, a default issued as a discovery sanction requires a valid underlying cause of action. 2008-Ohio-1076 at ¶ 17.

{¶30} Applying the foregoing considerations, we conclude that on these facts, the trial court abused its discretion in awarding PRF default judgment in this matter. As an initial matter, the record demonstrates that the first discovery request was served prior to DougOut being served with the summons and complaint in this case. As to DougOut's subsequent conduct, DougOut presented evidence outlining his efforts to comply with the discovery request. He informed the court that he had provided discovery and, both parties acknowledge that he informed counsel for PRF that all documents were available for review at his office. Counsel for DougOut also informed the trial court, on September 4, 2015, or well in advance of the court's September 22, 2015 hearing, that "he has been dealing with unidentified medical issues that have precluded him from maintaining a full work schedule." There is no evidence of

willfulness or bad faith.

{¶31} Further, the record fails to demonstrate that DougOut had sufficient notice that it faced the extreme sanction of default judgment. In the court's January 22, 2015 order on PRF's motion to show cause, the trial court outlined potential financial sanctions for future noncompliance. DougOut was notified that it faced financial sanctions of up to $1,000 per day. There is no mention of possible default judgment. As the discovery dispute continued, there was no mention that DougOut faced the possibility of the extreme sanction of default judgment until September 23, 2015, the day the court "*ordered*" PRF to file a motion for a default judgment. Although the trial court did not actually award PRF default judgment until October 22, 2015, the docket clearly demonstrates that the court intended to award PRF default judgment September 23, 2015, or one day after DougOut's counsel arrived too late for the sanction hearing. We find this insufficient notice and opportunity to be heard. *Accord LaRiche* at 10 (prior notice of one business day before the court granted the motion for default judgment did not give the appellant a reasonable time to respond).

{¶32} As to the events surrounding the hearing on September 22, 2015, the record indicates that counsel for DougOut drove from the Cleveland Clinic directly to the trial court when he learned of the September 22, 2015 sanctions hearing. He immediately met with the court's staff attorney and explained the reason for his absence, but in response to his explanation and excuse, the court indicated on its September 23, 2015 order instructing PRF to file a motion for a default judgment that DougOut's

counsel "failed to appear."

{¶33} Accordingly, we conclude that the trial court erred in awarding PRF default judgment as a discovery sanction herein. *Accord Toney*, 6 Ohio St.3d at 458-459 (error to award default judgment on discovery dispute where counsel apprised court of health issue and made alternative arrangements to provide requested records).

{¶34} Moreover, with regard to the $500,000 awarded to PRF, we additionally note that the trial court awarded this amount without providing DougOut with a hearing, or obtaining any evidence as to damages. Although the court set the matter for a damages hearing on October 20, 2015, when DougOut's counsel appeared on that date with a witness and evidence, the trial court refused to hold a hearing. Instead, the court advised counsel that the court would issue a journal entry on the matter. In that journal entry, the court awarded PRF damages of $500,000. PRF insists that this award is proper because its insurer permitted PRF to "pursue recovery in its name for any of the damages it may incur as a result of other tortfeasors." PRF also maintains that DougOut's failure to provide discovery prevented the apportionment of liability among codefendants. However, this court has determined that the default judgment was erroneously ordered herein. Further, under R.C. 2307.22 and 2307.23, there must be an apportionment of liability among codefendants, including defendants who have settled with the plaintiff. *Fisher v. Beazer E., Inc*., 8th Dist. Cuyahoga No. 99662, 2013-Ohio-5251, ¶ 36, citing R.C. 2307.22 and 2307.23.

{¶35} In accordance with all of the foregoing, the first assigned error is

well-taken.

Failure to Hold Hearing on Relief From Judgment Motion

{¶36} In its second assigned error, DougOut argues that the trial court erred by failing to hold a hearing on its August 30, 2016 motion for relief from the default judgment.

{¶37} In light of our disposition of the first assigned error, we conclude that the second assigned error is moot.

{¶38} Judgment is reversed, the default judgment is vacated, and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS
IN JUDGMENT ONLY

[Cite as *Cruz v. English Nanny & Governess School Inc.*, 2017-Ohio-4176.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103714

CHRISTINA CRUZ, ET AL.

PLAINTIFFS-APPELLEES
CROSS-APPELLANTS

vs.

ENGLISH NANNY & GOVERNESS SCHOOL INC., ET AL.

DEFENDANTS-APPELLANTS
CROSS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-768767

BEFORE: Keough, A.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 8, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendants-appellants/cross-appellees, English Nanny & Governess School ("the School"), English Nannies, Inc., d.b.a. English Nannies & Governess, Inc., ("the Placement Agency"), Sheilagh Roth ("Roth"), and Bradford Gaylord ("Gaylord") (collectively "defendants" or "English Nanny"), appeal the trial court's decision denying their motion for directed verdict and judgment notwithstanding the verdict on plaintiff-appellee/cross-appellant, Christina Cruz's ("Cruz"), claim for intentional infliction of emotional distress, and plaintiff-appellee/cross-appellant, Heidi Kaiser's ("Kaiser"), claim for wrongful discharge.

{¶2} Cruz appeals the trial court's decision granting defendants' motion for remittitur on her claim for intentional infliction of emotional distress. Cruz and Kaiser collectively appeal the trial court's decision reducing their attorney fee award. Finally, cross-appellant, attorney Peter Pattakos, appeals the trial court's decision imposing sanctions against him.

{¶3} For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural History

{¶4} The case arises from the relationship between Cruz and the defendants, and the demise of that relationship upon Cruz's decision to report an allegation of child abuse. Cruz believed that the defendants were not supportive of her decision to report the

alleged abuse, and the defendants believed that Cruz's allegations were not well-founded. Cruz believed that she was blackballed from being placed as a nanny after she decided to report the abuse, and Kaiser believed she was wrongfully terminated from English Nanny for not participating in the alleged cover-up of the child abuse report and for disclosing information to Cruz regarding the defendants' skepticism about Cruz's allegations.

{¶5} In November 2011, Cruz and Kaiser (collectively "the plaintiffs") filed a complaint against the English Nanny defendants, Bradford Holdings, and C.F.H. Ltd. In the complaint, Cruz brought causes of action for wrongful termination against public policy, defamation, negligent and intentional infliction of emotional distress, and breach of contract. Kaiser raised causes of action for wrongful termination against public policy and defamation. Defendants denied these claims and asserted a breach of contract counterclaim against Cruz.

{¶6} In March 2012, the trial court granted, in part, English Nanny's motion for partial judgment on the pleadings by dismissing the case against Bradford Holdings and C.F.H. Ltd. The court also dismissed Cruz's claims for wrongful termination in violation of public policy and negligent infliction of emotional distress.

{¶7} In October 2013, the trial court granted summary judgment in favor of Gaylord on Cruz's claims for defamation, intentional infliction of emotional distress, and breach of contract, and on Kaiser's claims of wrongful termination in violation of public policy and defamation. The trial court also granted summary judgment in favor of Roth on Cruz's claims for breach of contract, defamation, and intentional infliction of

emotional distress, and on Kaiser's claim for wrongful termination. The trial court granted summary judgment in favor of the School and the Placement Agency on Cruz's claims for defamation, breach of contract based on breach of the retail installment contract, and intentional infliction of emotional distress.

{¶8} In January 2014, Cruz moved for reconsideration of the trial court's decision granting summary judgment on her claim for intentional infliction of emotional distress. The request for reconsideration was based on the production of placement files that English Nanny produced after the trial court granted Cruz's motion to compel discovery. The trial court found that Cruz's introduction of this newly produced discoverable evidence was sufficient to withstand summary judgment on Cruz's intentional infliction of emotional distress claim.

{¶9} Accordingly, the causes of action left for trial were: Cruz's claims against the remaining English Nanny defendants for intentional infliction of emotional distress, and her claim against the School and Placement Agency for breach of contract based on the exclusive placement agreement; and Kaiser's claim for wrongful termination in violation of public policy against the School and the Placement Agency, and her claims for defamation against the School, the Placement Agency, and Roth.[1] Additionally, English Nanny's counterclaim against Cruz for breach of contract remained.

[1]Kaiser's defamation cause of action was dismissed with prejudice prior to the start of the first trial on April 2, 2015.

{¶10} On March 31, 2015, jury selection began for trial. At the end of voir dire, counsel for English Nanny commented that an article about the case had been published by Scene Magazine and was accessible on the internet. Before opening statements on April 2, 2015, discussion occurred about the article in Scene Magazine. The periodical containing the article was available on the internet and print copies were available free of charge in the courthouse and in a location where potential jurors could obtain a copy and view the article. The trial court questioned the parties about the source of the article, and attorney Pattakos explained that he had provided Scene Magazine with publicly available information about the case. The article contained only the plaintiffs' perspective about the matter and revealed unfavorable information about the defendants' case. Additionally, the online article had generated comments from the public that were unfavorable to the defendants.

{¶11} The trial court conducted an oral hearing on whether the availability of the article in the periodical had tainted the jurors in the case. The court concluded that attorney Pattakos's conduct was problematic, but found after questioning the jury, that the jury was not tainted so as to warrant a mistrial. However, the judge declared a mistrial days later for reasons unrelated to the Scene Magazine article, and the jurors were excused.

II. Jury Trial

{¶12} On May 19, 2015, a second jury was impaneled and the following relevant facts were presented; additional facts will be discussed as they pertain to each assignment of error.

{¶13} English Nanny & Governess School, Inc. is a prestigious trade school that has been training professional nannies and governesses since 1985. Roth is the executive director of the school, and Gaylord is the director of operations of the Placement Agency that works to help match families with nannies from among the School's qualified graduates. Kaiser worked briefly as a placement director at the Placement Agency in early 2011, while Cruz was a student at the School.

{¶14} In the spring of 2011, Cruz enrolled as a student at the School. When she enrolled, she paid $2,000 and signed a Retail Installment Contract with the School to borrow $7,100, the balance of the original $9,100 cost of tuition and fees. Pursuant to the contract, Cruz agreed to repay the loan beginning in August 2011.

A. Cruz's Claim

{¶15} After Cruz's graduation in June 2011, Kaiser, as the placement director, arranged for Cruz to spend a weekend with a single father and his two daughters in Pennsylvania interviewing for a nanny position. Cruz testified that during this trip, she felt uncomfortable and certain events, actions, and interactions caused her alarm. Specifically, she stated that during the final evening she was with the family, she witnessed an inappropriate sexual act between the father and the oldest daughter. Cruz testified that she was shocked and nervous and did not know what she should do

considering she was alone in the house with the family. She decided she would seek guidance from English Nanny on how to proceed with reporting the abuse.

{¶16} On July 9, 2011, after returning to Ohio, she told Kaiser what she had seen between the father and his daughter. On July 14, Cruz told Barbara Francis, director of operations for the Placement Agency, about the incident and that she was "getting the feeling that [Gaylord was] not happy about [what happened], that it's going to affect [her] placement." (Tr. 793.) Cruz disclosed to Francis that Kaiser told her that Gaylord was "annoyed" and that if she reported, it would "cause a big mess." (Tr. 794.)

{¶17} According to Cruz, Francis told her that whether she decided to report the abuse was up to Cruz, and that English Nanny was not getting involved. Additionally, Francis told Cruz that she was not a mandated reporter of child abuse and therefore, it was not her responsibility to report. (Tr. 792.) Based on this conversation, Cruz felt discouraged and was afraid her placement would be affected if she reported the abuse. Francis told Cruz to speak with Angel Chapin, the instructor of the class on child abuse at the School.

{¶18} Cruz testified that she spoke with Chapin and told her in detail about the events and what she witnessed. She testified her purpose was to see if there was enough or sufficient reasoning to report the abuse. According to Cruz, Chapin seemed like she did not believe her and kept questioning each detail. Despite Cruz telling Chapin that the entire weekend dynamic and the incident warranted a report, Chapin told her that she did not think it was child abuse and that she needed proof. Nevertheless, Chapin told Cruz

that it was ultimately up to Cruz to report the incident, but that in her opinion it was not child abuse and not to report it because it could ruin families. (Tr. 801-806.)

{¶19} As a result of this conversation, Cruz attempted to contact both Roth and Gaylord about the incident. Neither were available to talk to her, but Kaiser indicated to Cruz that they were upset and did not take the allegation seriously. (Tr. 806.)

{¶20} Cruz testified that when she finally spoke with Gaylord about the incident, she felt he was not supportive because he told her to "forget about it," and "don't get involved," "the father could sue the school," "it could be a mess." (Tr. 808.) According to Cruz, she felt Gaylord kept changing the topic to her placement as a nanny to deter her from reporting the abuse.

{¶21} Cruz learned of Kaiser's termination after speaking with Gaylord. According to Cruz, she felt that Kaiser was terminated because of her, which caused her to get scared, nervous, and sick because she felt that she was being blackballed. Accordingly, Cruz told Gaylord that she could not keep the incident a secret and that she was going to report the abuse. Cruz testified that this prompted Gaylord to agree that she should talk with Roth about the incident.

{¶22} Cruz stated that when she spoke with Roth, Roth was irritated and annoyed that Cruz was causing a problem. When Cruz told Roth that she was reporting the abuse, Roth told her "no you're not." (Tr. 819.) After explaining her position and that she needed help writing the report, Roth referred Cruz to Shari Nacson, a social worker whom the School had recently hired to teach a class on recognizing and reporting child abuse.

{¶23} Cruz testified that Nacson was supportive of her decision to report and based on what Cruz told her, Nacson indicated that the report needed to be made immediately. The two of the them worked together to create a thorough and detailed report. Although she met with Nacson in early August, Cruz did not file her formal report of child abuse until August 11, 2011.

{¶24} Cruz admitted that at the same time she was reporting the allegation of abuse, her loan with the School was due. She stated this caused her more anxiety and to have panic attacks because she was getting the feeling that her report was affecting her placement as a nanny. According to Cruz, she received permission from Gaylord to seek nanny placements outside the Placement Agency and the Exclusive Placement Agreement.

{¶25} Cruz testified that after Roth and Gaylord knew she was making the formal report, things changed between her and the Placement Agency. Cruz stated that there was little communication, interviews were cancelled, and she received a request for a medication list and to sign a release to obtain medical information. She was subsequently told that she could not be placed with a family because documentation was missing from her file. On August 19, 2011, a week after the formal report was made, Cruz received a letter from Roth releasing Cruz from the Exclusive Placement Agreement.

B. Kaiser's Termination

{¶26} Kaiser testified that on July 11th, she told Gaylord what Cruz had witnessed. According to Kaiser, Gaylord "became extremely agitated, very upset." (Tr. 1851.) She testified that Gaylord stated that Cruz "doesn't know what she saw; she's crazy; [the father is] going to sue us. Tell her not to report. No more interviews for Christina." (Tr. 1851.) Kaiser stated that moments later, Roth came into the office and Gaylord ordered Kaiser to "get [Roth] in here." (Tr. 1853.) Kaiser went into Roth's office and briefly told her what had occurred with Cruz. According to Kaiser, Roth responded similarly to Gaylord by stating that "she didn't know what she saw and this kind of thing ruins families. 'Tell her not to report.'" (Tr. 1853.) Both Roth and Gaylord denied that Kaiser ever told them about Cruz's allegation. However, Cheryl McNulty, who worked in the Placement Agency from June to September 2011, testified that Gaylord was upset that day, and although she did not know why, she knew it involved Cruz and Kaiser. (Tr. 1668.)

{¶27} Kaiser told the jury that Gaylord did not want Cruz to receive any more interviews if she reported the alleged abuse and told her to dissuade Cruz from reporting. (Tr. 1855.) Kaiser interpreted this conduct as "[h]e wanted me to blackball her." (Tr. 1855.) Nevertheless, Kaiser continued to encourage Cruz to report the allegations, but told her she would be met with opposition from Roth and Gaylord if she reported.

{¶28} Kaiser testified that she told Cruz how Gaylord had reacted and what was being said. Kaiser stated that despite being ordered to not send Cruz on any more interviews, Kaiser continued submitting Cruz's information to potential families.

Additionally, Kaiser stated that based on the allegation, she did not want to send the Pennsylvania father any additional nanny candidates, so she only referred individuals who she knew would be unacceptable to him. Ultimately, the father asked for a refund due to the lack of service. (Tr. 1860.)

{¶29} Kaiser testified that prior to the incident with Cruz, she had no problems with her job and had not received any complaints about her job performance. In fact, three weeks prior to her termination, Roth wrote letters to two separate individuals praising Kaiser as a "great asset" and "wonderful asset" to English Nanny, noting in one of the letters that, "we love having Heidi here." (Tr. 458-459.)

{¶30} On July 12, Kaiser received an email from Barbara Francis advising her about the workbook she wanted Kaiser to use. The email asked Kaiser to meet with her to go over the training on how to use it. Kaiser admitted that this was not the first time the use of the workbook was discussed, but that it was the first time she saw the workbook template. Based on her experience with spreadsheet-type documents, Kaiser believed the workbook could be improved upon; however, after meeting with Francis, she concluded it was best to do it the way Francis wanted.

{¶31} The following day, Kaiser received another email from Francis reminding her about their July 6 conversation that Gaylord wanted a list of current clients and all student graduates seeking positions. It was apparent from the email, that both Gaylord and Francis were unhappy that Kaiser had not compiled the list. Kaiser responded to the email, explaining that other agency tasks, including tasks for Gaylord that were not part

of her job description, had taken her away from this task, but that she would make it a priority to compile the information. Instead, on July 18, Francis handed her a termination letter, explaining that Kaiser was being fired for no improvement in her job performance.

{¶32} Lynn Behrman, Kaiser's successor, testified that she does not use any workbook spreadsheet to track the work done matching clients with student graduates and that no one has ever asked her to create such a document. (Tr. 2111-2112.)

C. The Defense

{¶33} Roth denied that she ever tried to discourage Cruz from reporting the suspected abuse, and in fact, that she believed Cruz had a duty to report the abuse and even provided Cruz with the father's address in Pennsylvania. Roth testified repeatedly that neither she, Gaylord, nor any other employee had an obligation to report the abuse, but that only Cruz had a duty to report the abuse. Roth stated that she could not understand why, despite this duty, Cruz did not report the abuse until August 11, 2011, which coincidentally was after Cruz defaulted on her School loan. She testified that she was not made aware of Cruz's allegations until she personally spoke with her on July 26, 2011. At that time, she referred Cruz with Nacson due to her expertise in the field. She testified that she assumed Nacson would help Cruz with her report; however, she was quite surprised that the formal report, which she characterized as "embellished," was not filed until over a month after the incident occurred.

{¶34} Roth testified that she became concerned about Cruz based on Cruz's conduct and erratic behavior after the abuse allegation, specifically, the constant phone calls and lengthy emails that Roth classified as "gobbledygook." She stated that this caused her serious concern about "what was going on with her." Based on this behavior, Roth reviewed Cruz's application file from 2008. In it, Roth found information regarding psychiatric symptoms and the name of Cruz's treating physician. Roth testified that in light of this information, and despite Cruz's subsequent 2011 application where she indicated that she had no past or present emotional conditions, Roth felt compelled to further inquire into Cruz's psychiatric history. Additionally, when Roth reviewed Cruz's 2011 application again, she realized that Cruz's file was incomplete. Roth testified that after contacting Cruz's former physician, Dr. Anna Burkey, she determined that she could no longer recommend Cruz for placement due to Cruz's ongoing mental health needs. Accordingly, on August 19, 2011, Roth wrote Cruz a letter releasing her from any obligation to the Placement Agency under the Exclusive Placement Agreement, focusing on the downturn of the economy and not Roth's concerns about Cruz's psychiatric conditions.

{¶35} Bradford Gaylord also testified that he never dissuaded Cruz from reporting the abuse. He also denied that Kaiser spoke to him about Cruz's allegations on July 11, stating that the first time he heard about the allegations was when Cruz called him in the late evening of July 25. Gaylord said he did not understand why Cruz waited two weeks to tell him about the alleged abuse, and that if she had told him immediately, he would

have definitely supported her. Gaylord testified that after he spoke with Cruz on July 25 about the alleged abuse, he went to work the following day and told Roth that "Christina has an issue, you need to deal with it." (Tr. 2650.) According to Gaylord, that was "all his responsibility was" because Roth was the appropriate authority to address the issue. (Tr. *id.*).

{¶36} When asked about Cruz's performance at the school, Gaylord told the jury that Cruz was a "great con artist" who "didn't learn much" attending the School, despite achieving high marks in all of her classes. (Tr. 2597.) Additionally, he denied telling Cruz that she could seek out nanny positions on her own because she was still under the Exclusive Placement Agreement.

{¶37} Additionally, Gaylord denied that he excluded Cruz from any interviews or potential placements after the allegation of abuse surfaced. Despite Kaiser testifying that Gaylord told her not to give Cruz any more interviews, Lynn Behrman, Kaiser's replacement, testified that she attempted to place Cruz as a nanny with families between July and August 2011. She stated that she was never advised not to place to Cruz with a family or to stop all interviews for Cruz until it was discovered that Cruz's file was incomplete. Additionally, Behrman stated that at no time was she reprimanded for attempting to place Cruz with a family.

{¶38} In their defense to Cruz's tort claims for emotional distress, the defendants focused on Cruz's history of emotional and psychological distress. The jury was presented with Cruz's medical history and her own testimony that she has suffered her

entire life with emotional problems, including anxiety and depression. Cruz admitted that the episodes of panic attacks, depression, and anxiety continued in her adult life, which she attributed to financial strain. She testified extensively about her financial difficulties and bouts of unemployment prior to attending the School, but said that despite these prior issues and the subsequent emotional distress caused by English Nanny, she was able to attend school, obtain high grades, and obtain and perform nanny-type employment.

D. The Verdict

{¶39} After a 26-day, bifurcated-jury trial, the jury found in favor of Cruz and against all defendants on her claim for intentional infliction of emotional distress. The jury award Cruz $150,000 ($75,000 in economic damages and $75,000 in non-economic damages) against each defendant. Additionally, the jury awarded Cruz punitive damages against (1) the Placement Agency in the amount of $50,000, (2) Sheilagh Roth in the amount of $68,750, and (3) Bradford Gaylord in the amount of $50,000. The jury also found these defendants liable for Cruz's reasonable attorney fees. The jury found in favor of Cruz on her breach of contract claim and awarded her nominal damages of $10.

{¶40} The jury also found in favor of Kaiser and against the School on her claim of wrongful discharge in violation of public policy, awarding her $20,000 in damages. Additionally, the jury awarded her punitive damages against the School and the Agency in the amount of $54,000, plus reasonable attorney fees.

{¶41} The jury found in favor of the School against Cruz on the School's counterclaim for breach of contract and awarded the School $8,262.24.

III. Post-Trial Motions

{¶42} Following the trial, the parties filed several post-trial motions, including motions for judgment notwithstanding the verdict ("JNOV"), new trial, remittitur, and to cap the punitive damages award.

{¶43} The trial court denied defendants' motions for JNOV challenging both verdicts in favor of Cruz and Kaiser; however, the trial court granted defendants' motion for remittitur, which reduced Cruz's economic damages award from $75,000 to zero. The court also applied the statutory punitive-damages caps to reduce the total damages award to $194,066.76. After a subsequent hearing on attorney fees, the trial court award the plaintiffs $125,504.45 in fees and expenses.

{¶44} In a separate but related matter, defendants filed a motion for sanctions against attorney Pattakos for his involvement in the creation and publication of the Scene Magazine article that was published during the first trial. The defendants sought sanctions in an amount equal to the defendants' attorney fees expended during the hearing regarding the publication, in addition to fees expended for seeking sanctions. After a hearing, the trial court issued a written opinion finding that attorney Pattakos had engaged in "frivolous conduct" in violation of R.C. 2323.51, thus warranting the imposition of sanctions. The parties stipulated that the fee award against attorney Pattakos would, if affirmed on appeal, be in the amount of $10,961.75.

{¶45} This appeal and cross-appeal follow.

IV. Appeal

{¶46} In their first and second assignments of error, the defendants contend that the trial court erred in denying their motions for directed verdict and JNOV on Cruz's claim for intentional infliction of emotional distress and Kaiser's claim for wrongful discharge in violation of public policy.

{¶47} Under Civ.R. 50(A)(4), a court may properly grant a motion for directed verdict when, after construing the evidence most strongly in favor of the party against whom the motion is directed, it finds that reasonable minds could come to but one conclusion on a determinative issue, and the conclusion is adverse to the nonmoving party. Review of the grant or denial of a motion for directed verdict is de novo. *Kanjuka v. Metrohealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 14 (8th Dist.), citing *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90, 509 N.E.2d 399 (1987). In evaluating the grant or denial of a Civ.R. 50(B) motion for JNOV made after all the evidence is presented at trial, a reviewing court applies the same test as that applied in reviewing a motion for a directed verdict. *Id.*; *Chem. Bank of New York v. Neman*, 52 Ohio St.3d 204, 206-207, 556 N.E.2d 490 (1990). With these standards in mind, we now turn to the defendants' arguments.

A. Cruz's Claim for Intentional Infliction of Emotional Distress

{¶48} Under Ohio law, to recover on a claim for intentional infliction of emotional distress, a plaintiff must prove:

> 1. [T]hat the [defendant] either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;
>
> 2. [T]hat [defendant's] conduct was extreme and outrageous, that it went beyond all possible bounds of decency and that it can be considered as utterly intolerable in a civilized community;
>
> 3. [T]hat [defendant's] actions were the proximate cause of the plaintiff's psychic injury; and
>
> 4. [T]hat the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it.

Pyle v. Pyle, 11 Ohio App.3d 31, 463 N.E.2d 98 (8th Dist.1983), paragraph two of the syllabus; *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994).

{¶49} When the Ohio Supreme Court first recognized the tort of intentional infliction of emotional distress, it adopted the standard set forth in the Restatement as, "'[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousement, & Helpers of Am.*, 6 Ohio St.3d 369, 374, 453 N.E.2d 666 (1983), quoting Restatement of the Law 2d, Torts 71, Section 46(1) (1965).

{¶50} "In order to state a claim alleging the intentional infliction of emotional distress, the emotional distress alleged must be serious." *Yeager* at *id.* Although the *Yeager* court did not define or explain the requirement of "serious emotional distress," the court referred to its decision in *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983).

In *Paugh*, the court stated that "serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Paugh* at paragraph 3a of the syllabus; *Banford v Aldrich Chem. Co.*, 126 Ohio St.3d 210, 2010-Ohio-2470, 932 N.E.2d 313, ¶ 29 ("serious emotional distress" means that which is "both severe and debilitating"); *Stancik v. Deutsche Natl. Bank*, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶ 44 ("serious emotional distress" defined as "emotional injury which is both severe and debilitating"). Thus, the distress goes "beyond trifling mental disturbance, mere upset or hurt feelings." *Paugh* at 78. In fact, the *Paugh* court noted that a "non-exhaustive litany of some examples of serious emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia." *Id*., citing *Molien v. Kaiser Found. Hosps.*, 27 Cal.3d 916, 933, 616 P.2d 813 (1980).

{¶51} The severity of a plaintiff's alleged emotional distress may be determined by the court as a matter of law. *Paugh* at 78. "The intensity and the duration of the distress are factors to be considered in determining its severity. * * * It is for the court to determine whether on the evidence severe emotional distress *can* be found; it is for the jury to determine whether, on the evidence, it has *in fact* existed." (Emphasis added.) Comment j to Restatement of the Law 2d, Torts 77, Section 46 (1965).

{¶52} The crux of defendants' arguments raised during its request for directed verdict, in its motion for JNOV, and now here on appeal is that insufficient evidence was

presented that Cruz's emotional distress was *both* severe *and* debilitating, specifically focusing on "debilitating." Cruz, on the other hand, contends that the word "debilitating" does not require complete and total debilitation. Therefore, this issue hinges on what constitutes "debilitating" in the realm of an intentional infliction of emotional distress claim and whether the evidence was sufficient to submit this issue to the jury.

{¶53} In *Binns v. Fredendall*, 10th Dist. Franklin No. 85AP-259, 1986 Ohio App. LEXIS 6568 (Apr. 22, 1986), the court stated that the word "debilitating" does not require that the emotional distress be of extreme gravity in order for the injured party to be entitled to recovery. *Binns* at *15. "Debilitating does not suggest one so feeble as to require a straight jacket or nursing care * * * but rather, to debilitate means only to impair the strength or to weaken." *Id*. "Debilitating" does not require that a person be permanently incapacitated, disabled, or forever unable to cope. *See Dayton Bar Assn. v. Corbin*, 109 Ohio St.3d 241, 2006-Ohio-2289, 846 N.E.2d 1249 (using the word "debilitating" to describe a disease that required a year-long hospitalization).

{¶54} The relevant case law surrounding the tort of intentional infliction of emotional distress seems to focus on whether the plaintiff sought medical or psychological treatment for the alleged emotional distress. *Plikerd v. Mongeluzzo*, 73 Ohio App.3d 115, 126, 596 N.E.2d 601 (3d Dist.1992) (evidence of serious emotional distress was insufficient where plaintiffs "neither sought or received any medical, psychiatric, or psychological treatment, missed any work or incurred any expense for

treatment of emotional distress"); *Paige v. Youngstown Bd. of Edn.*, 7th Dist. Mahoning No. 93 C.A. 212, 1994 Ohio App. LEXIS 5942 (Dec. 23, 1994) (an emotional injury will not be found to be severe and debilitating where plaintiff fails to show that he sought medical or psychological help or was unable to work or otherwise function in his daily life).

{¶55} The defendants direct this court to consider portions of Cruz's testimony where she indicated that she was able to cope adequately; including, Cruz's assertion that at all relevant times, she was able to function as a nanny; that at the time of trial, she was employed full-time at a daycare center; and immediately following the report of abuse, she was advertising and interviewing for nanny positions on her own. The defendants also place much emphasis on the fact that Cruz has suffered from mental health issues all her life and been under the constant care of a physician for her symptoms and conditions.

{¶56} However, the defendants ignore portions of Cruz's testimony where she indicated that she was unable to cope with the mental distress caused by the defendants' actions. She characterized this event as "one of the worst events that I've experienced" where she felt powerless and awful "because people she trusted treated her like garbage." (Tr. 864.) She explained that during this time, she suffered sustained depression, with constant emotional issues, panic attacks, anxiety attacks, and nightmares. (Tr. 864, 1351.) Additionally, she stated that "[t]his stress that I had to go through, basically making me have to choose between my livelihood and finishing the goals for my life, or reporting this about a little girl. It was awful." (Tr. 865.)

{¶57} Cruz testified that her sense of self-esteem is not the same, she has had trouble sleeping, "alternat[ing] between being unable to eat and stuffing [her] feelings, and that [appellants'] abusive conduct has affected how [she] feel[s] about [her]self and affected her relationships to the point that she feels unable to even be in a relationship." (Tr. 867; 1352.) She stated that she "experience[s] anxiety on the job and that the depression is something that [she's] had to hide," and she has been able to control those symptoms so they do not interfere with work. (Tr. 1357.) Cruz explained how she felt about Roth's misrepresentation about her mental health:

> They made me think I was crazy. * * * I literally thought maybe I was schizophrenic. * * * Thinking irrational thoughts about myself because I thought that maybe if all these people are saying you're crazy, what's the common denominator? * * * They made me feel like I'm not even human because I'm — I was on antidepressants; * * * that I had no right to be around children * * * You shouldn't have to always go around feeling ashamed of yourself because people basically used that as an excuse for getting rid of you.

(Tr. 1354-1355.)

{¶58} Dr. Monifa Seawell, Cruz's expert, opined to a reasonable degree of medical certainty that "Cruz had a preexisting major depressive disorder and panic disorder, but that she experienced a significant worsening of both of these conditions as a proximate result of [the defendants'] actions," and was left "severely impaired after and as a result of these incidents" with "ongoing symptoms of significant depression and anxiety * * * likely [to] continue." (Tr. 1444; 1469.) According to Dr. Seawell, Cruz was substantially unimpaired by her pre-existing anxiety and depression disorders prior to her involvement with the defendants. However, immediately after Cruz's experiences

with the defendants, Cruz's conditions worsened. She testified that the severity of Cruz's symptoms never subsided and that her depression symptoms were so severe that they impacted her academic performance, and that "her feelings of depression, low energy, and fatigue also made it difficult for her to concentrate on her work, causing her with withdraw from school." (Tr. 1466.)

{¶59} Conversely, the defendants' expert, Dr. Joel Steinberg testified to a reasonable degree of medical certainty that Cruz's pre-existing psychological problems do not appear to have been exacerbated or aggravated by any action taken by the defendants. However, Dr. Steinberg did testify that if the events Cruz disclosed to him and testified to at trial were in fact true, it would cause worsening of anxiety and depression symptoms.

{¶60} Finally, Dr. Fabio Urresta, Cruz's treating physician, testified about his treatment of Cruz since July 2011. He stated that since her involvement with English Nanny, Cruz's depressive symptoms have increased, and with the way her symptoms have manifested over time, there was a discrete cause or an event or series of events that were traumatic to Cruz and caused the worsening of any prior conditions she may have had. Further, because Cruz did not show any typical pattern in her life when it came to sleeping, eating, or enjoying certain aspects in her life, Dr. Urresta characterized Cruz as having a typical major depressive disorder. Finally, Dr. Urresta concurred with Dr. Seawell's expert opinion about Cruz's conditions, finding that her conclusions were consistent with his experience in treating Cruz.

{¶61} In this case, the evidence was sufficient to survive defendants' motion for directed verdict and subsequent motion for JNOV. Whether Cruz's mental health condition that existed prior to her involvement with English Nanny was unchanged or exacerbated by English Nanny's conduct was a question for the jury; testimony and evidence were presented supporting a finding of both. Therefore, reasonable minds could find that the evidence was sufficient to support the claim for intentional infliction of emotional distress. Whether the evidence proved that the defendants' outrageous conduct actually caused Cruz severe and debilitating emotional distress was for the jury to determine.

{¶62} Accordingly, viewing the evidence most strongly in favor of Cruz, we find that the trial court did not err in denying the defendants' motion for directed verdict and subsequent motion for JNOV. The defendants' first assignment of error is overruled.

B. Kaiser's Claim for Wrongful Discharge

{¶63} In their second assignment of error, the defendants contend that the trial court erred in denying their motions for directed verdict and JNOV on Kaiser's claim for wrongful discharge in violation of public policy.

{¶64} In the absence of an employment contract, employees work on an at-will basis, which means that the employee or the employer may terminate the employment relationship for any reason that is not contrary to law. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 483 N.E.2d 150 (1985), paragraph one of the syllabus. However, the Ohio Supreme Court has recognized a narrow public-policy exception to Ohio's

employment-at-will doctrine. *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 235, 551 N.E.2d 981 (1990), *Painter v. Graley*, 70 Ohio St.3d 377, 384, 639 N.E.2d 51 (1994).

{¶65} The elements of the tort of wrongful discharge in violation of public policy ("*Greeley* claim") are,

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

Painter at 385, fn. 8, quoting Professor Henry H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U.Cin.L.Rev. 397, 398-399 (1989); *Collins v. Rizkana*, 73 Ohio St.3d 65, 652 N.E.2d 652 (1995). *Greeley* claims survive only under limited circumstances when all four elements are satisfied. *Rebello v. Lender Processing Servs., Inc.*, 2015-Ohio-1380, 30 N.E.3d 999, ¶ 28 (8th Dist.).

{¶66} The clarity and the jeopardy elements are questions of law and policy to be determined by the court. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151, 677

N.E.2d 308 (1997), citing *Collins* at 70. The causation and overriding-justification elements are questions of fact to be determined by the trier of fact. *Id*.

{¶67} In this case, Kaiser alleged that she suffered retaliatory termination for not participating in the cover up of a child abuse report. Specifically, she alleged at trial that she was terminated for failing to discourage Cruz from reporting the child abuse, and for resisting or undermining the defendants' efforts to discourage Cruz from reporting the child abuse.

{¶68} The defendants maintained at trial, and on appeal, that Kaiser could not and did not satisfy the "jeopardy element" of the public policy exception to the "at-will employment" doctrine. Specifically, defendants contend that Kaiser's termination cannot jeopardize public policies relating to child abuse reporting and prevention because she did not witness or report child abuse, did not owe any duty to report child abuse, and had no job responsibilities or expertise that would place her in a position to report child abuse. Additionally, the defendants contend the public policy of reporting child abuse is already adequately protected by statutes and regulatory schemes; thus, recognizing a public policy exception is not necessary to protect society's interests. According to the defendants, the proper focus is on protecting the public policy, not protecting the employee's right to a civil remedy.

{¶69} Professor Perritt explained that proving jeopardy involves proving several subordinate factual propositions:

> 1. That the plaintiff engaged in particular conduct, such as an act while off duty, a protest of an employer's policy, or a refusal of an employer's order;

> 2. That the conduct proves in step 1 furthers the public policy asserted, either because the public policy directly promotes the conduct (as in the public policy in favor of jury service) or because the conduct is necessary to effective enforcement of the public policy (as in a public policy against excess consumer loan charges, which depends on vigilance by bank employees); and
>
> 3. That threat of dismissal will discourage the conduct.

2 Perritt, *Employee Dismissal Law and Practice*, Section 7.17, at 43 (4th Ed.1998).

{¶70} In the plurality opinion of *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, the Ohio Supreme Court discussed the jeopardy element. "An analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful discharge claim." *Id*. at ¶ 15, citing 2 Perritt at 44, Section 7.17. In *Wiles*, the employee brought a common law cause of action for wrongful discharge in violation of public policy based on an employer's violation of the Family Medical Leave Act ("FMLA").

{¶71} The *Wiles* court interpreted Professor Perritt's framework regarding the jeopardy analysis by stating that, "'If the statute that establishes the public policy contains its own remedies, it is less likely that tort liability is necessary to prevent dismissals from interfering with realizing the statutory policy.'" *Id.* at ¶ 15, quoting 2 Perritt at 71, Section 7.26. "Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests." *Id*. at ¶ 15, citing *Ross v. Stouffer Hotel Co. (Hawaii) Ltd.*,

Inc., 76 Haw. 454, 464, 879 P.2d 1037 (1994); *Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 562, 569 A.2d 793 (1990); *Kofoid v. Woodard Hotels, Inc.*, 78 Ore.App. 283, 286-287, 716 P.2d 771 (1986), citing *Walsh v. Consol. Freightways*, 278 Ore. 347, 563 P.2d 1205 (1977).

{¶72} "In that situation, the public policy expressed in the statute would not be jeopardized by the absence of a common-law wrongful-discharge action in tort because an aggrieved employee has an alternate means of vindicating his or her statutory rights and thereby discouraging an employer from engaging in the unlawful conduct." *Wiles* at ¶ 15. Accordingly, the court declined to recognize a common law cause of action for wrongful termination because allowing the claim is unnecessary to vindicate the policy goals of the FMLA; a statutory remedy exists within the act that protects society's interest and an employee's right against termination in violation of the FMLA.

{¶73} The Ohio Supreme Court again discussed the jeopardy element in *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36. In *Leininger*, the court was asked to recognize a common-law tort claim for wrongful discharge based on age. The court stated that in proving the jeopardy element, the plaintiff must prove that "without a common-law tort claim for wrongful discharge based on age, Ohio's clear public policy against age discrimination would be compromised." *Id*. at ¶ 21. The court stated, "[i]n *Greeley*, the statute involved [that expressed the public policy] did not provide any private remedies *to the employee*, and so a claim at common law was recognized." (Emphasis added.) *Id.* at ¶ 22.

{¶74} The court in *Leininger* reconciled the holdings in *Wiles* and *Kulch*, 78 Ohio St.3d 134, 677 N.E.2d 308, when considering what should happen if the statutory scheme upon which the public policy is based offers remedies that do not equate to complete relief. The court concluded "it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct." *Id*. at ¶ 27. "The jeopardy element necessary to support a common-law claim is not satisfied, because [the statute] adequately protects the state's policy against age discrimination in employment through the remedies it offers to *aggrieved employees*." (Emphasis added.) *Id*. at ¶ 33.

{¶75} Therefore, contrary to the defendants' interpretation of the "jeopardy element," the focus is on whether the employee has a proper and adequate remedy for wrongful termination when an employer discharges the employee in violation of the recognized public policy. Only when a remedy does not already exist, or is inadequate, will a court allow a common-law tort claim for wrongful discharge in violation of public policy.

{¶76} There is no doubt that a clear public policy exists expressed in R.C. 2151.421 in favor of reporting suspected child abuse. *Powers v. Springfield City Schools*, 2d Dist. Clark. No. 98-CA-10, 1998 Ohio App.LEXIS 2827 (June 26, 1998). This fact has not been disputed by the defendants. Under Ohio law, *anyone* who suspects child abuse may report such abuse. *See* R.C. 2151.421(A)(1)(b) (persons with a

mandatory duty to report child abuse); R.C. 2151.421(B) (allows any person to report suspected child abuse).[2] A party that owes a mandatory duty to report child abuse and fails to do so, is subject to criminal prosecution and penalties under R.C. 2151.99, and in some cases, is subject to civil liability. However, a nonmandatory reporter is not subject to criminal penalty. Based on the language of R.C. 2151.421, neither the defendants nor Kaiser have an affirmative duty to report abuse.

{¶77} Applying the reasoning in *Wiles* and *Leininger* to the facts in this case, R.C. 2151.421 does not provide a remedy to adequately compensate an aggrieved employee who is discharged, disciplined, or otherwise retaliated against in violation of the public policy to report child abuse. Allowing a common law cause of action for wrongful termination would serve to further the public policy of reporting child abuse.

{¶78} We recognize that Kaiser's own actions do not support her public policy claim. She did not report the abuse. And instead of helping to prevent any further abuse to the child by placing a watchful eye in the home, she sabotaged any nanny placement with the father, knowing that the placements she referred to him would be unsuitable. Kaiser, however, claims that she was terminated because she resisted or undermined the *defendants' efforts* to discourage Cruz from reporting the abuse. Therefore, it is the

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[2]A review of R.C. 2151.421 does not appear to mandate that in-home private child-care providers, like Cruz, have a mandatory duty to report child abuse. However, under Pennsylvania law, Cruz would have a mandatory duty to report the abuse. *See* 23 PaC.S. Section 6311(a) "((7) An individual paid or unpaid, who, on the basis of the individual's role as an integral part of a regularly scheduled program, activity or service, is a person responsible for the child's welfare or has direct contact with children;" (13) "an independent contractor").

defendants' own actions that support Kaiser's public policy claim. The evidence suggested that the defendants were trying to prevent Cruz from fulfilling her statutory obligation to report the suspected child abuse. Discharging Kaiser because she resisted and undermined the defendants' efforts to discourage Cruz from reporting child sex abuse jeopardizes the public policy in favor of reporting child abuse.

{¶79} The defendants' own argument that they have no duty to report child abuse proves that Kaiser satisfied the jeopardy argument because the public policy of reporting child abuse was not adequately protected in this instance. Accordingly, no alternative means were in place to promote the public policy of reporting child abuse when the abuse is witnessed and reported by a nonmandatory reporter. While Kaiser and the defendants may not have had a mandatory duty to report the abuse Cruz witnessed, Cruz had a duty under Pennsylvania law, and by attempting to dissuade her from fulfilling that obligation, the defendants' actions violated public policy.

{¶80} Accordingly, the Perritt jeopardy factual propositions as applied to the facts of this case have been proven by Kaiser; thus, proving the jeopardy element — (1) Kaiser refused to follow the defendants' order of dissuading Cruz from reporting the allegation of abuse; (2) Kaiser's conduct furthers the public policy because the conduct is necessary to effective enforcement of the reporting child abuse; and (3) the threat of dismissal will discourage the conduct of supporting a person to report child abuse. *See* 2 Perritt at 43.

{¶81} What is most troubling, however, is that Kaiser's fate at the Placement Agency rested upon her power of persuading an individual to not report the allegation of

abuse. But even if Kaiser had acquiesced to the defendants' request, there was no guarantee that Cruz would be persuaded to not report. Based on the evidence presented, Cruz believed she had an obligation to report the suspected abuse and despite any attempt to dissuade her, she was going to do so. The jury could have reasonably concluded that Kaiser was in a no-win situation. It makes no difference that Kaiser was terminated for resisting or undermining the defendants' efforts to discourage Cruz from reporting the abuse rather than for actually reporting the abuse herself. Under either circumstance, the public policy of child abuse prevention and reporting was jeopardized by the defendants' actions.

{¶82} Accordingly, the jeopardy element is satisfied because no law or authority adequately protects the state's public policy to report child abuse. No remedy exists to employees, like Kaiser, who are terminated for supporting the reporting of alleged child abuse. Therefore, the trial court did not err in finding that the jeopardy element was satisfied when denying the defendants' motion for directed verdict and JNOV.

{¶83} The defendants' second assignment of error is overruled.

V. Cross-Appeal

A. Remittitur — Intentional Infliction of Emotional Distress

{¶84} In the first cross-assignment of error, Cruz contends that the trial court abused its discretion by granting defendants' motion for remittitur of the jury's $75,000 economic damages award on her claim for intentional infliction of emotional distress despite the presentation of sufficient evidence to support the verdict.

{¶85} Unlike a motion for judgment notwithstanding the verdict that challenges the legal sufficiency of the evidence, a motion for remittitur challenges the weight of the evidence. *Austin v. Chukwuani*, 8th Dist. Cuyahoga No. 104590, 2017-Ohio-106, ¶ 19, citing *Brady v. Miller*, 2d Dist. Montgomery No. 19723, 2003-Ohio-4582, ¶ 12.

{¶86} We review a trial court's ruling on motions for remittitur under an abuse of discretion standard. *Shepard v. Grand Trunk W. RR. Inc*., 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853, ¶ 81. Under an abuse of discretion standard, the trial court's decision will be reversed only if it is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Additionally, an abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.).

{¶87} A court has the inherent authority to remit an excessive award, assuming it is not tainted with passion or prejudice, to an amount supported by the weight of the evidence. In *Chester Park v. Schulte*, 120 Ohio St. 273, 166 N.E. 186 (1929), paragraph three of the syllabus, the Ohio Supreme Court set forth the specific criteria that must be met before a court may grant a remittitur: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages. *See Wightman v. Consol. Rail Corp*., 86 Ohio St.3d 431, 444, 715 N.E.2d 546 (1999).

{¶88} In this case, the trial court issued a written decision granting the defendants' request for remittitur. However, the trial court's decision does not set forth any of the criteria that must be satisfied prior to granting remittitur, nor can we discern from the court's decision that it even considered the criteria. This lack of consideration renders the court's decision arbitrary.

{¶89} Moreover, nothing in the record demonstrates that Cruz consented to remittitur in lieu of a new trial. Remittitur gives the plaintiff the option of accepting a lower damages award (as determined by the trial judge) or receiving a new trial. "'Where the damages assessed by a jury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court, in the exercise of a sound discretion, may make the remittitur of the excess the condition of refusing to grant a new trial.'" *Larrissey v. Norwalk Truck Lines*, 155 Ohio St. 207, 219, 98 N.E.2d 419 (1951).

{¶90} Accordingly, Cruz's first cross-assignment of error challenging the trial court's grant of defendants' request for remittitur is sustained. The trial court's decision granting remittitur is reversed, and the matter is remanded for the trial court to reconsider the defendant's motion for remittitur and apply the criteria set forth by the Ohio Supreme Court.

B. Attorney Fees

{¶91} In this case, the jury, in awarding punitive damages for Cruz and Kaiser against all defendants, determined that those defendants should pay reasonable attorney fees. Cruz and Kaiser originally entered into a contingent fee agreement with their

attorney, whereby their attorney is entitled to 40% of any amount awarded to the plaintiffs, plus expenses. Based on the fee agreement, expenses submitted, and the discounted jury award, the trial court concluded that the total amount of fees under the contingency agreement and covered expenses would be $125,504.45.

{¶92} Nevertheless, plaintiffs' counsel requested fees in the amount of $577,862.92 based on a "lodestar" calculation. After a hearing on counsel's requested fees, the trial court issued a written opinion finding that counsel's conservative estimate of the number of hours he spent on the case was a valid conservative estimate despite defendants' objections. However, the court found that attorney Pattakos's hourly rate of $300 was less valid because (1) it was a contingency fee case; (2) counsel did not present any evidence that this was his customary hourly rate; (3) based on counsel's skill and experience, a reasonable hourly rate would be $150 at the start of the case in 2011, and increasing $25 an hour every year to $250 in 2015.

{¶93} The court also concluded that fees should not be awarded on non-prevailing claims or on unnecessary time that was expended based on attorney Pattakos's conduct. Additionally, the court reduced litigation expenses to only those that an attorney is obligated to pay to perform his work. Based on the court's calculations, the court determined that under the lodestar analysis, the total compensation for attorney Pattakos's hours would be $191,000 with expenses being $17,7782.87, for a total of $208,782.87.

{¶94} However, the court concluded that because counsel was retained under a contingency fee contract and torts are customarily prosecuted under a contingency

contract, the lodestar amount should be deviated downward. Thus, the court ordered that the defendants pay, in addition to the jury's award of punitive and compensatory damages, attorney fees including litigation expenses in the amount of $125,504.45. This amount included the fees that counsel would have received under the contingency fee agreement.

{¶95} In their second assignment of error, plaintiffs contend that the trial court abused its discretion by basing the attorney fee award on the existence of the contingency-fee agreement because it frustrates the purpose of awarding attorney fees to deter those who intentionally inflict serious harm by extreme and outrageous conduct and who put public policy at risk.

{¶96} "Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover fees as part of the cost of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. An exception to this rule exists where punitive damages are awarded in tort cases involving fraud, insult, or malice. *Columbus Fin., Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327, N.E.2d 654 (1975), citing *Roberts v. Mason*, 10 Ohio St. 277 (1859). If punitive damages are proper, reasonable attorney fees may be awarded as an element of compensatory damages. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 35, 734 N.E.2d 782 (2000). An award of attorney fees may stem from an award of punitive damages, but "the attorney-fee award itself is not an element of the punitive-damages award." *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 16.

{¶97} When determining the amount of attorney fees, a trial court is guided by a two-step determination. The trial court first calculates the "lodestar" by multiplying the number of hours reasonably expended by a reasonable hourly rate, and, second, decides whether to adjust that amount based on the reasonableness factors listed in Prof.Cond.R. 1.5(a). *Bittner v. Tri-County Toyota, Inc*., 58 Ohio St.3d 143, 569 N.E.2d 464 (1991), syllabus (applying the predecessor to Prof.Cond.R. 1.5(a); *Am. Chem. Soc. v. Leadscope, Inc*., 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 88. Those factors include the time and labor required; the novelty and difficulty of the questions involved and the requisite skill to perform the legal service properly; the amount of time involved and the results obtained; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent. Prof.Cond.R. 1.5(a).

{¶98} "These two inquiries may overlap, however, because several of the reasonableness factors are often subsumed within the initial lodestar calculation and normally will not provide an independent basis for adjusting the fee award." *Miller v. Grimsley*, 197 Ohio App.3d 167, 2011-Ohio-6049, 966 N.E.2d 932, ¶ 14 (10th Dist.), citing *Blum v. Stenson*, 465 U.S. 886, 900, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Freeman v. Crown City Mining, Inc*., 90 Ohio App.3d 546, 557, 630 N.E.2d 19 (4th Dist.1993). For example, consideration of the results-obtained factor typically is already contained in the determination to calculate a reasonable fee and usually does not provide an independent basis for increasing the fee award. *Freeman* at 557. Thus, in

determining whether hours are unreasonably expended, a trial court inevitably considers some of the reasonableness factors listed in Prof.Cond.R. 1.5.

{¶99} As the United States Supreme Court stated, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley* at 433. Calculation of the lodestar requires the trial court to exclude any hours that were unreasonably expended, e.g., hours that were redundant, unnecessary, or excessive in relationship to the work done. *Miller* at *id*., citing *Gibney v. Toledo Bd. of Edn*., 73 Ohio App.3d 99, 108, 596 N.E.2d 591 (6th Dist.1991), citing *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

{¶100} In calculating the lodestar amount, the trial court concluded that attorney Pattakos's claim that he spent 1,122 hours on the case "is, indeed, a conservative estimate." However, the trial court then determined that certain hours were excluded from this number as unnecessary or wasteful, including the first trial that was declared a mistrial, the issues related to the newspaper article, and the hours spent on the nonprevailing claims. Thus, the trial court reduced attorney Pattakos's hours to 1000. This amount only included attorney Pattakos's hours; it did not include hours for any other attorney or support staff who assisted attorney Pattakos in this case.

{¶101} However, the court determined that attorney Pattakos's hourly rate was not reasonable based on his experience. Accordingly, the trial court adjusted the billable

hourly rate to $150 at the start of the case in 2011, and increased the rate $25 an hour every year to $250 in 2015. Based on that calculation, the trial court determined that the lodestar amount was $191,000 just in attorney hours. Again, the court did not include fees for any other attorneys or staff.

{¶102} After calculating the lodestar amount, the trial court was required to consider the relevant factors found in Prof.Cond.R. 1.5(a) in determining whether to deviate from the calculated lodestar figure. From the court's written opinion, the trial court only mentioned two factors — (3) the fee customarily charged in the locality for similar legal services, and (8) whether the fee was fixed or contingent. The court stated that "attorney Pattakos was retained under a contingency fee contract and tort actions are customarily prosecuted under such contracts." Despite mentioning two factors, the trial court really only considered one factor — the existence of the contingency fee agreement. However, a contingency-fee agreement is one of many factors that a court should consider in determining the reasonableness of attorney fees — not the determining factor. *See Borror v. MarineMax of Ohio, Inc.*, 6th Dist. Ottawa No. OT-06-010, 2007-Ohio-562, ¶ 56.

{¶103} Based on this one factor, the trial court deviated downward from its lodestar amount of $191,000, plus expenses, to $77,626.60, plus expenses, based on the contingency fee contract. No consideration was given to the other six relevant factors as they pertained to this four-year litigation that resulted in a 26-day jury trial involving substantial evidence and testimony.

{¶104} This court is mindful that "[u]nless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc*., 23 Ohio App.3d 85, 91, 491 N.E.2d 345 (12th Dist.1985). An award of attorney fees is reviewed for an abuse of discretion. *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990).

{¶105} Based on the entire record, the trial court's award of attorney fees as they would be awarded under a contingent fee agreement shocks the conscience because the court did not consider any fees associated with any other attorney or support staff during this four-year litigation. Even the defendants maintained in their brief opposing attorney fees that the fees incurred by other members of the Chandra Law firm were reasonable. Accordingly, the trial court abused its discretion when it limited the review of attorney fees to only those incurred by attorney Pattakos even though unrefuted documentation was submitted demonstrating that other members of the plaintiffs' litigation team incurred fees. Additionally, the court abused its discretion in deviating from the lodestar amount based solely on the contingency fee agreement.

{¶106} Plaintiffs' second cross-assignment of error is sustained.

C. Attorney Sanctions

{¶107} In the third assignment of error raised in the cross-appeal, attorney Pattakos contends that the trial court erred as a matter of law by sanctioning him under R.C. 2323.51 for sharing scheduling information and publicly available pleadings with a

newspaper reporter. Attorney Pattakos maintains that his conduct was protected by the First Amendment and permitted by Prof.Cond.R. 3.6.

{¶108} Defendants moved for sanctions against all of plaintiffs' attorneys, including attorney Pattakos, James Rosenthal, and Joshua Cohen, and the law firm of Cohen, Rosenthal, & Kramer, seeking all costs and attorney fees incurred in connection with the March 31, 2015 trial that ultimately was declared a mistrial. Defendants noted five instances of conduct that allegedly warranted sanctions: (1) attorney Pattakos's involvement in the publication of the Scene Magazine article and his representations to the court surrounding his involvement, (2) the law firm's failure to adequately supervise attorney Pattakos's conduct, (3) the law firm's failure to ensure that its attorneys were sufficiently prepared to proceed with trial when attorney Pattakos became unavailable, and (4) that attorney Pattakos's unavailability for trial was undermined by his possible presence at a social gathering and his presence on social media sites. Defendants argued that attorney Pattakos's conduct constituted "frivolous conduct" as defined in R.C. 2323.51(A), and thus, was sanctionable conduct.

{¶109} The trial court issued a written opinion finding that neither the law firm nor any of its partners violated any professional obligations and that attorney Pattakos "did not intentionally commit any act which caused a mistrial." However, the trial court concluded that attorney Pattakos may have violated Prof.Cond.R. 3.6 based on his involvement in the creation and publication of the Scene Magazine article. Accordingly, the trial court set the matter for a hearing on that basis.

{¶110} After hearing testimony and reviewing the evidence, the trial court issued a written opinion concluding that "in the context of R.C. 2323.51, the sole purpose of [attorney] Pattakos in urging Scene on March 30 to begin coverage once the trial began was to harass or maliciously injur[e] the defendants outside of the litigation process — that soliciting news media coverage once trial began served no purpose of achieving an orderly or fair adjudicative process or settlement." The court found that attorney Pattakos's actions constituted "frivolous conduct" under R.C. 2323.51. Based on the law and record, however, we must reach a different conclusion.

{¶111} Pursuant to R.C. 2323.51, a party adversely affected by frivolous conduct may file a motion for an award of attorney fees. "Frivolous conduct" is defined in objective terms:

> (a) Conduct of a * * * party to a civil action * * * that satisfies any of the following:
>
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action * * * or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

R.C. 2323.51. Additionally,

> [A]ny party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct."

R.C. 2323.51(B)(1).

{¶112} An appellate court reviews a trial court's decision to impose sanctions pursuant to R.C. 2323.51 for an abuse of discretion. *Reddy v. Plain Dealer Publishing Co.*, 2103-Ohio-2329, 991 N.E.2d 1158, ¶ 37 (8th Dist.), citing *Bittner*, 58 Ohio St.3d at 146, 569 N.E.2d 464. The trial court is in the best position to appraise the conduct of the parties, and we must defer to the trial court's ruling on the motion for sanctions. *Reddy* at *id*., citing *First Place Bank v. Stamper*, 8th Dist. Cuyahoga No. 80259, 2002-Ohio-3109, ¶ 17. However, that discretion is not unfettered, especially when the trial court does not give due consideration to the law regarding attorney and media communication in connection with the facts of the case. An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, at ¶ 15.

{¶113} A review of the case law demonstrates that sanctions are typically imposed under R.C. 2323.51 for frivolous conduct involving pleadings and discovery. We can find no law supporting the award of sanctions under R.C. 2323.51 for the type of conduct here — communicating with the media about a pending case. Usually, this type of conduct is reviewed under the Professional Rules of Conduct under the exclusive jurisdiction of the Ohio Supreme Court. *See Disciplinary Counsel v. Brockler*, 145 Ohio St.3d 270, 2016-Ohio-657, 48 N.E.3d 557 (alleged violation of Prof.Cond.R. 3.6 reviewed by the Board of Professional Conduct of the Supreme Court), *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 2010-Ohio-6241, 940 N.E.2d 952, ¶ 32 (Section

2(B)(1)(g), Article IV of the Ohio Constitution, vests the Ohio Supreme Court with exclusive original jurisdiction over "admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.")

{¶114} Prof.Cond.R. 3.6 provides, in relevant part,

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:
>
> (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) information contained in a public record;
> (3) that an investigation of a matter is in progress;
> (4) the scheduling or result of any step in litigation;

(Emphasis sic.).

{¶115} In *Leadscope*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, the court found it of importance to note that "the lawsuit was not under seal, and the complaint was available to the public. The public has a legitimate, constitutionally protected interest in judicial proceedings, and the article provided information to educate and inform the public about the case." *Id*. at ¶ 85.

{¶116} Additionally, the Ohio Supreme Court stated:

> We make clear that Ohio law imposes no blanket prohibition on an attorney's communications to the media. Attorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements. *See*

> Prof.Cond.R. 3.6 ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter").

Id. at ¶ 90. The court recognized, however, that this right to communicate publicly is not without limitations — "[t]hus, while we do not muzzle an attorney representing a party in a proceeding, attorneys are not given carte blanche to defame others under the guise of litigation." *Id*. Therefore, as long as the attorney and his or her clients stay within the confines of what constitutes protected speech, and the attorney does not violate any ethic rules or rules of conduct, i.e. Prof.Cond.R. 3.6, media communication is not prohibited and thus should not be sanctionable.

{¶117} In this case, attorney Pattakos's media communication remained within the confines of protected speech. The trial court accepted attorney Pattakos's claim that the information he provided to Vince Grzegorek, a Cleveland Scene Magazine reporter, was a public record or involved scheduling. Our review of the article and the record in the case allow us to conclude that the information contained in the article was information found in the public record. Additionally, a review of the text message communications between attorney Pattakos and Grzegorek reveal that attorney Pattakos only communicated information about the scheduling of trial.

{¶118} The court also acknowledged that the information attorney Pattakos provided "may very well have been protected by Rule 3.6(b)." Nevertheless, the court found that attorney Pattakos's involvement caused "a substantial likelihood of materially

prejudicing an adjudicative proceeding." The trial court's reasoning in this matter is ambiguous. If attorney Pattakos's conduct was protected by Rule 3.6, then the communication cannot have caused "a substantial likelihood of materially prejudicing an adjudicative proceeding." *See* Prof.Cond.R. 3.6.

{¶119} The court specifically found that

> [Attorney] Pattakos's involvement in publication of the Scene article was a malicious attempt to injure and was intended to "harass" each of the defendants. Mr. Pattakos had a purpose to *defame* defendants when he instructed Mr. Grzegorek on January 20, to "[g]et your reporting pants on. Or at least tell one of your reporters to get his reporting pants on" and on March 30, 2015 notif[ied] Scene that the trial was about to begin.

The record is devoid of any evidence to support the trial court's conclusion that Attorney Pattakos's intentions were to "malicious[ly] attempt to injure" and "harass" and "defame" the defendants. Furthermore, the court made these conclusions despite its express finding that there was "no evidence that Mr. Pattakos knew when an article would be published, what it would contain, or that particular adverse comments about the defendants would be generated."

{¶120} It appears that the trial court attributed the article's content and the magazine's decision to publish the article to attorney Pattakos. The testimony at the hearing, however, as recognized by the trial, reveals that attorney Pattakos did not know when it would be published, what an article would contain, or what comments would be generated. In fact, Grzegorek testified that he assigned the case to one of his reporters, Doug Brown, and provided him with the information. According to Grzegorek, he gave the assignment to Brown because Brown knew how to access public records on a case. It

was Brown who chose not to include the defendants' perspective in the article, not attorney Pattakos.

{¶121} Our review of the record reveals that attorney Pattakos only provided the media with public information and informed an editor about the scheduling and location of trial. If English Nanny was concerned about any news media during the case, it could have requested the court to issue a gag order. In fact, even after the article was discovered, English Nanny did not request a gag order. Furthermore, it must not be ignored that as a result of the article's publication, defense counsel convinced the trial court to rescind its prior order closing the courtroom during Cruz's testimony. Finally, there was no indication that the second jury was tainted by any media publication. Although the voir dire examination of the jurors in the second case was not provided to this court to review, no argument has been raised that the second jury pool — the jury that ultimately decided the case — was tainted or compromised by the Scene Magazine article.

{¶122} The trial court found that Attorney Pattakos's actions of "urging Scene to begin coverage constituted initiating harassment" and "urging Scene to begin news coverage during the course of the trial constituted frivolous conduct." We disagree. Upholding the trial court's decision could have numerous unintended consequences; for example, defendants in criminal cases potentially could ask for sanctions against prosecutors who provide information to the media about criminal cases. On any given day, newspapers show headlines of ongoing trials, recapping the evidence that was

presented that day at trial. In fact, on April 3, 2015, around the same time that Scene Magazine printed the article at issue, a former Cuyahoga County Prosecutor issued a public statement that was published on various news media outlets about the trial of a Cleveland police officer that was set to begin in three days. No sanction was levied against the prosecutor's officer for this public statement. There is always a substantial likelihood that a jury member or potential juror may read a publication or encounter a publication about an upcoming or pending case. However, the judicial system trusts that jury members abide by the instructions to consider the case on the evidence at trial, not the "evidence" in the news media.

{¶123} It should not be held that merely urging a media outlet to cover a trial constitutes frivolous conduct. Whether attorney Pattakos violated Prof.Cond.R. 3.6 is not for this court to decide. Therefore, we find that the trial court abused its discretion in sanctioning attorney Pattakos for engaging in frivolous conduct in violation of R.C. 2323.51 by communicating with the media.

{¶124} Accordingly, the third assignment of error is sustained.

VI. Conclusion

{¶125} In conclusion, the trial court did not err in denying defendants' motions for directed verdict or JNOV on Cruz's claim for intentional infliction of emotional distress and Kaiser's claim for wrongful termination in violation of public policy. The trial court abused its discretion in (1) granting remittitur by failing to consider the relevant factors and for entering judgment on remittitur prior to Cruz's consent; (2) reducing the

plaintiffs' attorney fee award when its analysis focused entirely on the contingent fee agreement; and (3) finding that attorney Pattakos engaged in frivolous conduct and ordering that he pay defendants' stipulated attorney fees.

{¶126} Accordingly, on remand, the trial court is ordered to (1) reconsider the defendants' motion for remittitur in light of the mandatory criteria; (2) reconsider plaintiffs' motion for attorney fees; and (3) vacate the order of contempt against attorney Pattakos, including the stipulated order requiring him to pay defendants' attorney fees.

{¶127} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that the parties share equally the 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, ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR

[Cite as *Tomaydo-Tomahhdo, L.L.C. v. Vozary*, 2017-Ohio-4292.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104446

TOMAYDO-TOMAHHDO L.L.C., ET AL.

PLAINTIFFS-APPELLANTS

vs.

GEORGE VOZARY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-840927

BEFORE: Stewart, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: June 15, 2017

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MELODY J. STEWART, J.:

{¶1} Plaintiff-appellant Rosemarie Carroll and defendant-appellee Larry Moore were partners in a restaurant venture called Tomaydo-Tomahhdo. The partnership ended when the parties signed a share purchase agreement in which Carroll bought out Moore and Moore agreed not to compete against Carroll for one year. When Moore's noncompetition agreement with Carroll expired, he opened a catering business, Caterology, and eventually entered into a partnership with defendant-appellee George Vozary, a former Tomaydo-Tomahhdo employee. Carroll brought this action in her own name and in the name of Tomaydo-Tomahhdo and other businesses that she owned, against Moore, Vozary, and their business, Clean Plate, Inc. d.b.a. Caterology, alleging that Moore breached the share purchase agreement by recruiting Vozary and that Moore and Vozary stole trade secrets (recipes, menu builds, and a customer list) and engaged in unfair competition. The court granted summary judgment to all defendants, finding that most of the claims against them were preempted by the Ohio Unfair Trade Secrets Act and that there was no evidence that the items allegedly misappropriated by Moore were trade secrets or used without authorization. The sole assignment of error on appeal contests various aspects of the summary judgment.

{¶2} Carroll and Moore formed their partnership in 2000. They began with a restaurant named Captain Tony's and expanded their holdings to include the restaurants Tomaydo-Tomahhdo and Tomaydo-Tomahhdo Express. They envisioned the

Tomaydo-Tomahhdo restaurant to be "kid friendly," "quick-service," and inexpensive, yet "upscale." In addition to dining, the restaurant provided a food-catering service.

{¶3} In 2004, Carroll and Moore hired Vozary. Vozary signed a confidentiality agreement in which he acknowledged that he would be exposed to "confidential information, including recipes, food preparation methods, marketing strategies, financial information and other trade secrets." Among other things Vozary agreed "not to discuss or disclose" were recipes, food preparation information, design models and schematics, and databases or documents containing customer information.

{¶4} Carroll and Moore's partnership ended in February 2008 when Moore agreed to sell Carroll his entire interest in the business entities by a share purchase agreement. In Section 6.1 of the agreement, Moore promised, among other things, that he would not use, disclose, convey, or reproduce "menu files and development ideas, recipes (current and historical) and training tools (picture boards, build sheets, prep lists, master order guide), materials that describe the Tomaydo-Tomahhdo concept[.]" Moore also promised in Section 6.2 of the agreement that "on or before January 2, 2010," he would not "induce or attempt to influence" any of Carroll's employees into entering into an employment contract with any other person or entity or "induce or attempt to influence" an individual or entity from terminating a relationship or contract that they, the individual or entity, had with Carroll. The parties specifically contemplated that Moore would be opening a restaurant in the 2008 fiscal year, so the agreement also required Moore to

provide Carroll with the location of the restaurant he intended to open and that Moore not open a restaurant in certain northeast Ohio communities before July 31, 2008.

{¶5} Moore opened a restaurant called Go Bistro in December 2008, but closed it in July 2010. Moore had several catering jobs pending when he closed Go Bistro, so he started another business, Caterology, that he operated from his house before moving to the back of a pizza shop.

{¶6} During the time Moore began operating Caterology, Vozary began looking to branch out with his own restaurant through a business called Clean Plate, Inc. Clean Plate did not open a restaurant; however, Moore hired Vozary to work at Caterology starting in April 2011. In June 2011, Moore and Vozary combined Caterology and Clean Plate, Inc. in a handshake agreement in which they became equal partners.

{¶7} In February 2015, Carroll and her business entities including Tomaydo-Tomahhdo, filed a complaint[1] in the common pleas court alleging that Moore, Vozary, and Caterology misappropriated Tomaydo-Tomahddo recipes and customer lists, engaged in unfair competition, tortiously interfered with current and prospective business relationships, and otherwise breached contracts and fiduciary duties. Moore, Vozary, and Caterology sought summary judgment on the grounds that the recipes were not trade

[1]Carroll previously filed suit against Moore, Vozary, and Caterology in the common pleas court and in federal court. In *Ketchup To Us, L.L.C. v. Vozary*, Cuyahoga C.P. No. CV-13-803631, the case was voluntarily dismissed. In *Tomaydo-Tomahhdo, L.L.C. v. Vozary*, N.D. Ohio No. 1:14 CV 469, 2015 U.S. Dist. LEXIS 10532 (Jan. 29, 2015), *aff'd*, 629 Fed. Appx. 658 (6th Cir.2015), the trial court granted summary judgment in favor of defendants on a copyright infringement claim and declined jurisdiction on state law claims.

secrets; that the civil conspiracy, tortious interference, unfair competition, and breach of fiduciary duty claims were subsumed within the misappropriation of trade secrets claim; and that they did not access the Tomaydo-Tomahhdo customer list. The court granted summary judgment, finding that most of the items included in the trade secrets claim were not trade secrets; that Carroll and Tomaydo-Tomahhdo failed to establish that Moore, Vozary, and Caterology actually acquired and used customer lists; that there was no proof that Moore and Carroll breached non-competition agreements; and that the remaining claims were preempted by trade secrets law.

{¶8} Our review of a case decided on summary judgment is de novo, conducting an independent review of the record and affording no deference to the trial court. Summary judgment is appropriate if the evidence properly before the court and viewed in a light most favorable to the nonmoving party shows that there are no genuine issues of material facts; the moving party is entitled to judgment as a matter of law; and reasonable minds can come to but one conclusion adverse to the nonmoving party. Civ.R. 56(C).

I. Misappropriation of Trade Secrets

{¶9} In order to prevail on a misappropriation-of-trade-secret claim, Carroll had to show by a preponderance of the evidence: (1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret. *Heartland Home Fin., Inc. v. Allied Home Mtge. Capital Corp.*, 258 Fed. Appx. 860, 861 (6th Cir.2008). Carroll premised her misappropriation of trade secret claims on the alleged theft of customer lists, picture

builds (pictorial representations of how to make a sandwich or salad), recipes, food preparation and training techniques, and marketing strategies and business models. The court found that, apart from customer lists, the remaining items did not meet the definition of a trade secret.

{¶10} The Ohio Uniform Trade Secret Act, R.C. 1333.61(D), defines a "trade secret" as:

> [I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

{¶11} When analyzing a trade secret claim, the court must consider:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. (Citation omitted.)

Salemi v. Cleveland Metroparks, 145 Ohio St.3d 408, 2016-Ohio-1192, 49 N.E.3d 1296, ¶ 25.

A. Customer Lists

{¶12} Carroll alleged that Moore obtained her customer database prior to leaving the partnership and opening his restaurant. She maintains that Vozary and Moore had her computer consultant download her customer files onto a portable storage device and that they used the customer list to poach her catering customers. Acknowledging that a customer list can constitute a trade secret, *Salemi* at ¶ 26, the court found that Carroll failed to show that Moore and Vozary acquired the list as a result of a confidential relationship or that they used the customer list without authorization.

{¶13} The basis for the trade-secret claim relating to the customer list is Carroll's claim that the database file for her customer list showed that it had been accessed two weeks before Moore signed the share purchase agreement.

A manager of Carroll's with expertise in the Tomaydo-Tomahhdo point-of-sale computer system testified at deposition and gave equivocal testimony about whether he copied the customer list to a portable storage device: at one point he testified that there was "no question that I had been asked to download or to convert the customer database into a CSV file and save it on a jump drive at some point," but at other points stated that it was "quite possible" that he exported the customer list or that he "very well may have" copied the customer list to a portable storage device. The manager stated that he could not testify that he copied the customer list and gave it to Moore. He likewise testified that "I don't think I ever physically handed [Vozary] a copy of the customer list on a flash drive."

{¶14} Moore denied that he had the manager download the customer list or that he ever possessed it. He did acknowledge that in fulfilling his obligations under the share purchase agreement, he placed Tomaydo-Tomahhdo information on a portable storage device and returned it to the manager. Moore denied talking to Vozary about copying the customer list. For his part, Vozary firmly denied that the manager ever gave him a portable storage device containing the Tomaydo-Tomahhdo customer list.

{¶15} Viewing the evidence most favorable to Carroll, *see* Civ.R. 56(C), shows that the Tomaydo-Tomahhdo computer file containing the customer list had been accessed. And although the evidence was equivocal, Carroll is entitled to have the evidence show that the consultant downloaded the customer list to a portable storage device. But the inferences end there. Carroll maintains that only she and Vozary had the computer password, that she did not authorize the manager to copy the customer list, so the consultant must have copied the data file for Vozary. That is speculation and is insufficient to meet the requirements of a properly supported motion for summary judgment.[2] *Waugh v. Lynch*, 8th Dist. Cuyahoga No. 100432, 2014-Ohio-1087, ¶ 12.

{¶16} Beyond speculation as to whether the manager gave Vozary the customer list, Carroll had to engage in additional speculation to show that Moore and Vozary used

[2] In an affidavit filed in support of her opposition to the motion for summary judgment, Carroll stated that the manager told her just prior to his deposition that he copied the customer list at Vozary's request and gave the portable storage device to Vozary. Moore and Vozary filed a motion to strike that statement on grounds that it was inadmissible hearsay. The court granted the motion to strike as unopposed and additionally noted that the manager had not been questioned about it by Carroll in his deposition. That ruling was not appealed.

the customer list without authorization. She reasoned that Caterology's rapid growth had to be the result of an exploitation of her customer database because (1) Moore opened the competing restaurant using the same point-of-sale system, (2) 25 percent of Caterology's customer base overlapped with that of Tomaydo-Tomahhdo, and (3) the rapid success of Caterology came despite it doing no advertising or marketing.

{¶17} Once again, the argument relies on speculation rather than facts. And it is speculation based on speculation — first, that Caterology had the customer database; and second, that Caterology's success is so implausible that it can only be explained if Caterology actually used the customer database. This is not evidence to show that Moore and Vozary had, and actually engaged in the unauthorized use of, the customer database.

B. Picture Builds

{¶18} With regard to the picture builds, Carroll argues that the court erred by finding that picture builds were not trade secrets. In her deposition, she defined a "picture build" as "a photo of the end product of a menu item, the ingredients, the portions and the order that you build." The picture build would be posted near a work station in the kitchen so that an employee could consult it to make a consistent product.

{¶19} There was no evidence that the picture builds derived independent economic value from not being generally known to other persons who can obtain economic value from using those picture builds. At bottom, the picture builds showed how Carroll wanted her employees to make a sandwich or a salad. There was nothing proprietary about this because anyone, through observation, could easily ascertain the build order of

any Tomaydo-Tomahhdo sandwich. *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg*., 805 F.3d 701, 704 (6th Cir.2015), citing R.C. 1333.61(D).

{¶20} In addition, Moore gave uncontradicted evidence that he was not in possession of any Tomaydo-Tomahhdo picture builds. Carroll concedes the point — she testified in deposition that she did not know whether Moore took physical copies of the picture builds when he left Tomaydo-Tomahhdo. That concession led Carroll to claim that Moore must have the picture builds stored in his computer because he created them in the first place. This is pure speculation of a kind that cannot defeat a summary judgment motion. *United States Bank Natl. Assn. v. 3076 Representation Terrace Trust*, 10th Dist. Franklin No. 13AP-520, 2014-Ohio-2362, ¶ 21. The court did not err by finding that the picture builds were not trade secrets.

C. Recipes

{¶21} Carroll does not specifically argue that Moore misappropriated her recipes for menu items. The law is clear that "lists of needed ingredients and directions for combining them" generally require no "expressive elaboration" or "minimal level of creativity." *Hassett v. Hasselbeck*, 177 F. Supp.3d 626, 632-633 (D.Mass.2016). In related litigation in this case, the United States Court of Appeals for the Sixth Circuit rejected Carroll's claim that Moore and Vozary infringed on any creative work in Carroll's recipe book for purposes of a federal copyright claim. *Tomaydo-Tomahhdo, L.L.C. v. Vozary*, 629 Fed.Appx. 658, 661 (6th Cir.2015).

{¶22} Instead, the legal basis for Carroll's claim is that specific food items she served — dinner rolls, pulled pork, lasagna, chicken parmesan, mac 'n cheese, spaghetti and meatballs, roasted redskin potatoes, potato salad, fresh fruit, pasta salad, sandwiches, brownies, and cupcakes — constituted trade secrets that Moore and Vozary copied when they served similar items on their catering menu. That Moore and Vozary served the same type of food that Carroll served was unremarkable because such items are typical catering fare. *Rib City Franchising, L.L.C. v. Bowen*, D.Utah No. 2:15-cv-00636, 2015 U.S. Dist. LEXIS 149797, 21 (Nov. 2, 2015); *Memory Integrity, L.L.C. v. Intel Corp*., 178 F. Supp.3d 1022, 1037 (D.Or.2016). Carroll offered no evidence to show that her menu items were unique in a way that constituted a trade secret.

{¶23} Further defeating the trade secret claim is that Carroll admits there were differences in the ingredients that made up her menu items and those menu items served by Moore and Vozary: "Caterology food items that mimicked Tomaydo-Tomahhdo offerings were varied by one, possibly two ancillary item(s) in the ingredient list, but were otherwise the same." Appellant's brief at 17-18.

{¶24} What Carroll claims are "ancillary" ingredients were substantial components of the recipe. For example, Carroll argued that Caterology's Napa Valley turkey sandwich was a copy of her turkey focaccia sandwich. In her brief in opposition to the motion for summary judgment, she argued that "[t]he whooping [sic] differences between these 2 sandwiches are mozzarella v. provolone cheese, pesto mayo v. arugala [sic] mayo and balsamic v. cherry balsamic dressings." These were more than just minor

differences — the difference between arugula and pesto mayo is significant (one is a sauce/spread, the other a salad green). In other litigation between the parties, this same argument was rejected on grounds that "the test actually demonstrates that the food items served by defendants are different from those offered by plaintiffs." *Tomaydo-Tomahhdo, L.L.C.*, N.D.Ohio No. 1:14 CV 469, 2015 U.S. Dist. LEXIS 10532, at 11.

{¶25} We do not understand Carroll to argue that Caterology could not serve any kind of turkey sandwich. The district court came to the same conclusion: "[c]ertainly, plaintiffs cannot be suggesting that somehow the copyright prevents defendants from serving chicken salad sandwiches." *Id.* A turkey sandwich, in general, is nothing more than turkey held between two slices of bread. In this sense, every turkey sandwich is alike. The ways in which a sandwich-maker can vary a turkey sandwich is by use of different kinds of bread or condiments. Carroll conceded that if Caterology's menu items did not have the same ingredients, those items were "not exactly the same" as the items she served. This admission was fatal to her claim that Caterology copied her recipe.

{¶26} Carroll's concession that there were differences between her menu items and those offered by Moore and Vozary left her to argue that Caterology's dishes had the same "flavor profile" as her dishes. By this she meant that Moore and Vozary's menu items tasted "the same" as her menu items.

{¶27} In the catering world, a limited menu of food is prepared for large groups of people with varying tastes — this tends to make caterers resort to the least objectionable menu and ingredient options. To be sure, caterers like Tomaydo-Tomahhdo and Caterology pride themselves on serving food that tastes better than their competitors. But when the menu items are dinner rolls, pulled pork, lasagna, chicken parmesan, mac 'n cheese, spaghetti and meatballs, roasted redskin potatoes, potato salad, fresh fruit, pasta salad, sandwiches, brownies, and cupcakes, there is unlikely to be much variation in taste. So it is an unremarkable proposition that Caterology's eggplant parmesan might taste very similar to Tomaydo-Tomahhdo's eggplant parmesan.

D. Food Preparation and Training Techniques

{¶28} Carroll offered no testimony to show that her food preparation and training techniques were secret. In fact, she offered no evidence to show what these techniques were, much less that they were secret. To the extent that Moore and Vozary gained knowledge in how to prepare food through their employment with Tomaydo-Tomahhdo, there was no showing that what they may have learned was different from what another kitchen employee would learn working in a different restaurant. "A person who enters employment as an apprentice and leaves it a master cannot be enjoined from developing or using the unique and advantageous materials and processes revealed to him in a confidential employer-employee relationship under substantial measures of secrecy." *Wiebold Studio Inc. v. Old World Restorations, Inc.*, 19 Ohio App.3d 246, 248, 484 N.E.2d 280 (1st Dist.1985).

E. Marketing Strategies and Business Models

{¶29} Carroll maintains that Moore and Vozary misappropriated her marketing strategies and business models, but she offered no evidence in her opposition to the motion for summary judgment to show what those strategies and models were. Carroll acknowledged that Moore developed unique recipes for Tomaydo-Tomahhdo by "[t]aking ingredients that were available and combining them in a way I preferred." This is not a concept or strategy.

{¶30} The failure to identify the marketing strategies and business models was fatal — once Moore and Vozary supported their motion for summary judgment, Carroll had the obligation to set forth specific facts showing that there is a genuine issue of material fact for trial. *See* Civ.R. 56(E).

{¶31} It is uncontested that Caterology was not a restaurant, so it did not directly compete with Tomaydo-Tomahhdo's restaurant business. At best, Carroll's claim is that Moore and Vozary created a food catering business using what they learned when working for Tomaydo-Tomahhdo to start their own business. Moore and Vozary were not required to disregard the experience they gained in the food service industry when striking out on their own. *Wiebold Studio, Inc.*, 19 Ohio App.3d at 248, 484 N.E.2d 280 ("A former employee can use to his own advantage all the skills and knowledge of common use in the trade that he acquires during his employment."). There is no evidence that Moore and Vozary obtained and used Tomaydo-Tomahhdo's trade secrets to run their catering business.

II. Civil Conspiracy, Tortious Interference, Unfair Competition, and Breach of Fiduciary Duty

{¶32} The court found that Tomaydo-Tomahhdo's claims for civil conspiracy, tortious interference, unfair competition, and breach of fiduciary duty were subsumed within its misappropriation of trade secrets claim consistent with R.C. 1333.67(A). That section states that the uniform trade secrets act displaces "conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." *See Rogers Indus. Prods. v. HF Rubber Mach., Inc.*, 188 Ohio App.3d 570, 2010-Ohio-3388, 936 N.E.2d 122 (9th Dist.); *Allied Erecting & Dismantling Co.*, 649 F.Supp.2d 702, 720 (N.D.Ohio 2009).

{¶33} Although Carroll and Tomaydo-Tomahhdo argued against preemption in their opposition to the motion for summary judgment, they raise no argument on appeal that the court erred by finding that their civil conspiracy, tortious interference, unfair competition, and breach of fiduciary duty claims were preempted. Their only reference to preemption appears in topic headings 7 and 8 of their brief, where they argue that the court erred by granting summary judgment on the civil conspiracy and unfair competition counts "if not preempted by the OUTSA." At oral argument, appellant's counsel conceded the issue. We therefore need not address it.

III. Breach of Contract

{¶34} The court correctly recognized that preemption of the trade secrets act does not apply to contract claims, whether or not they are based on misappropriation of a trade secret. *See* R.C. 1333.67(B)(1). The court found that the breach of contract claim

regarding the misappropriation of trade secrets failed because there was no evidence that Moore retained any of the items listed in the share purchase agreement. The court also found that Moore did not violate the terms of the noncompetition clause when he opened a restaurant after leaving Tomaydo-Tomahhdo. Finally, the court found that Moore did not hire Tomaydo-Tomahhdo employees in violation of the share purchase agreement.

A. Theft of Customer Database

{¶35} A breach of contract claim consists of (1) a binding contract or agreement; (2) the nonbreaching party performed its contractual obligations; (3) the other party failed to fulfill its contractual obligations without legal excuse; and (4) the nonbreaching 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.).

{¶36} In the share purchase agreement, Moore agreed that he would return to Carroll all current and updated graphic design files, videos, photographs taken by Moore or a party approved by him, menu files and development ideas, recipes (current or historical) and training tools (picture boards, build sheets, prep lists, master order guide), and materials that describe the Tomaydo-Tomahhdo concept, its goals and/or strategies.

{¶37} As noted earlier in our discussion of the trade secrets claim, Carroll offered no evidence to show that Moore remained in possession of any of these items. Moore testified at deposition that he returned all Tomaydo-Tomahhdo items in his possession. Carroll offered no evidence in rebuttal, just speculation that Moore continued to retain certain items. As a matter of law, this aspect of the contract claim failed.

{¶38} We likewise reject the claim that Moore copied the Tomaydo-Tomahhdo business model and "concept." The most obvious difference between Tomaydo-Tomahhdo and Caterology is that Tomaydo-Tomahhdo is primarily a restaurant, whereas Caterology is a catering service. Even though both businesses offer similar menu items, nothing in the share purchase agreement prohibits Moore from offering menu items that are similar to those offered by Tomaydo-Tomahhdo.

B. Enticing Employees

{¶39} In the share purchase agreement, Moore also promised that he would not:

> (2) induce or attempt to influence any then-current employees or representatives of [Tomaydo-Tomahhdo] to enter into any employment contract relationship with any other person or entity; or (3) induce or attempt to induce an individual or entity from terminating a relationship or contract with [Tomaydo-Tomahhdo].

{¶40} Tomaydo-Tomahhdo claimed that Moore induced three of its employees to leave and join Caterology: Vozary, David Porter, and Timothy Spock. Porter and Spock were intertwined — Carroll claimed that Porter told her that he had been contacted by Spock about working for Moore at the restaurant he opened after leaving Tomaydo-Tomahhdo. This assertion was a subject of Caterology's unopposed motion to strike on grounds that it was inadmissible hearsay.[3] The court ordered that assertion stricken, and Tomaydo-Tomahhdo does not challenge that order on appeal. With the

[3] Actually, Carroll's claim that Moore breached the share purchase agreement by using Spock to recruit Caterology's employees relies on hearsay upon hearsay: Porter told Carroll what Spock told Porter.

statement stricken, it cannot serve as evidence that Moore breached his agreement not to entice Tomaydo-Tomahhdo employees to come work with him.

{¶41} Carroll's evidence with respect to the recruitment of Vozary consists of telephone records showing that Moore and Vozary spoke "hundreds of times" after Moore signed the share purchase agreement and Vozary continued to work for Tomaydo-Tomahhdo. Moore and Vozary both denied that the telephone calls involved Moore trying to recruit Vozary. They explained that they were friends and Moore gave Vozary a car in exchange for Vozary agreeing to perform home remodeling work for Moore, so the telephone calls were, among other things, related to the remodeling work.

{¶42} Without any contrary evidence on the content of the telephone calls, Carroll can only speculate that the subject of these many telephone calls was Moore's attempt to recruit Vozary. But even if Carroll might be entitled to an inference that the number of telephone calls proved that Moore had been attempting to recruit Tomaydo-Tomahhdo employees, that inference evaporated because Vozary did not leave Tomaydo-Tomahhdo until March 2011 — more than three years after Moore signed the share purchase agreement.

{¶43} This was not a case where the telephone calls were made days before Vozary quit Tomaydo-Tomahhdo; had that been a fact, it might be reasonable to infer that Vozary's quitting was connected to some form of recruitment. By the time Vozary left Tomaydo-Tomahhdo, the restrictions on Moore with regard to influencing Tomaydo-Tomahhdo employees had been expired for more than a year.

Tomaydo-Tomahhdo's argument requires us to believe that Moore was recruiting Vozary, albeit unsuccessfully, for well more than a year in advance of when Vozary actually decided to quit. This is not a reasonable inference.

{¶44} Finally, Tomaydo-Tomahhdo claimed that Moore violated the share purchase agreement by going to the Tomaydo-Tomahhdo parking lot in violation of his promise not to "enter any of the Entities, which included future locations." The court found that the lot is a public parking lot not owned or controlled by Tomaydo-Tomahhdo, so Moore did not breach the agreement. We agree with this conclusion and further note that Moore explained that he only went to the parking lot to return the Tomaydo-Tomahhdo information in his possession as agreed to in the share purchase agreement. He said he chose the parking lot "because I can't go in the store." Even if Tomaydo-Tomahhdo owned the parking lot in question, Moore's presence there would have been legally excused by his duty to return the information in his possession.

{¶45} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

_____

MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR

[Cite as *Konarzewski v. Ganley, Inc.*, 2017-Ohio-4297.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104681

WILLIAM KONARZEWSKI, ET AL.

PLAINTIFFS-APPELLEES

vs.

GANLEY, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-08-647589

BEFORE: S. Gallagher, J., Boyle, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 15, 2017

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SEAN C. GALLAGHER, J.:

{¶1} Defendants-appellants Ganley, Inc. and Ganley Management Co. (collectively "defendants") appeal the trial court's decision to grant the motion for class certification of plaintiffs-appellees William Konarzewski and Rachel McCormick (collectively "plaintiffs"). Upon review, we reverse the decision of the trial court.

{¶2} On January 16, 2008, plaintiffs filed a class action complaint against defendants,[1] asserting claims individually and as representatives of a class of motor vehicle purchasers. The alleged claims included violations of the Ohio Consumer Sales Practices Act ("OCSPA"), violations of the Ohio Retail Installment Sales Act ("RISA"), intentional infliction of emotional distress, gross negligence, fraud, and breach of contract. The putative class action involves a claim under the OCSPA arising from defendants' use of certain form documents, namely a retail sales installment contract ("RISC") and a conditional delivery agreement ("CDA"), which were alleged to contain conflicting, misleading, unconscionable, and substantially one-sided terms.

{¶3} In the course of the proceedings, the parties filed summary judgment motions. On December 5, 2008, the trial court issued its ruling on the motions for summary judgment. In part, the trial court granted partial summary judgment to the plaintiffs, finding defendants' use of the RISC and CDA violated the OCSPA.

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[1] Ganley Management Co. was sued as the entity that "owns, operates, manages, and/or controls" numerous "Ganley" dealerships that use substantially the same forms.

{¶4} Plaintiffs also filed a motion to certify a class action for the OCSPA claims, defining the purported class as follows:

> All consumers, who from within two years prior to the commencement of this action to the present, purchased or attempted to purchase a vehicle from Defendants or any dealership owned, operated, managed, or controlled by Ganley Management Co., which transaction involved the use of a RISC together with a CDA.

On December 5, 2008, the trial court issued a ruling that denied class certification.

{¶5} The ruling on class certification was reversed by a panel of this court in *Konarzewski v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 92623, 2009-Ohio-5827 ("*Konarzewski* I"). Although the court determined that the Civ.R. 23 requirements for certifying a class action had been satisfied, the court found the proposed class definition was inconsistent with the limitations on damages under the OCSPA. *Id*. at ¶ 44-47. The court determined that the scope of available damages for class actions brought under the OCSPA is limited and that class action plaintiffs must prove actual damages under R.C. 1345.09(B). *Id*. at ¶ 44-46. As a result, the court found that the trial court had abused its discretion by failing to modify the class or giving plaintiffs the opportunity to modify the class to conform with the additional requirement of actual damages found in R.C. 1345.09(B) for class actions brought for violations of the OCSPA. *Id*. at ¶ 49. Importantly, in *Konarzewski* I, the class definition, as then proposed, was never certified.

{¶6} On remand, modified class definitions were proposed for certification. On June 10, 2016, the trial court granted class certification of a class defined as follows:

> All Ganley consumers who, from within two years prior to the commencement of this action to the present, purchased a vehicle involving the use of the RISC, together with the CDA, and did not receive the benefit of the bargain and as a result suffered actual damages.

The trial court recognized its duty to conduct a rigorous analysis when determining whether to certify a class pursuant to Civ.R. 23 and considered the Civ.R. 23 factors. The court determined that plaintiffs satisfied the requirements of Civ.R. 23 for class certification and that the class definition was sufficient to comply with the requirement of R.C. 1345.09(B) that class members must have actual damages to pursue a class action under the OCSPA. The court certified the class under Civ.R. 23(B)(3), as the only subsection applicable to the case.

{¶7} Defendants timely filed this appeal challenging the trial court's decision to grant class certification.

{¶8} A trial court has broad discretion in determining whether to certify a class action, and its determination will not be disturbed absent an abuse of discretion. *Marks v. C.P. Chem. Co., Inc*., 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. The trial court's discretion is not unlimited, but is bound by and must be exercised within the framework of Civ.R. 23. *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442.

{¶9} "[A] party seeking certification pursuant to Civ.R. 23 bears the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of

the requirements set forth in the rule." *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 15. The Ohio Supreme Court has noted the following seven requirements that must be met in order for a class action to be maintained under Civ.R. 23:

> (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met.

Hamilton at 71, citing Civ.R. 23(A) and (B), and *Warner v. Waste Mgt.*, 36 Ohio St.3d 91, 521 N.E.2d 1091 (1988). Class certification must be denied upon the failure to meet any one of the Civ.R. 23 requirements. *Blue Ash Auto, Inc. v. Progressive Cas. Ins. Co.*, 8th Dist. Cuyahoga Nos. 104251 and 104252, 2016-Ohio-7965, ¶ 11.

{¶10} As an initial matter, we reject any contention by plaintiffs that we are somehow bound by the determinations made in *Konarzewski* I, 8th Dist. Cuyahoga No. 92623, 2009-Ohio-5827. In that appeal, the Civ.R. 23 requirements were considered with regard to the proposed class then before the court. That proposed class was never certified, nor was a mandate issued for class certification. Rather, the case was remanded for modification of the class definition, albeit to comport with the requirement of actual damages found in R.C. 1345.09(B). That decision has no effect upon the review of a subsequently certified class. We find nothing in the doctrine of the law of the case that would preclude a court from revisiting the class certification requirements

with regard to a modified or revised class definition. Class certification cannot be granted unless all requirements for class certification have been met, and the court is required to conduct a rigorous analysis in making its determination. *Cullen* at ¶ 16.

{¶11} We also must recognize that there have been intervening decisions by the Ohio Supreme Court since the decision in *Konarzewski* I, including *Cullen*; *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224; and *Stammco, L.L.C. v. United Tel. Co.*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 11. We are not persuaded by plaintiffs' arguments to the contrary. Each of the Ohio Supreme Court decisions represents an intervening change in the law with respect to certification of a class action that is applicable in this matter. It is well settled that an intervening decision by the Ohio Supreme Court is an extraordinary circumstance that creates an exception to the law-of-the-case doctrine and must be followed by inferior courts. *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 1, 23.

{¶12} In *Cullen*, the Ohio Supreme Court indicated that the rigorous analysis "requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 16. A trial court may examine the underlying merits of the claim as part of its rigorous analysis, but only to the extent necessary to determine whether the Civ.R. 23 requirements are satisfied. *Id*. at ¶ 17. Further, "deciding whether a claimant meets the burden for class certification pursuant to Civ.R. 23 requires the court to consider what

will have to be proved at trial and whether those matters can be presented by common proof." *Id*. at ¶ 17.

{¶13} In *Felix*, which involved the certification of a class for claims based on alleged violations of the OCSPA, the Ohio Supreme Court found that "[p]roof of actual damages is required before a court may properly certify a class action." *Id*. at ¶ 31. The court recognized that at the class-certification stage, plaintiffs "must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions." *Id*. at ¶ 33, citing *In re Rail Freight Fuel Surcharge Antitrust Litigation - MDL No. 1869*, 725 F.3d 244, 257 (D.C.Cir.2013). The court indicated that although the precise amount of damages incurred by each class member need not be shown, the "fact of damage," which requires that "all class members suffered *some* injury," must be shown by common evidence. *Felix* at ¶ 33. "If the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(b)(3)." *Id*. at ¶ 35. "'[A] proposed class action requiring the court to determine individualized fact of damages does not meet the predominance standards of Rule 23(b)(3).'" *Id*. at ¶ 34, quoting *Gonzales v. Comcast Corp*., E.D.Cal. No. 10-cv-01010-LJO-BAM, 2012 U.S. Dist. LEXIS 196, 55 (Jan. 3, 2012). Under the circumstances in *Felix*, the court determined that the class was broadly defined and there was "absolutely no showing that all of the consumers who purchased

vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages." *Id*. at ¶ 37.

{¶14} As was the case in *Felix*, we find the requirement of Civ.R. 23(B)(3) was not satisfied in this matter. The trial court found that of the Civ.R. 23(B) requirements, only subsection (3) is applicable. This is not disputed by the parties. For a class to be certified under Civ.R. 23(B)(3), the trial court must find (1) "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and (2) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Cullen* at ¶ 29.

{¶15} The modified class definition includes purchasers who "did not receive the benefit of the bargain and as a result suffered actual damages." We recognize that this definition attempts to comport with the actual damages requirement under the OCSPA. However, consideration must be given to how those purchasers who suffered actual damages are to be ascertained. As recognized by the Ohio Supreme Court: "'the CSPA's damages limitation impacts not only the damages that may ultimately be recovered by a properly certified class but whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance.'" *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 40, quoting *Felix v. Ganley Chevrolet, Inc*., 8th Dist. Cuyahoga No. 98985, 2013-Ohio-3523, ¶ 72 (Rocco, J., dissenting).

{¶16} We recognize that the trial court was cognizant of the decision in *Konarzewski* I and did attempt to conduct the rigorous analysis required under *Cullen* in

determining whether to grant class certification. However, the trial court's analysis was flawed. The trial court glossed over the individualized determinations necessary for determining whether members of the putative class in fact suffered damages. The trial court found that it had "already determined the defendants' use of the RISC and CDA violated the Ohio CSPA" and that the liability arising from the OCSPA violations was "common to the class and predominates over the issue of actual damages." However, "[a] colorable claim does not satisfy the requirements of Civ.R. 23." *Cullen* at ¶ 34. In order to satisfy Civ.R. 23(C), plaintiffs must demonstrate and a trial court is required to find that questions common to the class in fact predominate over individual ones. *Id.*

{¶17} The trial court recognized that the issue of calculating each class member's damages would require an individualized determination. However, the court did not consider whether there was any common proof showing that each class member was in fact damaged by defendants' conduct. The trial court found it unnecessary to the analysis and proceeded to determine that "defendants' liability arising from their CSPA violations is common to the class and predominates over the issue of actual damages." The trial court's opinion is in direct contravention of the Ohio Supreme Court's decision in *Felix*, which holds that "[p]roof of actual damages is required before a court may properly certify a class action" and that plaintiffs "must adduce common evidence" demonstrating that all class members suffered some injury. *Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 31, 33. The trial court never recognized the *Felix* decision, despite it being cited by defendants in opposition to class certification.

Moreover, insofar as the trial court deemed the issue of defendants' liability common to the class, "[t]here is no authority in the statutory scheme or in our precedent to support a damages award to a class member in class action litigation arising from the OCSPA absent a showing that the class member was injured and sustained damages as a result of the defendant's conduct." *Felix* at ¶ 38.

{¶18} Similar to *Felix*, the plaintiffs herein failed to demonstrate that they can prove, through common evidence, that all class members were in fact injured by defendants' use of the RISC and CDA forms. There is no common proof of "the fact of damage." Rather, the question of whether a particular purchaser suffered actual damage as a result of the use of the two form documents turns on individualized facts and evidence. Because resolution of the issue of actual damages would require a case-by-case analysis of each transaction, we cannot say that common questions of law or fact predominate over individualized inquiries. The need for such individualized inquiries precludes class certification under Civ.R. 23(B)(3). *Felix* at ¶ 34; *Ford Motor Credit Co. v. Agrawal*, 8th Dist. Cuyahoga No. 103667, 2016-Ohio-5928, ¶ 26, 34 (finding class certification under Civ.R. 23(B)(3) was not proper because uniform application of a "clean" standard and determination of the fact of injury to all lessees was not susceptible to common class-wide proof); *Blue Ash Auto, Inc.*, 8th Dist. Cuyahoga Nos. 104251 and 104252, 2016-Ohio-7965, at ¶ 29-30 (finding denial of class certification proper where resolution of the dispute would require a case-by-case analysis of every repair conducted by each potential class member).

{¶19} Plaintiffs' "benefit of the bargain" argument does not alter our analysis. We also reject plaintiffs' argument pertaining to a "document preparation fee," which is not related to the use of the CDA and RISC forms. As the court held in *Felix*, "all members of a class in class action litigation alleging violations of the OCSPA must have suffered injury as a result of the conduct challenged in the suit." *Felix* at ¶ 36. In *Felix*, the court found, under circumstances akin to this matter, as follows:

> Here, the class, as certified, fails because there is no showing that all class members suffered an injury in fact. The broadly defined class encompasses consumers who purchased a vehicle at Ganley through a purchase contract that contained the unconscionable arbitration provision. But there is absolutely no showing that all of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages.

Felix at ¶ 37.

{¶20} Further, "a plaintiff seeking to certify a class based on allegedly common documents and procedures must establish that the documents and procedures were, in fact, uniformly applied to every potential class member." *Agrawal* at ¶ 23, citing *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614. Even the trial court acknowledged that not all consumers who purchased a vehicle from defendants involving the use of the RISC and CDA forms suffered damages. As defendants claim, "the question whether the forms had any impact on any given transaction is highly variable and individualized." Purchasers might have purchased a different vehicle, put more money down, obtained a co-signer, or revised the terms of their transaction. As in *Felix*, because there is no class-wide proof of injury and actual damages arising as a result of the

use of the forms, there is no showing of predominance under Civ.R. 23(B)(3). *See Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 35.

{¶21} The Ohio Supreme Court also has held that class certification under Civ.R. 23 is not proper when the class definition prevents class members from being identified without expending more than a reasonable effort. *Stammco,* 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 11 (finding certification improper where the trial court would have to determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill). Here, the trial court would have to conduct a transaction-by-transaction inquiry into whether actual damages were sustained. Therefore, plaintiffs also have failed to meet the first requirement of Civ.R. 23 — that an identifiable class must exist and the definition of the class must be unambiguous.

{¶22} Accordingly, we find the trial court abused its discretion in granting class certification pursuant to Civ.R. 23(B)(3). We further find that the class definition does not permit class members to be identified without expending more than a reasonable effort. The assigned error is sustained, and we need not address the remaining arguments raised.

{¶23} The trial court's decision granting class certification is reversed. We remand for further proceedings consistent with this opinion.

{¶24} Judgment reversed; case remanded.

It is ordered that appellees 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 the common pleas 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.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
ANITA LASTER MAYS, J., CONCUR